C.A. No. 114628

NOVA SCOTIA COURT OF APPEAL

Cite as: Nova Scotia (Attorney General) v. Williams, 1995 NSCA 119

Chipman, Freeman and Flinn, JJ.A.

BETWEEN:

ATTORNEY GENERAL OF NOVA Appellant - and - RICHARD AND ALICE WILLIAMS Respondents	)	Margaret MacInnis for the Appellant John G. Langley, Q.C. for the Respondents Appeal Heard: June 8, 1995 Judgment Delivered: July 26, 1995

THE COURT: The appeal is dismissed per reasons of Freeman, J.A., Chipman and Flinn, JJ.A. concurring.

Freeman, J.A.:

The respondents incurred substantial legal and appraisal expenses after the provincial Department of Transportation launched the process to expropriate an important portion of their farm at Saltsprings, Pictou County, N.S. for the twinning of the Trans Canada Highway. Upon cabinet approval of the expropriation, which was dated

September 8, 1993, the Attorney General of Nova Scotia became the statutory expropriating authority under s. 9 of the **Expropriation Act**, R.S.N.S. 1989, c. 156.

The respondents' request for reimbursement under s. 35(1) of the **Expropriation Act**, prior to the compensation hearings, was refused. The Utilities and Review Board, which has jurisdiction to deal with compensation claims pursuant to the **Expropriation Act**, ordered payment by the Attorney General subject to taxation. The compensation claim is before the Utilities and Review Board but has not yet been decided.

The Attorney General's appeal is brought under s. 30(1) of the **Utility and Review Board Act**, R.S.N.S. 1989, c. 11, which provides for an appeal to this court from an order of the Board "upon any question as to its jurisdiction or upon any question of law." It raises a number of issues as to whether the Board had jurisdiction respecting costs prior to the determination of the claim for compensation, whether the order could fairly be made at a pre-hearing conference, and whether the Board correctly interpreted s. 35 of the **Expropriation Act**.

The relevant section provides:

> 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.
>
> (2) The cost of one appraisal, if no cost for the same is claimed under subsection (1), and legal and other costs reasonably incurred after the commencement of proceedings shall be paid as determined by Section 52.

The underlying concern, and the real issue in this appeal, is control of the cost of the "one appraisal" prior to the institution of proceedings. It appears to have been the former practice of the Attorney General to pay such claims upon submission, although the question did not arise in the majority of claims, which were settled by agreement. As appraisals have become more detailed and sophisticated in the interests of greater

accuracy, appraisal fees have escalated. The Attorney General now seeks an interpretation of the statutory requirement.

The respondents are seeking payment of an appraiser's account totalling $49,747.61 and legal fees of $18,561.61.

The expropriation took effect upon the filing of appropriate documents in the Registry of Deeds at Pictou, N.S. on September 29, 1993, after failure of many months of negotiations in search of an agreement. The expropriation was the threshold event, prior to which there was no right to reimbursement for costs (See **Batiot v. Nova Scotia (Attorney General)**(1990), 105 N.S.R. (2d) 354.) The respondents then became "persons entitled to compensation" pursuant to s. 35(1) under the provisions of s. 24, which states:

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

The right to compensation is statutory; the amount of the compensation to which owners are entitled must be determined by the Utilities and Review Board.

It is the Attorney General's position that the Utility and Review Board has no jurisdiction with respect to costs apart from s. 52, and that s. 35 must be read in light of that section, which provides:

> 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**.

> (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 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.

A brief review of the facts is necessary to set the matter in perspective. Richard and Alice Williams are a 48-year old couple who bought their farm, then consisting of about 143 acres including 30 acres of cleared land, in 1974. Mr. Williams gave up off-farm employment in 1978. They tried successively goats' milk, white veal, honey, and ducks and geese before settling on beef cattle. By the end of 1993, the year of expropriation, they had 92 cows, 84 calves and three bulls. Over the years they had made capital outlays on buildings and acquiring land; they were operating 440 acres, of which they owned 224 and leased 216.

The appraisal report prepared by Charles Hardy Appraisals Limited, incorporating two consultants' reports, says that by 1993 the farm

> ... had reached, through the energy and initiative of the Williams, a state of maturity and productivity from which the Williams family could reasonably look forward to 20 or more years of fruitful and profitable enjoyment as an ongoing farm business. The core element in that perspective was the multi-nodal beef breeding-and-finishing operation which the Williams had developed around an internally-dependent feeding system which integrated high-capacity forage and grazing lands with lower-capacity hay and pasture which provided the waste-management base for the farm.
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> All of this has been dramatically altered by the taking, for the twinning of the Trans Canada Highway, of the most productive core lands (both owned and leased) from the heart of the Williams' farm. There is virtually unanimous agreement among agricultural professionals familiar with this case that the taking will have a catastrophic effect upon the operation and profitability of the farm, and will create for it a

> range and type of problems which will likely preclude the farm from ever being returned to essential equivalence with its pre-expropriation condition.

