C.A. No. 108641

NOVA SCOTIA COURT OF APPEAL

Cite as: Nova Scotia (Attorney General) v. Hill, 1995 NSCA 73
Hallett, Chipman and Freeman JJ.A.

BETWEEN:

ATTORNEY GENERAL OF NOVA SCOTIA Appellant - and - ARTHUR HILL and ANGUS HILL Respondents	David G. Giovannetti and Margaret MacInnis for the Appellant Douglas A. Caldwell, Q.C. and Lloyd I. Berliner for the Respondent Appeal Heard: December 5, 1994 Judgment Delivered: April 13, 1995

THE COURT: Appeal allowed and cross-appeal dismissed per reasons for judgment of Chipman J.A.; Hallett J.A. concurring by separate reasons; Freeman J.A. dissenting.

CHIPMAN, J.A.:

This is an appeal by the Attorney General of Nova Scotia from a decision of a judge of the Supreme Court in Chambers finding that the respondents had an interest in property expropriated by the appellant in 1966. By this decision the Chambers judge purported to enable the respondents to seek compensation before the Nova Scotia Utility and Review Board under the **Expropriation Act**, R.S.N.S. 1989, c. 156 respecting such interest.

The respondent also appealed from the amount of the Chambers Judge's award of costs to them.

The respondent, Arthur Hill, acquired ownership of the property at issue from his father, Ross Hill in 1982. It is a farm property. The respondent Arthur Hill and the respondent Angus Hill now operate the farm as partners. The property is located in Upper and Central Onslow, Colchester County, N.S. On February 16, 1966 Her Majesty the Queen in the right of the Province of Nova Scotia represented by the Minister of Highways expropriated 11.28 acres of the Ross Hill farm by depositing a Notice of Expropriation and related documents at the Registry of Deeds for Colchester County. The land expropriated consisted of a strip of land acquired for the building of the Trans Canada Highway. The whole interest in these lands in fee simple was taken without limitation. The expropriated strip severed the property so that after the expropriation it consisted of a parcel to the south of the Trans Canada Highway and two parcels to the north thereof, one south of the Laybolt Road and the other to the north of that road. Both a strip of land and access from the southern parcel to the northern parcels was thus taken from Hill by operation of law. Compensation was payable for this loss under the provisions of the **Expropriation Act**.

By Order-in-Council dated June 7, 1966, the highway being constructed on the expropriated land was designated as a controlled access highway pursuant to s. 20 of the **Public Highways Act**, R.S.N.S., 1954, c. 235. This legislation, now continued as the **Public**

Highways Act, R.S.N.S., 1989. c. 371, provided for the designation by the Governor-in-Council of a controlled access highway. The consequences of such designation are expressed in s. 21 and s. 23 of the 1954 legislation (s. 22 and s. 24 of the 1989 **Act**);

> "21 (1) Where a highway or portion thereof or any land has been designated as a controlled access highway, no person shall, without a written permit from the Minister,
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> (a) construct, use, or allow the use of, any private road, entrance way or gate which or part of which is connected with or opens upon the controlled access highway; or
>
> (b) sell, or offer, or expose or sale, any vegetables, fruit, meat, fish or other produce, or any goods, wares or merchandise upon or within one hundred and fifty feet of the limit or the controlled access highway; or
>
> (c) erect, construct or place or cause to be erected, constructed or placed, any building or other structure, or part thereof, or extension or addition thereto upon or within two hundred feet of the limit of the controlled access highway.
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> . . .
>
> (3) The Minister or any person acting by or under his authority may at any time close up any private road, entrance-way or gate constructed, opened or used in violation of this Section and for that purpose may enter by himself, his servants and agents, by force, if necessary, into and upon any land or part thereof.
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> . . .
>
> 23 (1) Where, pursuant to Section 20 or 22, or any regulations made thereunder, property is injuriously affected, the owner thereof, in respect of any matter or thing that has not been the subject of compensation, shall be entitled to compensation for such injury.
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> (2) Any question as to whether any property is injuriously affected as aforesaid and as to the amount of payment and compensation shall be determined by arbitration and the provisions of the Arbitration Act shall apply.

> (3) Notwithstanding subsection (1), where pursuant to Section 20 the Governor in Council designates as a controlled access highway
>
> (a) a new highway or a new portion of a highway;
>
> (b) any land reserved for highway purposes under Section 13A; or
>
> (c) any land referred to in clause (b) of subsection (1) of Section 20,
>
> the owner of property that adjoins such new highway, new portion of a highway or land shall not be entitled to compensation for injurious affection to that property resulting from the designation."

Access from the parcels of the farm on either side of the highway to that highway had thus been denied by operation of law. No compensation was payable to Ross Hill for this denial of access to the new highway.

Extensive negotiations ensued in 1967 between experienced counsel representing Ross Hill and Her Majesty respectively, and correspondence passing between such counsel formed a part of the record before the chambers judge. On October 5, 1967, counsel reached an agreement on behalf of their respective clients whereby Ross Hill would receive the sum of $13,000 in full settlement of his claim. The claims released by him are described in a Deed of Release which he and his wife executed on October 17, 1967;

> "NOW THIS DEED WITNESSETH that ... the Releasors do hereby release and forever discharge the Releasee, Her Heirs, Successors and Assigns of and from all manner of actions, causes of actions, suites, debts, duties, accounts, covenants, contracts, claims and demands whatsoever which against the Releasee the Releasors ever had, now have or which their Heirs, Executors, Administrators or Assigns or any of them hereafter can, or may have, for or by reason of the said Expropriation of the said lands above described, or for any and all damages of any kind whatsoever resulting from the said expropriation or for injurious affection to other lands of the Releasors resulting from highway construction on the said lands so expropriated."
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> (emphasis added)

The lands described in the Release are those consisting of the strip of land of 11.28 acres to which I have referred.

In the course of construction of the Trans Canada Highway the Department of Highways caused to be constructed two ramps on the right-of-way taken by Her Majesty from the boundary of the north and south parcels of the Ross Hill property to the black top surface of the highway. These ramps were constructed and maintained by adding gravel to the base thereof by the Department of Highways. The department also built fences on both sides of the Trans Canada Highway and gateways across the ramps. It appears that these ramps were used by Mr. Hill to cross the Trans Canada Highway but the extent of such user was not made clear in the documentary evidence tendered on behalf of the respondents to the Chambers judge. It is apparent from the plan in evidence that the north and south portions of the farm could be reached from one another by a slightly longer route along a road which lead to the Laybolt Road via an underpass under the Trans Canada Highway to the east of the Ross Hill farm. It is also obvious that any user across the Trans Canada Highway on other than a grade separated pass would be hazardous in the extreme to those making the crossing as well as motorists on the highway.

In 1992 the Trans Canada Highway was "twinned" by the construction of two additional lanes to the north of the original lanes on the strip of property which had been expropriated in 1966. As far as is material to these proceedings, no additional expropriation was required for the construction of these lanes and none was ever instituted. During the new construction the access ramp from the northern parcels of the farm of the respondents was removed, and although it was replaced in 1993 the respondents have been advised that access to the new twinned Trans Canada Highway from their property will not be permitted. This position is authorized by s. 22(3) of the **Public Highways Act**.

