C.A. No. 111210

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S.; Roscoe and Pugsley, JJ.A.

Cite as: Nova Scotia (Attorney General) v. L.E. Powell Property Ltd., 1995 NSCA 101

BETWEEN:	)	
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NOVA SCOTIA, REPRESENTED BY THE ATTORNEY GENERAL OF NOVA SCOTIA Appellant/Respondent on Cross-Appeal	)	Margaret L. MacInnis for the Appellant/ Respondent on Cross-Appeal
- and -	)	
L. E. POWELL PROPERTY LIMITED and L. E. POWELL & COMPANY LIMITED Respondents/Appellants on Cross-Appeal	)	Brian J. Hebert for the Respondents/ Appellants on Cross-Appeal
	)	Appeal Heard: April 18, 1995
	)	Judgment Delivered: August 8, 1995

THE COURT: The appeal is allowed and the cross-appeal is dismissed as per reasons for judgment of Pugsley, J.A.; Clarke, C.J.N.S. and Roscoe, J.A., concurring.

PUGSLEY, J.A.:

On July 26, 1986, the Nova Scotia Department of Transportation and Communications (the Crown) expropriated 45.3 acres of land at East Chezzetcook, Halifax County (the Land), for the construction of Highway 107, from companies (the Claimants) controlled by L.E. Powell, a civil engineer who had been in the construction business for a period in excess of 44 years.

After a trial of 13 days, (commencing May 3, 1994 and concluding July 22, 1994) Richard Weldon, as panel chair and sole member of the Nova Scotia Utility and Review Board assigned to the matter, in a decision consisting of 96 pages, to which 73 pages of schedules were annexed, awarded the Claimants compensation, aggregating $123,532.

The Crown appeals, submitting the Board erred in law in the following respects:

1. In determining that the highest and best use of the land was for residential subdivision;
2. In determining that areas V, W, X, Y and Z of the Land were injuriously affected by the expropriation;
3. In determining the Claimants were entitled not only to the market value of the land, but also to the survey cost, engineering and design costs incurred, and development profit, allegedly lost, as a consequence of the expropriation;
4. In determining, the Claimants were entitled to be compensated for a special economic advantage in the land, when the issue was not pleaded;
5. In awarding costs incurred by the Claimants prior to the institution of proceedings;
6. In attributing a qualification, and level of expertise and knowledge, to an expert which he did not possess;
7. In making findings of facts not supported by the evidence.

The Claimants cross-appealed, submitting that the Board erred in law in finding that only $16,900 of the $42,000 in engineering and design fees, incurred in the course of preparing plans for the development of the Land prior to expropriation, were compensable.

Relevant Legislation

The expropriation of the Land was carried out pursuant to the **Expropriation Act**, C.156 R.S.N.S. 1989, (hereinafter called the **Act**).

The following provisions of the **Act** are relevant:

> **Interpretation**
>
> 3 (1) In this Act,
>
> (h) "injurious affection" means
>
> (i) Where a statutory authority acquires part of the land of an owner,
>
> . . .
>
> (A) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and
>
> (B) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute, ...
>
> **Payment if offer accepted**
>
> 16 (1) Where an offer of full compensation has been made to a person under this Act and that person accepts the offer, the full amount thereof shall forthwith upon acceptance of the offer be paid to that person.
>
> **Payment if offer refused**

(2) If the registered owner under Section 13 or the owner under Section 15 does not accept the offer of the amount of full compensation made, then the statutory authority shall immediately pay to him seventy-five per cent thereof without prejudice to the right of that person to claim additional compensation in respect of the expropriation.

Part III
COMPENSATION

Duty to pay compensation

24 Where land is expropriated, the statutory authority shall pay the owner compensation as is determined in accordance with this Act.

Aggregate of items to be compensated

26 The due compensation payable to the owner for lands expropriated shall be the aggregate of

(a) the market value of the land or a family home for a family home determined as hereinafter set forth;

(b) the reasonable costs, expenses and losses arising out of or incidental to the owner's disturbance determined as hereinafter set forth;

(c) damages for injurious affection as hereinafter set forth; and

(d) the value to the owner of any special economic advantage to him arising out of or incidental to his actual occupation of the land, to the extent that no other provision is made therefor in due compensation.

Land value to be market value

27 (2) Subject to this Section, the value of land expropriated is the market value thereof, that is to say, the amount that would have been paid for the land if, at the time of its taking, it had been sold in the open market by a willing seller to a willing buyer.