The Department of Transportation had consulted with residents of the area respecting alternatives for the location of the new road prior to the expropriation process. Knowing their farm was targeted, the Williams retained counsel in January, 1992, and sought agreement with the Province until March, 1993, when they requested formal expropriation. In March, 1994, they formally rejected the province's offer of compensation based on its own appraisals and engaged the Hardy firm.

On September 22, 1994, they submitted the appraiser's account to the Attorney General for payment in the amount of $49,747.61, including $29,730.28 in consultants' fees. The Notice of Hearing was filed October 19, 1994. John G. Langley, Q.C., the Williams' lawyer, submitted his interim account for legal fees dated January 6, 1995 to the Attorney General for payment in the amount of $18,561.61. The account was for fees incurred during the previous three years. By letter dated January 17, 1995, the Attorney General advised Mr. Langley that the appraisal and legal fees would not be paid until the issue of compensation had been resolved.

The order of the Board requiring payment subject to taxation was issued following a pre-hearing conference on January 27, 1995. Mr. Langley had given notice on December 22, 1994, that he would be seeking direction as to the payment of the appraisal and legal costs at the pre-hearing conference. The Attorney General objected that the Board had no jurisdiction over costs prior to the determination of compensation and further objected that it was not given full opportunity to be heard.

The obvious aim of s. 35 (1) is to ensure that an owner whose lands are expropriated can be informed, at the negotiating stage prior to the formal compensation hearing, as to the value of the property and the degree to which it will be injuriously affected, and to be advised as to his or her legal rights. Such a provision facilitates early

settlements without compensation hearings. It is also an attempt by the legislature to redress the inequality between the positions of the expropriating authority, with its relatively unlimited resources, and individuals otherwise unable to afford expensive professional services. Both s. 35 and s. 52 were introduced by the **Expropriation Act** S.N.S. 1973 which came into force by proclamation June 20, 1974. Therefore, they must be deemed to be remedial provisions of equal status serving distinct purposes, and they should be liberally construed to give effect to the legislative intent.

The plain meaning of the language, and the obvious intention of the legislature, was that appraisal and legal fees incurred prior to the notice of hearing during the stage when both parties are attempting to negotiate a settlement should be paid without undue delay, that is, upon submission or reasonably soon thereafter. The compensation hearing itself can be complex and protracted, and unpaid accounts for substantial professional fees dating from the negotiating phase could add unnecessarily to the pressures on owners seeking fair compensation. As s. 35(1) accounts are to be paid in any event, regardless of the amount of compensation awarded, no good purpose would be served by delaying reimbursement until after the hearing.

In **Stevenson v. Lawrencetown (Village)** (1994), 133 N.S.R. (2d) 258 Justice Gruchy stated at p. 262:

> Section 35 of the **Act** is clear. Mr. Stevenson was entitled to the cost of his appraisal. The account ought to have been paid by Lawrencetown at the time it was first received by the Village of Lawrencetown.

At page 261 he commented:

> Stevenson was entitled as of right to the costs of an appraisal. Any other costs must be "reasonably incurred"; that restriction does not apply to the appraisal. That does not mean, however, that the cost of the appraisal is limitless.

I agree with Justice Gruchy's interpretation of s. 35(1). The appraisal bill is in a separate category from other expenses. This accords with the plain meaning of the

language, which reflects the assumption that "legal and other costs reasonably incurred" will ordinarily mean legal costs and disbursements which are subject to control by taxation. While a lawyer is limited to the recovery of fees taxed on a solicitor and client basis, an appraiser is not governed by the taxing process. Claims for appraisal accounts subject to s. 52 may be reduced, by the Board or upon taxation, to less than the amount of the bill, but in the absence of an agreement to the contrary the owner remains liable to the appraiser for the full amount. The "limit" Justice Gruchy referred to with respect to s. 35(1) appraisal fees is that any bill for professional services not subject to taxation must be proven to be reasonable compensation for the services rendered in a civil action to collect the account. (See **Coopers & Lybrand Ltd. v. John F. Stevens Ltd.** (1978), 29 N.S.R. (2d) 396 (N.S.S.C.A.D.)). The scheme of the **Act** is to control appraisal costs by limiting reimbursement to "one appraisal." If that is no longer seen as an adequate safeguard for public monies the scheme can be changed by legislative amendment, but it is not the intention of the present provision that the burden of high professional fees should fall on the expropriated owner.