The basis of the respondents' claim for further compensation under the

Expropriation Act was that the removal of these ramps constituted an interference with an easement which they maintain was created in favour of Ross Hill following the 1966 expropriation and prior to the final settlement which was formalized in the Deed of Release dated October 17, 1967.

The **Expropriation Act** contains the following provision for an application by the expropriating authority for a determination respecting the title to lands taken;

> "17 (1) Where the expropriating authority, at any time after the registration of the expropriation document at the appropriate office of the registrar of deeds, is in doubt as to the persons who had any right, estate or interest in the land to which the expropriation document relates, or as to the nature of extent thereof, it may apply to the Court to make a determination respecting the state of the title to the land or any part thereof and to order who had a right, estate or interest in the land at that time and the nature and extent thereof.
>
> (2) An application under this Section shall in the first instance be **ex parte** and the Court shall fix a time and place for the hearing of the persons concerned and give directions ...
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> (3) After the hearing the Court shall either judge for the purposes of this Act what persons had any right, estate or interest in the land expropriated and the nature and extent thereof or direct an issue or issues to be tried for the purpose of enabling the Court to make such an adjudication.
>
> (4) An adjudication made by the Court for the purposes of this Act shall be deemed to be a final judgment of the Court and, subject to variation an 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."

The respondents commenced these proceedings by an Originating Notice (Ex Parte application) dated April 5, 1994, issued at Truro. The proceedings found themselves into Chambers on June 10, 1994. The argument before the Chambers judge was based on affidavits filed on behalf of the respondents and the appellant. The documentation filed included the extensive correspondence between counsel representing the parties in 1967 leading up to the final settlement for $13,000 and the Deed of Release to which I have

referred.

There is no authority in the **Expropriation Act** for the proceedings which were taken here. In my opinion they were misconceived. If the respondents wished to establish the existence of an easement over the ramps in question no procedure for so doing can be found in the **Expropriation Act**. That is because no expropriation proceedings were taken by the appellant in 1992 - 1993 respecting any of the lands at issue. The proper course of action for the respondents in such circumstances would be to commence an action for damages for wrongful interference with the alleged right-of-way. Presumably a trial with **viva voce** and documentary evidence would be held, and the court would make an adjudication on the basis of such evidence, including the granting of relief by way of damages.

The respondents treated the proceedings in Chambers as a proceeding to establish an easement over the lands of the highway right-of-way embraced by the ramps. The Supreme Court of Nova Scotia certainly had jurisdiction to resolve such an issue. The appellant did not challenge the jurisdiction of the Chambers judge or object to the form of the proceedings before him or the form of the evidence adduced. The appellant did not include in its Notice of Appeal a contention that the proceedings were improperly constituted or that the Chambers judge lacked jurisdiction. In its factum the appellant does raise the point that only the expropriating authority may proceed under s. 17 of the **Act**.

It appears to me that the parties have proceeded on the assumption that the issue was before the Chambers judge as to whether or not the respondents had an easement or other interest respecting the portion of the expropriated property covered by the ramps. The parties elected to have that issue determined on the basis of the documentary evidence presented before the Chambers judge. On consideration I believe that they have elected to proceed in this fashion and it is too late now for them to challenge the jurisdiction of the

Chambers judge to make a determination on the basis of the material which by consent of the parties was placed before him for that purpose. Accordingly this court is in a position to review the decision of the Chambers judge to determine whether it was correct on the evidence before him and the law.

In the event the Chambers judge correctly concluded that the respondents had an easement over the ramps in question, then the consequence of the appellant's interference therewith would have to be determined not by proceedings under the **Expropriation Act** but by proof of damages before the Chambers judge. Nothing other than an assertion that the alleged right-of-way was interfered with was offered by the respondents. No evidence of the user made of it was offered. They have given no other evidence as to what, if any damages, they suffered as a result of the closing off of these ramps. Should this court determine that the Chambers judge was right in holding that there was an interest, this court would have to make an adjudication of the quantum of damages. That is the only remedy open to the respondents. Such damage award would have to be based on the material which the respondents placed before the Chambers judge.

First, I propose to review the decision of the Chambers judge with a view to determining whether it was established by the respondents that they had any form of easement or other proprietary right in the area embraced by the ramps.

Having made reference to the negotiations in 1966 and 1967 the Chambers judge concluded:

> "I am satisfied on the evidence before me that the parties felt that Mr. Hill was obtaining permanent access across the highway at the time he negotiated the compensation for injurious affection. I accept the submission that this agreement was verbally expressed to Mr. Hill not only by the engineer on behalf of the department but also by the then Minister of Highways, G.I. Smith. The fact that the solicitor acting for the Department corresponded with the Director of Claims as regards the need to improve the access ramps confirms that the access ramps were a part of the compensation package as alleged by Mr.

Hill."

From this the Chambers judge concluded that the "agreement as regards access was never reduced to writing but the Department did act on it by installing the access ramps and carrying out the improvements."

With respect, an examination of the record does not support the conclusion that the Department granted permanent access to Ross Hill. Mr. Hill's initial affidavit and the correspondence makes reference to the fact that the Department of Highways did in fact construct the ramps. The only reference to the engineers relates to the construction carried out under their direction. The only reference to the Minister of Highways, G.I. Smith, was Mr. Hill's statement that Mr. Smith had told him that the construction of the highway had gone too far to enable the Department to build an access culvert and a statement that the said Minister never indicated that the farm would not have access via the highway.

In a supplementary affidavit dated June 7, 1994, Ross Hill deposed:

> "2 That the sum of Thirteen Thousand Dollars ($13,000) was full settlement of all remaining claims because a permanent level crossing from one side of the Trans Canada Highway to the other and vice versa which I have been promised by the department engineer and G. I. Smith, the Minister of Highways had already been constructed."

This assertion contradicts the information given in the earlier affidavit, but, most important, it is negated by the terms of the Release dated October 17, 1967.

Correspondence between the experienced solicitors representing the parties touched on the adequacy of the ramps which the Department appeared to have constructed as a convenience to Mr. Hill. It also touched on various items of loss for which Mr. Hill claimed compensation. Initially the Department's solicitor offered $2822 "in full settlement for all claims which Mr. Hill may have against the Department". This figure was finally enhanced to $13,000 paid for the release together with $300 costs. Thus, the Chambers judge was correct when he stated that this issue relating to access was "part of the

negotiations".

At the end of the lengthy negotiations carried out by the solicitors no easement or other interest was given to Ross Hill in the expropriated property. He received $13,000 plus costs and executed a release in the terms which I have set out above. That release clearly covers all claims for the expropriation of the land itself, for any damages resulting from that expropriation or for injurious affection resulting from the highway construction on the expropriated land. It is a very comprehensive release which covers all of the matters which had been the subject of negotiation prior to its execution. It precludes the claim asserted before the Chambers judge in these proceedings.

The Chambers judge did not make reference to this release or give consideration to its significance. In my opinion he made a material error in failing to consider this document which was the culmination of the negotiations between the parties.

The erection of the ramps by the Department of Highways can only in these circumstances be taken to be consistent with an accommodation gratuitously provided to Ross Hill during the course of the building of the road. It is inconceivable that two such experienced solicitors as those representing Ross Hill and the Department of Highways would not provide for an easement if it was the intention of the parties that there should be one.