Land value where owner-occupier dislocated

(3) Where the owner of land expropriated was in occupation of the land at the time the expropriation document was deposited in the registry of deeds and, as a result of the expropriation, it has been necessary for him to

give up occupation of the land, the value of the land expropriated is the greater of

(a) the market value thereof determined as set forth in subsection (2); and

(b) the aggregate of

(i) the market value thereof determined on the basis that the use to which the land expropriated was being put at the time of its taking was its highest and best use, and

(ii) the costs, expenses and losses arising out of or incidental to the owner's disturbance, including moving to other premises but if such cannot practically be estimated or determined, there may be allowed in lieu thereof a percentage, not exceeding fifteen, of the market value determined as set forth in subclause (i),

plus the value to the owner of any element of special economic advantage to him arising out of or incidental to his occupation of the land, to the extent that no other provision is made by this clause for the inclusion thereof in determining the value of the land expropriated.

Costs prior to institution of proceeding

35 (1) The cost of one appraisal and the legal and other costs reasonably incurred by the person entitled to compensation in asserting a claim for compensation prior to the institution of proceedings to determine compensation shall be paid by the statutory authority.

PART IV
NEGOTIATION

Costs if award eighty-five per cent of offer

52 (1) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Board and the amount awarded by the Board is eighty-five per cent, or more, of the amount offered by the statutory authority, the Board shall make an order directing the statutory authority to pay the reasonable legal, appraisal and other costs actually incurred by the owner for

> the purposes of determining the compensation payable, and may fix the costs in a lump sum or may order that the determination of the amount of such costs be referred to a taxing master of the Supreme Court who shall tax and allow the costs in accordance with this subsection and the tariffs and rules prescribed by the **Costs and Fees Act**.
>
> **If award under eighty-five per cent of offer**
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> (2) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Board and the amount awarded by the Board is less than eighty-five per cent of the amount offered by the statutory authority, the Board may make such order, if any, for the payment of costs as it considers appropriate, and may fix the costs in a lump sum or may order that the determination of the amount of the amount of such costs be referred to a taxing master of the Supreme Court who shall tax and allow the costs in accordance with the order and the tariffs and rules prescribed by the **Costs and Fees Act** in like manner to the taxation of costs awarded on a party and party basis.

Compensation under the **Expropriation Act** since June 30, 1992, has been determined pursuant to the provisions of the **Utility and Review Board Act**, C.11 S.N.S. 1992.

The following provisions of the **Utility and Review Board Act** are relevant:

> **Jurisdiction**
>
> **22** (1) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it.
>
> **Questions of law and fact**
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> (2) The Board, as to all matters within its jurisdiction pursuant to this Act, may hear and determine all questions of law and of fact.
>
> **Effect of finding**
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> **26** The finding or determination of the Board upon a question of fact within its jurisdiction is binding and conclusive.
>
> **Appeal**

> **30** (1) An appeal lies to the [Court of Appeal] from an order of the Board upon any question as to its jurisdiction or upon any question of law, upon filing with the Court a notice of appeal within thirty days after the issuance of the order.

Background

The Claimants purchased approximately 297 acres of land in East Chezzetcook (the Property) by tax deed on February 7, 1963, for $650.

The Property consists of mixed woodland located in a lightly populated area of Halifax County some twenty miles from the City of Dartmouth.

Pursuant to a ten-year forest management agreement negotiated in March of 1979, with the Nova Scotia Department of Lands and Forests, the Claimants received approximately $17,000 to assist in meeting the costs of a management plan, and survey, and for the construction of a class D woods road to assist in removing the timber on the Property. The road was completed shortly thereafter and most of the mature timber was removed.

The Crown expropriated 26.7 acres of the Property on November 13, 1981. The expropriation was abandoned shortly thereafter and a payment of $3,250 was made by the Crown to the Claimants respecting the abandonment.

On March 11, 1982, the Crown expropriated substantially the same lands for the extension of a controlled access highway (i.e. Highway 107). A settlement was negotiated whereby the Claimants were paid approximately $31,000 for land taken (market value determined to be $750 per acre) together with costs of $14,000 and $5,285 for reimbursement of appraisal costs.

In November of 1982 the Claimants made an application for subdivision of part of the Property for construction of a single-family dwelling.

On January 26, 1983, an application to the County of Halifax was made by the Claimants for subdivision of a 45-lot development on the property.

In August, 1984, an application for tentative subdivision approval of 54 lots on the Property was submitted to the County. In November, 1985, the County cancelled the application because of the Claimants' failure to proceed with the application.