Indeed counsel for Mr. Hill by letter to counsel for the Department of Highways dated February 11, 1967 specifically raised the point that Mr. Hill contended that he had been promised a level crossing. This point was obviously subsumed in the release which concluded the negotiations. It is not reasonable to infer that the competent solicitor representing Mr. Hill would not require an express grant of easement if the parties had made an agreement to this effect. The only conclusion that can be drawn with respect to the construction of the ramps by the Department of Highways is that this was a gratuitous

accommodation.

This conclusion is further fortified by the fact that counsel for the Department advised the Director of Claims that Mr. Hill felt that $3000 was a fair land value for the lands taken. From this it can be inferred that the additional $10,000 represented the other items raised and touched upon by counsel in their negotiations. Included among these items was the question of a crossing and access.

In summary then the Chambers judge found that there was an agreement to give an easement solely upon the assertion by Ross Hill that he considered that the construction of the ramps was intended to provide him with a permanent crossing. Such assertion is contrary to the release he subsequently executed. The Chambers judge said:

> "The evidence as to what transpired as between the parties in the 1960's is not complete. It is clear from the affidavits on file that the issue of access to the portion of the farm to the north of the TCH was the subject of discussion. . . .
>
> The fact that the issue of access was part of the negotiations is also confirmed in the correspondence between the solicitor for Mr. Hill and the solicitor for the Department. In exhibit D-3 directed to the Director of Claims for Highways the Department's solicitor talked of the need to improve the access ramps because Mr. Ross Hill had equipment stuck on the ramp."

With respect, this evidence is insufficient to establish a property interest in the ramps, which would contradict the terms of the release executed at the end of the negotiations.

The earlier evidence cannot be relied upon to add, vary or contradict this written transaction. It does not fall within any of the well known exceptions to the parol evidence rule or circumstances to which that rule has no application. Such exceptions or circumstances are discussed in **Phipson on Evidence**, 14th ed. (London: Sweet & Maxwell, 1990) at p. 1020 et seq. and **Cockle's Cases and Statutes on Evidence**, 10th ed. (London: Sweet & Maxwell, 1963) at p. 148 et seq. None of them come into play where as here a clear

unambiguous agreement was reached following negotiations between two experienced solicitors. Had an agreement with respect to an easement been part of the deal, these solicitors would have incorporated it into the documentation. No evidence was adduced to show that they made any error or oversight in the conclusion of the deal.

Reference has to made to s. 25 of the **Expropriation Act** as it existed in 1967 and which is now found in slightly different wording in s. 65 of the **Act**:

> "25 If the injury to any land or property alleged to be injuriously affected by the exercise of any of the powers conferred by this Act may be removed wholly or in part by any alteration in, or addition to, any public work, or by the construction of any additional work, or by the abandonment of any part of the land taken from the claimant, or by the grant to him of any land or easement, and if the Crown before any award is made, undertakes to make such alteration or addition, or to construct such additional work, or to abandon such portion of the land taken or to grant such land or easement, the damages shall be determined in view of such undertaking and the judge shall declare that, in addition to any damages awarded, the claimant is entitled to have such alteration or addition made, or such additional work constructed or such part of land abandoned or such grant made to him."

Section 65 provides that the Board has the same powers as the court had under s. 25.

If settlement had not been reached this section could come into play in appropriate cases. Here there is no admissible evidence to support the conclusion that the Crown undertook to make any alteration or grant any such easement. The section only operates when a matter is resolved in court where the judge (now the Board) may act upon the basis of such undertaking. The evidence relating to any alleged undertaking here is inadmissible because the documentary settlement contradicts it.

I have thus concluded that the Chambers judge erred in finding that the respondents had any proprietary interest in the area embraced by the ramps or any other area of the expropriated lands.

It is not necessary to address the appeal by the respondents from the award by the Chambers judge of costs of $500.00. Nor is it necessary to deal with the application to admit fresh evidence relating thereto. I would dismiss this appeal.

I would allow the Attorney General's appeal and set aside the decision of the Chambers judge. I would award the appellant Attorney General costs on the Chambers application of $500.00 and costs of these appeals in the amount of $2,000 plus disbursements.

Chipman, J.A.

Freeman, J.A. - Dissenting

In 1966 the Nova Scotia Department of Highways expropriated an ll.28 acre strip of land across the dairy farm of Ross Hill at Upper Onslow, near Truro, N.S., for construction of the Trans Canada Highway, severing the farm into two main parcels with the buildings and some fields south of the highway and fields, pasture and woodlands to the north.

Mr. Hill was left with direct access to the northern portion of the farm by way of two small underpasses, which proved impractical, and a level crossing over the highway for which the Department of Highways had built him ramps in 1965 when construction of the highway was under way. That degree of access was a factor in Mr. Hill's agreement with the Department to settle the compensation issues in 1967. He was not paid for loss of that access in 1967 because he had not lost it.

In 1992, when the highway was being twinned, that remaining access was terminated without compensation by the Department. Its position is that Mr. Hill's access was a mere license which the Department was at liberty to revoke at will. In the meantime, Mr. Hill had conveyed the farm including the north portion and his means of access to it, to his two sons, the respondents.

The Issue

The issue in this appeal is whether the Department had the right to terminate access to the northern part of the farm without paying further compensation to the respondents.

The matter is before this court on appeal from a declaratory judgment of Justice Scanlon in the Supreme Court of Nova Scotia holding that the Department had created an equitable easement, that is, a property right for the loss of which compensation could be

claimed. An application under the **Expropriation Act** claiming for injurious affection resulting from the termination of that right had first been brought before the Nova Scotia Utilities and Review Board by the Hill sons but the Board has no jurisdiction to determine questions of title, necessitating the application to the Supreme Court to determine if a property right existed. If a right exists, the expropriation issues would be determined by the Utilities and Review Board.

The Expropriation Act

The expropriation took place when the Minister of Highways deposited a notice of expropriation, plan and description of the expropriated property in the County of Colchester Registry of Deeds on February 16, 1966. At that point the lands described in the documents became vested in Her Majesty by operation of the Expropriation Act. After the documents were filed, were it not for s. 25 of the Expropriation Act, all that would have remained was the determination and payment of compensation. However s. 25 contemplates negotiations between the parties with a view to making accommodations for the benefit of the expropriated owner and the Department. These can include construction or alteration of works, abandoning part of the expropriation, or the grant of lands or easements. This provision lessens the hardship suffered by the expropriated owner and thereby reduces the damages which must be paid for injurious affection of the owner's remaining lands. An accommodation made or promised under s. 25 becomes part of the compensation to be paid to the owner.

Section 26 of the **Expropriation Act,** R.S.N.S. 1967 provides:

> 26. If the injury to any land or property alleged to be injuriously affected by the exercise of any of the powers conferred by this Act may be removed wholly or in part by any alteration in, or addition to, any public work, or by the construction of any additional work, or by the abandonment of any part of the land taken from the

> claimant, or by the grant to him of any land or easement, and if the Crown, before an award is made, undertakes to make such alteration or addition, or to construct such additional work, or to abandon such portion of the land taken or to grant such land or easement, the damages shall be determined in view of such undertaking and the judge shall declare that, in addition to any damages awarded, the claimant is entitled to have such alteration or addition made, or such additional work constructed or such part of land abandoned or such grant made to him.

The actual expropriation which occurs on the filing of documents is normally followed, therefore, by negotiations leading to a compensation agreement or award consisting of two elements, cash plus the value of the s. 26 accommodation. The greater the value of the accommodation, the less the expropriating authority has to pay by way of cash compensation.

When an expropriated property right is abandoned, and the abandonment is taken into account in calculating the cash compensation, it follows that the right belongs to the owner and not the Department. That is how a reasonable person would construe an agreement settling the expropriation issues. If the Department later requires that right, it must become the subject of further expropriation. It is at that later time that the Department must pay compensation for that right. Section 7 of the **Expropriation Act** makes it clear that expropriation can take place with respect to interests less than the whole interest, or fee simple, in property.

Section 7 (2) provides:

> (2) Where the land is required for a limited time only, or only a limited estate, right or interest therein is required, the plan and description so deposited shall indicate, by appropriate words written or printed thereon, that the land is taken for such limited time only, or that only such limited estate, right or interest therein is taken, and by the deposit in such case the right of possession for such limited time, or such limited estate, right or interest, shall become and be vested in the Crown.

It is important that limitations on the interests expropriated be indicated in the

registry of deeds for the benefit of third parties without notice, but parties to the expropriation in a relationship of privity, and those claiming through them, are governed by any actual agreements reached as part of the expropriation process. The s. 7(2) requirement for registry notice of limitations on property interests cannot in any event apply to accommodations negotiated after the actual expropriation as contemplated by s. 26.

Analysis

The underpasses and ramps were built in connection with the expropriation before Mr. Hill had agreed to the amount of compensation which was negotiated between his lawyer and the solicitor for the Department. They were obviously intended to reduce his damages for injurious affection by providing access from the southern portion of the farm to the northern portion. When agreement was reached at $13,000, Mr. Hill settled the matters at issue in the expropriation by executing a "deed of release" to the Department. If he was paid for a complete loss of access to the northern portion of the farm, and the evidence does not suggest that he was, his sons cannot claim compensation for it again. However, if access by way of the ramps, which were used by the Hills and maintained by the Department for 27 years, was a means of access in respect of which the Department was able to avoid paying compensation for total loss of access in 1967, compensation should be paid when the Department finally denied access in 1992.

The evidence supports the respondents' position, beyond a balance of probabilities, that Ross Hill had, and was considered by the negotiating lawyers to have had, such access to the northern part of his farm as the ramps and the two impractical underpasses could provide at the time cash compensation for the expropriation was negotiated. The value of that access was taken into account in arriving at the amount of

compensation to be paid. In my view the burden of proof falls on the Department under s. 26 and it has not discharged this burden. I am satisfied that Mr. Hill was not compensated for loss of all access to the northern part of his farm in 1967. I am therefore satisfied that the Department abandoned that right of access in his favour as contemplated by s. 26 and did not acquire it from him. He was therefore at liberty to include it with the property interests he sold to his sons, and they were entitled to compensation when the Department took it from them..

Sufficient land to provide for eventual twinning was included in the 1967 expropriation, and no additional land was expropriated from the Hills in 1992. No expropriation proceedings were taken in 1992. The Hill sons were simply told they could no longer cross the expropriated land to reach the northern part of their farm. After 1992 they could only reach that part of the farm by way of a more roundabout and costly route over local public roads.

If the Department never paid Mr. Hill for loss of access by way of the ramps, it cannot now be heard to say that the right of way thus provided was merely permissive and subject to termination without compensation. It was a property right the Department never acquired, for which it never paid compensation, and over which is was not entitled to exercise control without paying compensation. The correspondence exchanged between lawyers for Mr. Hill and for the Department leading to the 1967 settlement, the works constructed on the ground, the use made of them, and the clear intention of the parties at the time, all consistently support this view.

While the term "easement" does not appear to have been used in 1967, the trial judge found that what Mr. Hill was left with was an equitable easement. The broad language of s. 26 of the **Expropriation Act** does not distinguish between legal and equitable easements. The key element is that the right referred to as an equitable easement reduced his

claim for damages for injurious affection. The Department has paid damages for injurious affection based on severance of the Hill farm while a limited means of direct access from one part of it to the other was in existence, but it has never paid compensation for the further injurious affection resulting from a complete absence of a direct means of access. The Department got what it paid for, but it did not get what it did not pay for. In my view it is not necessary to go further and to characterize the right of access abandoned by the Department in favour of Mr. Hill as an equitable easement, although as the trial judge concluded, it meets that description.

The fact that Mr. Hill agreed to a negotiated settlement rather than a court judgment should not operate to his detriment, nor to that of his sons. The "deed of release" was prepared by the Department. It does not specify the terms of the agreement which was consideration for that deed. The works performed by the Department, which were present on the ground for Mr. Hill's use at the time the deed was drafted and executed, were as much a part of the transaction as the written document. Indeed, they were clearly part of the "agreement" referred to.

I would be prepared at this point to dismiss the appeal, but the details of the negotiations following the expropriation bear out the respondents' contentions and are of some interest. Of interest as well are the trial judge's conclusions that the right in issue is an equitable easement.

THE EXPROPRIATION

A contemporaneous record of the dealings between Ross Hill and the Department of Highways, which began with engineering and survey work in 1965, is contained in detailed correspondence between Mr. Hill's lawyer, Mr. William Grant, and the lawyer representing the Department of Highways, Mr. William Cox.

There appears to be some confusion in the correspondence as to the underpasses. Mr. Grant refers to a four by six foot concrete underpass and Mr. Cox speaks of an eight-foot culvert. A videotape of a CBC interview with Ross Hill at the time of the expropriation was included in the evidence. That shows two underpasses, one answering each description. Neither one proved of practical use to Mr. Hill or his sons.

Mr. Hill was unsuccessful in his efforts to have the Department build a culvert/underpass beneath the Trans Canada Highway adequate to provide access for cattle and equipment from the south segment of his lands to the north field and pasture. Cattle refused to go through the small underpasses which were built. They are obviously too small for the passage of farm tractors or machinery. Moreover, one serves as a sluice for a brook.

The level crossing, although far from ideal, provided the only practical access. Ross Hill refers to this in his affidavit as follows:

> 9. That in 1966 as the Trans Canada Highway was being built, the Department of Transportation had its engineers construct and build two permanent access ramps for my use thereby joining what became the north and south sides of the farm across the Trans Canada Highway. These access ramps were built to provide the land continuous access between the severed portions of the farm in order to move cattle, machinery and other equipment across the highway.
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> 11. That not only did the Department of Transportation build the access ramps as described herein in 1966, the Department of Transportation also built the fences on both sides of the Trans Canada Highway and built the gateways into the farm on both sides of the ramps.
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> 12. That the Department of Transportation has continued to maintain the access ramps by adding gravel to the base of the ramps when required. . . .