In the spring of 1985, the Claimants were advised by the Crown that Highway 107 would be built over the Property.

After unsuccessful negotiations, the Crown expropriated the Land on July 22, 1986 for the construction of Highway 107. The Notice of Claim was not filed by the Claimants until January 21, 1994.

The Claimants submitted that the Land formed part of an intended 54-lot residential subdivision which would have comprised approximately 80 acres, that engineering plans had been completed displaying street layout and drainage design, and that the woods road would eventually serve as the base for the main road in the subdivision.

As of the date of expropriation registered encumbrances aggregating approximately $265,000 were filed and outstanding against the Property.

Appeal Limited to Questions of Jurisdiction or Law

Section 30 of the **Utility and Review Board Act** limits the appeal to this Court, from the decision of the Board, to "any question as to its jurisdiction or upon any question of law".

An excess of jurisdiction will, of course, occur where an award is made without supporting evidence (**Ramage v. Vancouver (City)** (1955), 6 D.L.R. (2d) 231 (B.C.C.A.)).

If, however, the Court is satisfied that "the evidence before the tribunal was reasonably capable of supporting its conclusions, these will not be disturbed unless they resulted from the application of an erroneous principle." In particular, questions as to the competence, credibility and weight to be given to expert testimony are matters for the tribunal (**Todd, The Law of Expropriation and Compensation in Canada,** 2nd Ed.,(1992) p. 543).

Clarke, C.J.N.S., on behalf of this Court, considered the issue in **Crossman v. Labour Standards Tribunal** (1992), 109 N.S.R. (2d) 274. He stated at 277:

> This means first, that an appeal is not a new trial. It is not for this Court to hear the evidence all over again and render a fresh decision as though the Tribunal never existed or had no jurisdiction ... In this instance, the issues are essentially questions of fact to be determined by the Tribunal. In such a situation the law is settled but where the enabling legislation gives the Tribunal the authority to make final and conclusive decisions of fact, the issue on appeal only becomes a question of law where there is no evidence before the Tribunal which can support the findings it has made ... There was evidence before the Tribunal in which it could make the findings that it did. Therefore, the issues having been within its jurisdiction, there is no question of law upon which the decisions and findings of the Tribunal can be disturbed. (emphasis added)

I am of the opinion that with respect to grounds 1 and 6, the Board committed no error of law and accordingly these grounds should be dismissed. The Crown has not established any error of law in the illustrations cited in support of Ground 7.

Ground No. 2

In determining that areas V, W, X, Y and Z of the Land were injuriously affected by the expropriation;

With the exception of area W, I am of the opinion that there was evidence before the Board to justify the award of injurious affection for areas V, X, Y, and Z and, accordingly, the appeal with respect to those areas should be dismissed.

Area W consists of 8.50 acres. Fergus Omond, a qualified appraiser retained by the Crown, was of the opinion that no injurious affection was suffered by this area.

Lee Weatherby, a qualified appraiser retained on behalf of the Claimants, acknowledged that the area is still accessible from the East Chezzetcook Road and testified "I have not attributed any injurious affection to that parcel of land".(emphasis added)

Notwithstanding the opinion of both experts, the Board awarded $5,036 (rounded to $5,000) for the injurious affection caused area W by the expropriation.

It is evident that the Board understood the position of both parties:

> The expressed evidence from the [Claimants] shows little support for any injurious affection damages for area W. The Crown forces deny there is any ... If the Board determines there is injurious affection to area W in the face of such presentations, it must make such determination based on reasonable conclusions drawn from the evidence before it. To quantify such compensation it must use the same inferential thought process to try to perceive the correct amount.

The Board based its conclusion to award injurious affection of $5,000 on three factors:

1. Area W contained part of the entrance access right-of-way to the Land. This conclusion, in my opinion however, ignores the existence of Highway 107, a high quality access road, which serves the remainder of the Property. It was constructed by the Crown following the expropriation.

2. The Board was impressed that the woods road constructed in 1980 by the Claimants, was an expense that was wasted, in view of the subsequent expropriation. This conclusion, in my opinion, ignores the Claimants' own evidence, namely that the

request to the Crown for financial assistance to construct the road, was to assist in retrieving forest products from the land.

3. The Board concluded that a portion of area W fell "within the ministerial planning blight accompanying a hundred series limited access highways". The evidence, however, establishes that the highway was not designated as a controlled access highway until March 5, 1991, some five years after the date of expropriation. Without in any way commenting on the Claimants' ability to bring a subsequent claim for such a designation, the Board, in my opinion, did not have the jurisdiction to consider this impediment consequent upon an expropriation that occurred in July of 1986.