In a comprehensive letter to Mr. Cox dated February 11, 1967, Mr. Grant spoke of the importance of the northern field to Mr. Hill's farming operation and stated in paragraph 4 of his letter:

> He now has very limited access to this field. There is one entrance. The roadway provided by the Department has an access

road to this field but is on such a steep angle that Mr. Hill does not believe that a tractor could come down it with any load behind with any degree of safety. In addition to this, approximately 500 feet eastward the main Trans Canada Highway dips, and a vehicle could be hidden in that dip and be out of sight when a tractor and load proceeded onto the pavement but before the tractor and load could successfully cross the pavement would or could be in contact with the tractor and load. This renders the field virtually inaccessible except through this very treacherous roadway . . .

At paragraph 5 he stated:

In addition to the field to the north of the right of way, there is also a substantial amount of pasture land there. This acreage was used by the Hill herd and was an integral part of his farm operation. The department has put a tunnel 4 by 6 and 200 feet long under the right of way. Mr. Hill requested the department to put an 8 by 8 tunnel, but the department was not prepared to do so. To date, none of his cattle has gone through the tunnel. This tunnel is also a sluice through which a stream passes. It is now virtually impassable by humans or animals because of the slime and sludge which has built up at the bottom.

Paragraph 10 also referred to the level crossing:

Mr. Hill informs us that he had been promised a level crossing. However, as it turned out, the banks of the right of way are so steep that it is questionable whether or not a tractor hauling a loaded farm unit would be able to successfully navigate the roadway down the steep banks on either side of the right of way. In addition to this, the right of way is very close to a dip in the road which we have described in paragraph 4.

In his reply, dated February 28, 1967, Mr. Cox stated:

As far as paragraph 4 is concerned, I regret to advise that the Department does not feel that the suggestions contained in that paragraph have any merit.

As far as paragraph 5 is concerned, I am advised that the present underpass is, in fact, 8 feet by 8 feet and if there is a 4 by 6 underpass that this is in addition to the 8 by 8 underpass.

Item number 10 will be checked by officials of the Department on the ground and if the ramp is, in fact, too steep then appropriate action will be taken by the Department.

Mr. Cox then offered $2,822 plus $1,064 for fencing in full settlement of Mr. Hill's claims.

The inference is clear that a means of access across the expropriated property had been negotiated before there was any attempt to fix the amount of compensation. Means of getting from the south part of the farm to the north part had been constructed on the ground and existed as a circumstance material to the price negotiations. Compensation was determined on the basis that access would be ongoing.

There was no suggestion in the correspondence or elsewhere in the evidence that the ramp was temporary, or that it was in any way contrary to the policies or statutory authority of the Department of Highways, or that it might be subject to termination. Mr. Hill was justified in inferring that the level crossing was intended to provide continuous access between the severed portions of the farm. This must have been present in his mind when he concluded the negotiations for compensation. Indeed, s. 26 of the **Expropriation Act** requires that it be taken into account in determining damages for injurious affection.

The settlement figure inched upwards toward the final figure of $13,000 during continuing negotiations between the two counsel. Mr. Cox visited the Hill farm and on July 7, 1967 wrote to F. S. Bruce-Williams, Director of Claims for the Department of Highways, about a number of aspects of the claim, including the following:

> 3. Access to the North Field
>
> > Apparently Mr. Hill has encountered difficulty from time to time in entering the north field by way of the ramp provided by the Department. He states that he got his tractor with a load of fertilizer stuck on the ramp and that Mr., Mr. MacCarthy of the Department of Highways came out and viewed this situation. It would appear that some improvement should be made to the access ramps provided by the Department.
>
> 4. Road from Farm Buildings to Rear Fields

> Mr. Hill maintained that he would acquire a new right-of-way from a neighbour if he was denied the use of the old road. I recommend that contour maps be obtained to determine the characteristics of this old road before construction began. It would appear that it was much less satisfactory than the ramps which have now been provided. It should also be determined whether access will be provided from the old road for Mr. Hill to travel on the new road from it to the access ramps.
>
> 5. Under-pass
>
> Mr. Hill maintains that his cattle will not use the present under-pass and that no cattle have used it since it was constructed. He emphatically stated that it is impractical to use and of no value to him and that he has to truck his cattle to the back pasture. He also states that he was given to understand that another cattle pass would be built and at a place satisfactory to him. ...

There was no material change in the position of either party with respect to the question of access between the date of that letter and settlement of the claim in October, 1967. While the amount seems low today, it was not unreasonable based on 1967 values. A deed of release was drafted by the Department and executed by Mr. Hill and his wife October 17, 1967.

It is not a deed of conveyance of the property. It recites that the Minister of Highways pursuant to the Expropriation Act deposited a notice of expropriation, plan and description in the County of Colchester Registry of Deeds on February 16, 1966. Under the provisions of the **Expropriation Act,** that was when the property vested in Her Majesty.

The negotiations between February 16, 1966 and October 17, 1967 were aimed at reducing injurious affection and fixing the value of compensation. The controlling dynamic of the negotiations was straightforward: the greater the success in limiting injurious affection, the smaller the compensation. The $13,000 figure finally agreed to included the value of the injurious affection modified by the access to the northern part of the farm provided by the ramps and underpasses. If the injurious affection had not been

lessened by the means provided, the cash component of the settlement would presumably have been higher. Both the access and the cash payment were elements of the agreement which was the consideration for the deed of release.

The deed describes the 11.28 acres expropriated, without purporting to further convey them to the Department, and recites:

> And Whereas pursuant to the provisions of the said Expropriation Act the Releasors and the Releasee have agreed on the amount to be paid to the Releasors as compensation for the land so expropriated and for *all damages of any kind whatsoever resulting from the said expropriation or for any and all injurious affection to the other lands of the Releasors* resulting from highway construction on the said expropriated land. (Emphasis added.)

The reference to injurious affection resulting from "highway construction on the said expropriated land" does not provide a release with respect to the right of access, because the Department had abandoned the expropriation relating to the right of access in favour of Mr. Hill, as discussed above, so the right of access was not part of the "expropriated land." It was an instrument for reducing damages from the serious injurious affection resulting from severance of a working farm.

The deed then provides:

> NOW THIS DEED WITNESSETH that in pursuance of the said Agreement between the Releasors and the Releasee as to the amount of compensation to be paid to the Releasors by the Releasee and in consideration of the sum of One Dollar ($1.00) of lawful money of Canada, paid by the Releasee to the Releasors (the receipt whereof is hereby acknowledged) and other good and valuable consideration the Releasors do hereby release and forever discharge the Releasee, Her Heirs, Successors and Assigns of and from all manner of actions . . . for or by reason of the said Expropriation of the said lands above described, or for any and all damages of any kind whatsoever resulting from the said expropriation or for injurious affection to other lands of the Releasors resulting from highway construction on the said land so expropriated.

The "Agreement" referred to with respect to the consideration for the deed would have included any benefits negotiated by Mr. Hill, including the right of access abandoned

in his favour, following the deposit of the expropriation documents. The correspondence from Mr. Cox, as well as the works on the ground, make it clear that at the time of the execution of the deed of release Mr. Hill had been left with access to the northern portion of his farm, a fact required by s. 26 to be reflected in the amount of the compensation paid. Mr. Hill was obviously using the ramp for its intended purpose when his load of fertilizer referred to in the correspondence became stuck. The release could not have been executed in contemplation of the future loss of that right because, as far as Mr. Hill could have known, the Department did not plan to take that from him. The deed of release, however, did not purport to fetter in any way the Department's statutory discretion to expropriate additional property interests from Mr. Hill or his heirs or assigns if future need arose.