There was, in my opinion, no evidence to justify the conclusions reached by the Board that area W had been injuriously affected.

Accordingly, I would allow the Crown's appeal respecting the award of $5,000 for injurious affection to area W. The Crown's appeal should be dismissed with respect to the award of injurious affection for areas V, X, Y and Z.

Third Ground of Appeal

In determining the Claimants were entitled not only to market value of the Land, but also to survey costs, engineering and design costs incurred, and development profit, allegedly lost, as a consequence of expropriation;

Fourth Ground of Appeal

In determining the Claimants were entitled to be compensated for a special economic advantage in the land, when the issue was not pleaded;

Cross-Appeal

The Claimants submit the Board erred in law in finding that only $16,900 of the $42,000 in engineering and design fees, incurred in course of developing the Land prior to expropriation, were compensable.

It is convenient to consider the third and fourth grounds of appeal, as well as the cross-appeal, together, as they all relate to the same issues.

Engineering plans, showing a complete street layout and drainage design, were prepared by Mr. Powell some time prior to the expropriation. He estimated that the value of this work was equivalent to $750 per lot for the 54 lots for which subdivision was requested, thus aggregating $40,500.

The Board accepted approximately 40% of those costs (i.e. $16,900) as constituting an "appropriate expense made for this expropriation". It also awarded the sum of $24,241 for loss of "special economic advantage", or "development profit".

The development profit was estimated by Mr. Weatherby to be profit that could be expected to be received if the subdivision had proceeded.

Mr. Weatherby had calculated that the market value of the Land based on the highest and best use was $1,100 per acre. This estimate was accepted by the Board.

In attempting to justify the additional claims, Mr. Weatherby testified as follows:

> The Claimant was entitled to two things in addition to the market value of the land. Firstly, a portion of the profit which it could reasonably have anticipated on completion of the development and secondly, the money actually spent on partially developing the Land. ... Following the principles in that case [i.e. **Harris v. Minister of Lands and Forests** (1975) 11 N.S.R. (2d) 361] and applying them to this case, I added the following activities by the Claimant which increase the amount of this claim:
>
> Firstly, subdivision plans had been prepared, preliminary approval obtained, and the application for tentative approval was well advanced. Secondly, extensive negotiations had gone on with government officials to the point where the only department still required to respond favourably was the Department of Health concerning soil tests. And, thirdly, engineering plans were being prepared showing a complete street layout and drainage design which I have reviewed.

> That's dated July 6, 1984, prepared by Mr. Powell. And culvert sizes for storm drainage had been designed, again by Mr. Powell...

The **Harris** case (*supra*) related to an expropriation that occurred in 1971 and the compensation was determined in accordance with the "value to the owner " concept then in force.

Nova Scotia, like most jurisdictions in Canada, following the English statutory changes of 1919, altered the manner in which compensation should be determined from "value to the owner" to "market value plus". (**Expropriation Act,** 1973, S.N.S. C.7).

In **Bank of Nova Scotia, et al v. Province of Nova Scotia, et al** (1978), 22 N.S.R. (2d) 568, Macdonald, J.A., on behalf of the Court, held at p. 592:

> Section 24 provides that "Where land is expropriated, the statutory authority shall pay the owner compensation as is determined in accordance with this Act." The succeeding sections to and including s. 33 constitute a code for determining the amount of compensation which, in my opinion, has replaced and superseded the judicial test of concept of value to the owner by what has been termed a "market value plus" approach. Compensation is now to be determined in accordance with the statutory criteria set out in ss. 24 to 33 and not by attempting to determine the value of the constituent elements which have in the past been judicially held in the aggregate to amount to value to the owner. The whole object and intent of the sections is to eliminate the necessity of determining compensation payable by interpretation of judgments but instead to reach a conclusion by application of the sections in question to the particular facts of any expropriation.
>
> The answer to the question therefore should be in the negative; the compensation payable to any party having an interest in the land is not "value to the owner" but rather the compensation is to be determined by the "market value plus" approach as set out in ss. 24 to 33 of the Act. It may well be that the result in any particular case will be the same but the approach is not now to search out value to the owner from decided cases but to arrive at compensation by a proper interpretation and application of the provisions of ss. 24 to 33.

Crown counsel drew to the Board's attention the change made in 1973 to the legislation.