The Judgment Appealed From

In view of s. 26 which provides a statutory foundation for the transaction between the Department and Ross Hill, I have not been persuaded that the trial judge was wrong in concluding the right of access remaining to Mr. Hill after the expropriation was an equitable easement. Justice Scanlon states in his decision:

> [11] The definition of an easement is found in **Anger and Honsberger Real Property** (2nd Ed.), vol. 2, p. 925:
>
> > An easement is a privilege without profit annexed to land to utilize the land of a different owner (which is not involved in the removal of any part of the soil or the natural produce of the land) or to prevent the other owner from utilizing his land in a particular manner for the advantage of the dominant owner. It has been described as a right annexed to land which permits the owner of the dominant tenement 'to suffer or not to do' something on such land.
>
> [12] The essential qualities of an easement are present in this case. There is a dominant and servient tenement and the easement is to accommodate the dominant tenement of the applicants. The parties

are different entities. The right is capable of forming the subject matter of a grant.

[13] There does not exist a common law easement as it could only be created by deed or will. The principles of equity recognize easements other than those created by deed or will. **Gale on Easements** (9th Ed.), at p. 64, discusses equitable easements as follows:

> According to this rule (in equity) if there is an agreement (whether under seal or not) to grant an easement for valuable consideration, equity considers it (as between the parties to the agreement and persons taking with notice) as granted, and will either decree a legal grant or restrain a disturbance by injunction. ... a verbal agreement for an easement may be in force where there has been part performance.

[14] At common law a grantee who claims under a parol or a written grant acquires a mere licence which is revokable at the will of the grantor. The respondent argues that, at best, Mr. Ross Hill acquired a right to use the access ramp as long as he held the farm. I find nothing in the evidence before me which would indicate that was the intention of the parties. If the department had intended to limit the easement to the time that Mr. Hill operated the farm this limitation could have been reduced to writing. The respondent also suggests that Mr. Hill should have known the easement would expire at sometime in the future as it was obvious that there was to be a twinning of the highway in the future. Again, if the department wanted to limit the easement the limitation could have been spelled out in writing.

[15] In **Cheshire's Modern Real Property** (5th Ed.), at p. 244, the author writes:

> ... Equity acts upon the principle that what ought to be done must be regarded as actually done ... If a grantee under a verbal grant of an easement relies on the grant and materially alters his position for the worse, as for instance by the expenditure of money deliberately acquiescence in by the grantor, the latter will not be allowed to say that there is a mere licence and no easement.

[16] In the present case Ross Hill materially altered his position as regards the negotiation of damages for injurious affection to his land. He relied on the permanent access ramps as a factor which would minimize the effect of the expropriation. If the applicants are denied use of the access ramps, it will be necessary for them to travel several extra miles to access the northern section of their farm.

Authority To Grant:

[17] Mr. Ross Hill was led to believe that he would be given permanent access to the north side of his farm by way of the access ramps. This belief was based on the numerous representations, the actions of the department representatives, and its solicitor and the then Minister of the Department. The Crown had the power to sell any part of its lands or to convey an interest such as an easement. I see nothing in the Act which fetters the authority of the provincial Crown to dispose of its property. The representatives of the Crown who negotiated compensation for the expropriated land led Mr. Ross Hill to believe that he would have a permanent right of access to his farm to the north of the highway. I am satisfied that what was promised was more than a licence which was terminable at any time.

[18] The submission by the respondent is that because this was a controlled access highway, the persons making the representations could not do so because it was beyond the scope of their authority. They were conducting negotiations on behalf of a Crown Department. The representations they made created reasonable expectations which Ross Hill and subsequently the applicants relied upon. It would be grossly unfair if the applicants are made to bear the burden of the cost of a public undertaking such as highway construction. The Expropriation Act is in place to provide a mechanism whereby private landowners who have their land expropriated for a public purpose receive compensation. If in the negotiation of a settlement figure the Crown representatives make representations that affect the settlement amount, then the other side is entitled to rely on those representations. If it turns out that the Crown cannot or will not fulfil its part of the bargain then the private citizen should not be left to shoulder the burden alone.

[19] I note in **Crabb v. Arun District Council**, [1975] 3 All E.R. 865, Lord Denning of the English Court of Appeal said:

> True the Council on the deeds had the title to their land, free of any access at point B. **But they led Mr. Crabb to believe that he had or would be granted a right of access at point B.**
>
> **I would therefore, hold that Mr. Crabb ... has a right of access at point B ... I will allow the appeal and declare that he has an easement accordingly.**

The respondent takes the position that the persons who represented the DOT were not authorised to grant any easements and therefore the applicants, nor Mr. Ross Hill, could acquire an easement or any other right in the access ramps. At the time the applicant alleges an

> easement was granted, the Public Highways Act, R.S.N.S. 1955, c. 235, was in effect. Section 16 of that **Act** would prevent the applicants from acquiring any interest in the access ramps by prescription. This is not an easement acquired by prescription. This is an equitable easement.

There is considerable support for Justice Scanlon's views in **Descar Ltd. v. Megaventures Corp** (1990) 72 O.R. (2d) 389 in which Lane J. of the Ontario High Court of Justice approved of and applied the **Crabb** case in finding that equitable estoppel was one of the alternatives by which the easement in question in that case could be supported. He cites Lord Denning's judgment in **Crabb** as follows at pp. 406-407:

> When Mr. Millett, for the plaintiff, said that he put his case on an estoppel, it shook me a little: because it is commonly supposed that estoppel is not itself a cause of action. But that is because there are estoppels and estoppels. Some do give rise to a cause of action. Some do not. In the species of estoppel called proprietary estoppel, it does give rise to a cause of action. We had occasion to consider it a month ago in **Moorgate Mercantile Co. Ltd. v. Twitchings** [1976] Q.B. 225 [1975] 3 All E. R. 314 where I said . . . that the effect of estoppel on the true owner may be that
>
> > . . . his own title to the property, be it land or goods, has been held to be limited or extinguished, and new rights and interests have been created therein. And this operates by reason of his conduct - what he has led the other to believe - even though he never intended it.
>
> The new rights and interests, so created by estoppel, in or over land, will be protected by the courts and in this way give rise to a cause of action. This was pointed out in **Spencer Bower and Turner on Estoppel by Representation**, 2nd ed. (1966), pp. 279-282.
>
> The basis of this proprietary estoppel - as indeed of promissory estoppel - is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law. The early cases did not speak of

> it as "estoppel". They spoke of it as "raising an equity." If I may expand what Lord Cairns L.C. said in **Hughes v. Metropolitan Railway Co.** (1877) 2 App. Cas. 439, 488: "It is the first principle upon which all courts of Equity proceed," that it will prevent a person from insisting on his strict legal rights - whether arising under a contract, or on his title deeds, or by statute - when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties.
>
> What then are the dealings which will preclude him from insisting on his strict legal rights? If he makes a binding contract that he will not insist on the strict legal position, a court of equity will hold him to his contract. Short of a binding contract, if he makes a promise that he will not insist on his strict legal rights - then, even though that promise may be unenforceable in point of law for want of consideration or want of writing - then, if he makes the promise knowing or intending that the other will act on it, and he does act on it, then again a court of equity will not allow him to go back on that promise: see **Central London Property Trust v. High Trees House, Ltd.,** [1947] K.B. 130 and **Charles Rickards Ltd. v. Oppenheim** [1950] 1 K.B. 616, 623.