While the reasoning of the Board is somewhat difficult to follow, it appears to have justified the award for engineering costs and development profit initially as a component of value to the owner, alternatively as an item of special economic advantage, and in the final alternative as a part of market value.

The Board first referred to s. 27(3)(b)(ii) of the **Act** and expressed the view that the "wording of this clause seems to equate to a value to owner concept or to have a similar effect as the developer's value concept".

In my opinion, the Board committed an error of law when it made any award to the Claimants based upon the concept of value to the owner. (See **Bank of Nova Scotia, et al**, *supra*)

The Board then went on to determine that the Claimants enjoyed a "special economic advantage" in the Land, for which additional compensation should be awarded, apparently under s.26 or 27 of the **Act**.

This conclusion was made despite the opinion expressed by Mr. Weatherby in his appraisal report of March, 1993, that he was not aware "at this time of factors which would give rise to a claim for special economic advantage". This opinion was confirmed in his *viva voce* evidence as well.

"Special economic advantage" is a term found in s. 26(a) of the **Act** and presumably is a codification of the "special value" concept found in those cases dealing with value to the owner.

The advantage must satisfy three pre-requisites. It must be

(a) special, and

(b) economic, and

(c) arise out of use or occupation (Todd, *supra*, p. 118).

The preparation of engineering plans for a proposed subdivision on the Lands does not satisfy the first or third prerequisite. It is not similar to the special value which has been found to arise in the reported cases. In **R. v. Lynch's Limited** (1920-21), 20 Ex. C.R. 158, for example, a claimant occupied land for purposes of carrying out a bakery business. The bakery, built on a slope, possessed a high basement which permitted direct access to an adjacent railway siding. This added worth to the owners arising from these facts justified an award for "special value".

The authorities, in addition, stipulate that special value can only arise when the owner is actually putting the property to some use for which it is especially well suited (per Cooper, J.A., on behalf of this Court in **P.O.W. Investments Ltd. v. Province of Nova Scotia** (1973), 5 N.S.R. (2d) 121, affd., [1975] 2 S.C.R. 86).

The matter was considered, as well, by Macdonald, J.A., on behalf of the Court in **Bank of Nova Scotia**(*supra*) when he stated at p 592:

> ...in my opinion, s.26(d) requires that the owner be actually using the property, which I think connotes actual occupation of it. In addition he must be carrying on there a commercial or business operation. If he derives from such use a special economic advantage, and that must depend upon the facts in particular cases, then he is entitled to compensation for the loss of such an advantage. Although it may not be necessary for me to do so, I nevertheless express the view that Portland Estates here was not actually putting the property to use at the time of expropriation so as to bring s. 26(d) into play. The land indeed was then vacant.

The evidence is clear in the case before us that the Claimants were not in "actual occupation" of the Land, nor were they carrying on a commercial or business operation thereon.

In short, there is nothing in the evidence before the Board to justify the conclusion that the Claimants were in the type of occupation required by ss. 26 and 27 of the **Act** in order to establish special economic advantage.

The Board recognized that any award based upon "special economic advantage" would be in conflict with decisions of this Court and stated:

> This common sense ruling by the Board on a relatively inactive "occupation" does not stand well in the face of Nova Scotia Appeal Court cases defining "occupation" under the *Act* as a more active occupation than Powell exercised here. Yet the Board holds the opinion there is a value taken from the owner which the Act compensates for.

With respect, neither the **Act**, nor common sense, justified the making of the additional awards.

As a final alternative position, the Board determined "It believes the amount is suitable to be placed under market value as an addition to the raw land value as a compensation to the owner, for which another prospective reasonable purchaser would pay".

The potentiality, as well as the adaptability, of the Land, were matters considered by both appraisers in determining market value. The Claimants would be doubly compensated if, having accepted Mr. Weatherby's estimate of market value for the Land, an additional sum should be added for engineering costs incurred, or lost profit.

The comments of the Land Compensation Board of Ontario in **Ridgeport Developments v. Metropolitan Toronto Region Conservation Authority** (1977), 11 L.C.R. 143 at 156 are apposite:

> The Board is unable to accept the proposition that a land developer, who is compensated for the market value of land expropriated from him, should be entitled to additional compensation for the loss of profit that might have been realized from a development which, but for the expropriation, might have

> taken place. In the opinion of the Board such a landowner is made whole by the compensation to which he is entitled for the market value.

I would, accordingly, allow the Crown's appeal as set forth in Ground 3 and Ground 4 and dismiss the Claimants' cross-appeal, thereby reducing the award by the sums of $16,900 and $24,241.

Ground No. 5

In awarding costs incurred by the Claimants prior to the institution of proceedings

Pursuant to s. 35(1) of the **Act** the Claimants submitted their appraiser's fee aggregating $17,399.27, for professional services to the Crown for reimbursement.

The Crown argued that the fees were unreasonable, and accordingly only paid a part of the amount claimed. (i.e. $9,000)

The Board determined:

> The Crown decided this unilaterally and without reference to any arbitral body. In the Board's opinion, the Crown took unfair advantage of [the Claimant's] known financial weakness...The Crown does not have to pay an unreasonable appraisal fee under s. 35(1). It cannot, however, unilaterally decide not to pay when invoiced in the usual course of business just because it feels the account rendered is unreasonable. If it genuinely believes the account unreasonable, it should take steps to pay under protest and/or have it adjudicated upon by the reasonable adjudicative valuer within a reasonable time.

The Crown further argued that the Board had no jurisdiction to order costs until it made a decision as to the overall compensation payable. Since the Board had not made any determination at the time of the hearing pursuant to ss. 52(1) and 52(2) of the **Act**, i.e. that the Claimants were entitled to 85% or more of the amount offered by the authority, it was argued that there was no jurisdiction of the Board to make an order for costs.

Finally, the Crown submitted that it is only reasonable that costs be assessed at the conclusion of a case, or following an appeal, since only then is a taxing authority in

a position to consider the nature of the claim, the type of evidence required, the success achieved, and all the other factors which bear upon the consideration of whether or not the fees of an expert are reasonable.

I reject the Crown's position.

I respectfully adopt the reasons of Freeman, J.A. in **Attorney General of Nova Scotia v. Richard and Alice Williams** (C.A. No. 114628, July 26, 1995 - unreported), and in particular at pages 7 and 9:

> When the public interest demands that property rights must be taken from an individual owner against his or her will, the owner has no option but to rely in good faith on the professionalism of an appraiser for advice as to their value. It is unlikely the owner will have experience in dealing with appraisers or any means of controlling the cost of ascertaining the value of the expropriated property interests. It is not the intention of the **Act** that an owner whose lands are taken should have to spend the compensation received for them on professional fees. ...
>
> To give effect to the Attorney General's contention that initial appraisal and legal expenses are subject to s. 52 and are taxable and payable only after compensation has been determined would be to make s. 35 redundant and deny it the meaning intended by the legislature.

Section 35(1) simply enables an owner to operate on a level playing field with the expropriating party in order to ensure the owner has access to appropriate legal and appraisal advice in considering any offer made by the expropriating party.

The comments of the report of the Ontario Law Reform Commission respecting the basis for compensation on expropriation are pertinent:

> Approaching the costs problem from the indemnity aspect, there is no reason why the claimant should not be fully compensated for his legal and appraisal expenses. It is not the same situation that exists where two private litigants are engaging in a contest before the courts and where costs, in all likelihood, will be paid by the loser to the winner. Here, the state has intervened and injured one of its subjects in the enjoyment of his property ... Certainly in expropriation cases, claimants should not be placed in a position where they are afraid to consult the legal profession because they are apprehensive about the costs. The same applies to seeking the advice of an appraiser. People should be placed in a position

> which gives them freedom of action in seeking advice. In this way, they will be more likely to feel fairly treated and that the expropriating authority has not taken advantage of them. (**Ontario Law Reform Commission Report**, Sept. 1967)

If the expropriating authority objects to the costs submitted under s. 35(1) then the authority has the opportunity of requesting taxation. It cannot, however, simply "wait out" the Claimants in hopes of forcing the Claimants to settle at an unreasonable figure. In the present case, the Board concluded that the Crown "took unfair advantage of [the Claimants'] known financial weakness".

I would, accordingly, dismiss this ground of appeal.

Conclusions

I would allow the appeal by reducing the compensation awarded by the Board by the sum of $46,141. I would dismiss the cross-appeal.

The Crown has been marginally successful in the issues considered, and I would award costs to the Crown on the appeal and cross-appeal in the aggregate amount of $1,500, together with disbursements.

Pugsley, J.A.

Concurred in

Clarke, C.J.N.S.

Roscoe, J.A.

C.A. No. 111210

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NOVA SCOTIA, REPRESENTED BY THE ATTORNEY GENERAL OF NOVA SCOTIA Appellant/Respondent on Cross-Appeal	
- and -	REASONS FOR JUDGMENT BY:
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