In **Western Fish Products Ltd. v. Penwith District Council,** [1981] 2 All E.R. 204, the English Court of Appeal revisited proprietary estoppel and affirmed the **Crabb** principle while confining it to cases involving an expectation of acquiring a right over land

. . .

In our own court, in **Classic Communications Ltd., v. Lascar** (1985), 51 O.R. (2d) 769, 21 D.L.R. (4th) 579, 36 R.P.R. 186, Pennell J., after referring to **Crabb** said at p. 777:

> It was for long supposed that estoppel, at least the familiar species known as promissory estoppel, could only be used as a defence and not to found an action. In its enlarged and elevated nature as proprietary estoppel, equity stands ready to strike or defend as and when conscience commands.

While Equity may stand ready to come to the assistance of the Hills, in my view it need not be summoned in view of s. 26 of the **Expropriation Act**. The Department clearly gave Mr. Hill to understand he had the right to cross the expropriated lands, and it was with

that understanding that he agreed to the amount of the cash settlement. Under s. 26, the right of access was abandoned by the Department in Mr. Hill's favour. This reduced Mr. Hill's entitlement to compensation at that time; he was not paid for something he did not lose. That right passed to his sons by assignment when he sold them the farm.

Putting the matter in its simplest terms, the Department never paid Mr. Hill compensation for the right of access so it never acquired it from him. That is provided by statute. There is no need to resort to equity.

Mr. Hill was free to convey what he owned to his sons. If the Department wishes to terminate their right of access, it may do so under the **Expropriation Act**. But it must pay them compensation for it.

Controlled Access

Section 20(1) of the **Highways Act** makes provision for the designation of a highway as a controlled access highway. The highway in question was so designated. Section 21(1) provides that

> ... no person shall, without a written permit from the Minister,
>
> (a) construct, use, or allow the use of, any private road, entrance way or gate which or part of which is connected with or opens upon the controlled access highway;

With regard to the appellant's arguments based on this section, the trial judge found:

> [23] In the present case there was no written permission. As I indicated earlier, I do accept that the then Minister of Highways did verbally indicate that the access ramps would be provided. A written permit would be more in the nature of a licence. That was not what was intended by the parties here and one would therefore not expect to find such a permit.

With respect, I would have gone further and found written permission. The right of access created by the Department became a component of the negotiated expropriation settlement agreement. The settlement was negotiated by Mr. Cox on behalf of the Department, that is to say, the Minister. The Minister has authority to grant access over a controlled access highway; s. 21(1) makes that clear. The Minister cannot say he has not granted written permission when the presupposition of the letters from his lawyer to Mr. Hill's lawyer was that Mr. Hill was intended to use the right of way.

Conclusion

The means of access by way of the ramps and gate constructed by the Department was provided for Mr. Hill or, in the language of s. 26, abandoned in his favour, as a partial remedy for the injurious affection of Mr. Hill's land when his farm was divided into two parts. Not having been compensated for loss of that access in 1967, Mr. Hill or those claiming under him were therefore entitled to compensation when the right of way was taken by the Department in 1992.

In releasing his claims for injurious affection with respect to property interests expropriated from him in 1967, Mr. Hill did not release any future claims for injurious affection arising from fresh expropriations, such as the present termination of the right of access. I agree with the following statement by the trial judge:

> [26] The fact that the access was promised at the time of the original expropriation means that the injurious affection now complained of did not occur until the access was denied. The injurious affection will only occur at the time the property right or interest is removed by the Province. In this case it is the removal of the access ramps that has caused the injurious affection.

I would have dismissed the appeal and returned the matter to the Utilities and Review Board to be dealt with as an expropriation of a property right. In view of the decision of the majority it is not necessary to deal with the various issues raised as to costs.

Freeman, J.A.

HALLETT, J.A.:

I have read the opinions of Justices Chipman and Freeman. I agree with Mr. Justice Chipman that the appeal should be allowed. The facts are set out in his decision. In concluding that the Hills had an equitable easement across the Trans Canada Highway the learned trial judge relied on: (i) s. 25 of the **Expropriation Act**, R.S.N.S. 1954, c. 91 [s. 26 R.S.N.S. 1967; c. 96]; (ii) the decision of the Court of Appeal in **Crabb v. Arun District Council**, [1975] 3 All E.R. 865; (iii) the dealings between the solicitors representing the parties; and (iv) an alleged promise by the Minister of Highways to Mr. Ross Hill that he would have permanent access to the controlled access. He erred in that he disregarded the most relevant fact before him that Mr. Ross Hill had signed a Release of all claims. He further erred in that he gave insufficient regard to the provisions of ss. 21 and 23 of the **Public Highways Act**, R.S.N.S. 1954, c. 235. These sections are set out in the decision of Mr. Justice Chipman as are the operative words of the Release signed by Mr. Ross Hill. These were the Acts in force at the time of the expropriation in 1966 and the settlement in 1967 and are the Acts referred to throughout these reasons unless otherwise expressly stated.

Section 21(1) of the **Public Highways Act** provides that no person shall without a written permit from the Minister, use an entrance way which opens upon a controlled access highway. Section 23(3) states that notwithstanding that a person whose property has been injuriously affected upon being designated a controlled access highway is entitled to compensation, if the controlled access highway is a "new highway" the owner of property that adjoins such new highway shall not be entitled to compensation for injurious affection to that property resulting from the designation. This prevents a person, whose land was expropriated for a new highway, from being compensated for injurious affection to the remaining lands twice; once under the **Expropriation Act** and again under the **Public Highways Act**.

The expropriation took place on February 16th, 1966; the proposed highway was designated a controlled access highway on June 7th, 1966. It was a new highway within the meaning of s. 23(3) of the **Public Highways Act**. Ross Hill's claim for compensation for the land expropriated and for injurious affection to his adjoining lands was formally released on October 17th, 1967.

The learned trial judge put considerable reliance on s. 25 of the **Expropriation Act** which provides:

> " 25. If the injury to any land or property alleged to be injuriously affected by the exercise of any of the powers conferred by this Act may be removed wholly or in part by any alteration in, or addition to, any public work, or by the construction of any additional work, or by the abandonment of any part of the land taken from the claimant, or by the grant to him of any land or easement, and if the Crown, before an award is made, undertakes to make such alteration or addition, or to construct such additional work, or to abandon such portion of the land taken or to grant such land or easement, the damages shall be determined in view of such undertaking and the judge shall declare that, in addition to any damages awarded, the claimant is entitled to have such alteration or addition made, or such additional work constructed or such part of land abandoned or such grant made to him." {Emphasis Added}

As Mr. Justice Chipman pointed out, this section applies to the judge [now the Nova Scotia Utility and Review Board] that fixes the compensation following an expropriation. However, it is obvious that the section contemplates that in order to alleviate the extent of the injurious affection the expropriating authority may construct works, abandon part of the land taken or grant land or an easement to the owner. In this case the Departments of Highways had constructed two tunnels under the new highway and constructed the access ramps in question so that access between the south and north fields could be achieved by crossing the lands expropriated which, of course, include the controlled access highway as built. No easement was granted in documentary form. It is clear that the ramps were too steep and therefore not entirely satisfactory and it goes without saying that crossing the Trans Canada Highway with cattle or a tractor would be a hazardous venture given the heavy traffic

between Truro and Amherst. A review of the correspondence between the solicitors would indicate that the unsatisfactory nature of these works was a factor that was pressed by Mr. Hill's solicitor in striving for greater compensation than that initially offered by the Department. As noted by Mr. Justice Chipman, Mr. Hill's solicitor had a considerable degree of success based on these arguments. There was no evidence as to the extent the Hills used the access ramps for the purpose of crossing the Trans Canada Highway. They had and still have access from the south portion of their farm via a public highway to the north field; this does not involve crossing the Trans Canada Highway.

The construction of the access ramps for Mr. Ross Hill was consistent with the provisions of the **Public Highways Act** that the Minister had authority to permit access to the controlled access highway. Written permission was never given to Mr. Hill; this was either an oversight or felt to be unnecessary as the Department of Highways had constructed the ramps.

There was not a provision then, nor at the present time, in the **Public Highways Act** authorizing the Minister to grant an easement across a controlled access highway. A permit is in the nature of a license and is therefore revocable.

Assuming that the Minister promised permanent access as asserted by Mr. Hill it could not, upon revocation, give rise to a claim under the **Expropriation Act** in force at the time as no interest in land could have been created - the Minister having no authority under the **Public Highways Act** to grant an easement across a controlled access highway. A grant of land or grant of an easement as provided in s. 25 of the **Expropriation Act** clearly contemplates formal documentation. There was no documented grant of an easement to Mr. Ross Hill. Nor was there any undertaking to grant an easement in any of the correspondence from the solicitor acting for the Province.

Both Mr. Hill and the Province were represented by competent and experienced counsel who, after lengthy negotiations, reached a settlement of Mr. Hill's claim under the

Expropriation Act. Mr. Hill's lawyer would be presumed to know the legislation relevant to claims under the **Expropriation Act** and know the provisions of the **Public Highways Act**, particularly with respect to access to controlled access highways. Mr. Hill finally settled for $13,000. At that time the tunnels under the highway had been constructed as well as the access ramps. These were "works" constructed within the meaning of s. 25 of the **Expropriation Act**. Mr. Hill signed a full release of all claims arising out of the expropriation.

In my opinion the learned trial judge made a fundamental error where he stated that there was nothing in the evidence before him that would indicate that it was the intention of the parties that a mere license was granted. And erred when he stated that if the Department had intended to limit the easement to the time that Mr. Hill operated the farm this limitation could have been reduced to writing. The learned trial judge erred because he had before him the relevant legislative provisions. There is a presumption that the parties know the law and, in particular, the lawyers acting for the parties would know the law relevant to the claim they were settling. Therefore, there is a presumption that they would know that the use of the access ramps to gain access to the Trans Canada Highway could only be by written permit as provided in the **Public Highways Act**. They would know that a grant of easement would be inconsistent with the **Public Highways Act** and that if, for some reason, it was intended to grant an easement under the **Expropriation Act** it would require a formal grant of an easement. The only reasonable inference from the applicable law and the facts is that a grant of easement was not intended.

In his reasons for judgment the learned trial judge went on to state: "I see nothing in the **Act** [**Expropriation Act**] which fetters the authority of the provincial Crown to dispose of its property". That is correct as the Crown can abandon an expropriation and dispose of the property. However, there is no evidence of an abandonment of any of the lands expropriated from Mr. Hill. The evidence is inconsistent with an abandonment of part of

the land expropriated and inconsistent with a grant of easement, each of which would normally be documented. As already noted, under the **Public Highways Act** the Minister had authority only to grant permission to access the controlled access highway. Implicit in this is the lack of authority to grant an easement across a controlled access highway. That is entirely consistent with the concept of such a highway. The evidence relating to the construction of the access ramps is consistent with the provisions of s. 25 of the **Expropriation Act** which contemplates that works can be constructed that might reduce the award of compensation to be fixed. While it is true there is nothing in the **Expropriation Act** that fetters the authority of the provincial Crown to dispose of its property when a public highway is in issue the provisions of the **Public Highways Act** cannot be ignored in attempting to ascertain if the parties intended that an easement would be granted across the Trans Canada Highway. The learned trial judge did not give adequate consideration to the relevant provisions of the **Public Highways Act**.

Considering: (i) s. 25 of the **Expropriation Act** and ss. 21 and 23 of the **Public Highways Act**; (ii) the fact that no formal easement was granted or undertaken to be granted to cross the expropriated land from the south field to the north field; (iii) the fact that a full release was signed by Mr. Ross Hill; and (iv) the fact that the settlement was negotiated by experienced lawyers, it was totally unreasonable for the trial judge to conclude that the Minister intended to grant an easement across the controlled access highway when he allegedly promised Mr. Ross Hill permanent access. Mr. Ross Hill was not cross-examined on his affidavit; the Minister is dead. The learned trial judge made a manifest error when he concluded that the lawyer acting for the expropriating authority agreed to grant an easement to Mr. Ross Hill. There is nothing in the correspondence to support such a conclusion nor was there a grant of easement in proper form as one would expect where a transfer of an

interest in the land was contemplated. The conclusion reached by the trial judge requires one to assume that neither of these experienced lawyers knew what he was doing.

The Minister had no authority to do anything other than to permit access.

There is no explanation on the record as to why this permission was not put in writing. It is idle speculation that it was not in writing because the intention was to grant an easement; such a conclusion flies in the face of the **Public Highways Act** and the Release signed by Mr. Ross Hill.

The learned trial judge who heard and granted the application had only affidavit evidence before him. In the absence of evidence from the lawyers who negotiated the settlement that the Release was either a mutual mistake or was induced by fraud or evidence that would vitiate the terms of the Release on some other legal basis, the learned trial judge ought to have given effect to the Release which in broad terms released all present and future claims "resulting from the said expropriation or for injurious affection to other lands of the releasors resulting from highway construction on the said land so expropriated." The Hills' claim results from highway construction on the land expropriated and is thus covered by the Release. Effect must be given to formal releases or it becomes unsafe for parties to legal proceedings to settle their differences.

In my opinion the learned trial judge erred in failing to give effect to the Release; this was an error of law. He erred in finding that an equitable easement exists; this conclusion of the trial judge for the reasons set forth in this decision was an overriding error that warrants this court interfering with his decision. (**Toneguzzo-Norvell (Guardian *Ad Litem* of) v. Burnaby Hospital**, [1994] 1 S.C.R. 114).

The application before the learned chambers judge ought to have been dismissed. I would allow the appeal. I agree with Mr. Justice Chipman as to the disposition of the cross-appeal and costs.

Hallett, J.A.

C.A. No. 108641

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF NOVA SCOTIA Appellant - and - BY: ARTHUR HILL and ANGUS HILL Respondents	REASONS FOR JUDGMENT CHIPMAN, J.A. HALLETT, J.A (concurring by separate reasons) FREEMAN, J.A. (dissenting)