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.

Section 35(2) illustrates the distinction drawn in the **Act** between the cost of one appraisal and legal and other costs reasonably incurred. The clause "if no cost for the same is claimed under subsection (1)" follows "one appraisal" and separates it from

"legal and other costs reasonably incurred". Clearly, "reasonably incurred" is a modifier for "legal and other costs", not "the cost of one appraisal."

The appellant has objected that the appraisal in the present case is not "one appraisal" but rather an "umbrella appraisal" incorporating two agricultural business loss consultants' reports. (The Attorney General also had to resort to several consultants before arriving at its own appraisal figure for agricultural business loss.) The Hardy firm appraised the value of the farm land actually expropriated, and the value of lands severed from the farming operation and rendered useless to the Williams by the expropriation, a total value of $55,600. Consultants were engaged to evaluate the economic impact on the farm operation including the capitalized value of projected lost income and efficiencies, which was calculated at a total of $291,051.67. For the purposes of negotiating a settlement or establishing a claim before the Board it was as necessary for the Williams to know the value of the farm business loss as to know the market value of the affected lands. Determining those values involves specialized knowledge and functions. To provide an owner with competent figures an appraiser may find it necessary to engage consultants for heads of damages lying outside the appraiser's own area of expertise. There can be no valid objection to an "umbrella appraisal" provided it results in "one appraisal" for each head of damages with no duplication of results.

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 52(1) applies to an owner who has proved a right to compensation greater than 85 per cent of the amount offered by the Attorney General, that is to say, after the amount of compensation has been determined. It empowers the Board to

order the statutory authority to pay the "reasonable legal, appraisal and other costs actually incurred by the owner." The Board can fix the amount as a lump sum or order the costs to be taxed before a taxing master. By necessary implication, legal fees must be taxed on a solicitor and client basis under s. 52(1) to reflect costs "actually incurred by the owner." Section 52(2) applies when the owner has refused a reasonable offer, that is, when the amount of compensation fixed by the Board is less than eighty-five percent of the settlement offered by the statutory authority. In that event 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 order that costs be taxed on a party and party basis. While actual taxation is to be referred to a taxing master, that appears to be for the convenience of the Board. Both subsections confer jurisdiction on the board to fix costs in a lump sum, a broad jurisdiction enabling the Board to consider the same factors that would be before a taxing master.

Section 35 does not contain an express provision giving the Board jurisdiction to order payment because payment is ordered by the statute. Nor does that section refer to the Board's jurisdiction to fix the amount of costs payable, presumably because the reasonableness of legal fees can be determined by having them taxed on a solicitor and client basis.

However, the situation is not quite that simple, as this appeal illustrates. As with any statute imposing a duty, questions of fact can arise as to whether given circumstances have triggered performance of the duty. For example, in the present matter, the question whether the Hardy account was for "one appraisal" was discussed above. Whether the legal fees and disbursements were reasonably incurred is a question of fact to be resolved by taxation. The question for this court is whether the Board has jurisdiction to order compliance with the statute.

The imposition of a statutory duty implies the concurrent creation of jurisdiction to enforce that duty, usually in a court or designated tribunal. The scheme of the **Act** is that statutory authorities may expropriate, the Supreme Court of Nova Scotia determines land titles, the owner is entitled to compensation pursuant to s. 24, and all questions of compensation are for the Board under s. 47, which provides:

> 47(1) The Board shall determine any compensation in respect of which a notice has been served upon it under subsection (1) or (4) of Section 36, and in the absence of agreement, determine any other matter required by this or any other Act to be determined by the Board.

The express language of s. 52 makes it clear that the legislature considered costs, a concept inextricably intertwined with compensation, to be one of the "other matters" to be determined by the Board; that is, the Board has jurisdiction in matters of costs under the **Expropriation Act.** No jurisdiction to deal with questions arising from s. 35 has been expressly granted to any authority other than the Board. It follows therefore by implication, and in my view necessary implication, that the enforcement of the statutory duty created by s. 35 falls within the jurisdiction of the Board as an "other matter" under s. 47, and that the Board was within its jurisdiction to order that costs claimed pursuant to s. 35 be paid forthwith. The order made by the Board is in the following form:

> IT IS HEREBY ORDERED THAT:
>
> 1. The Claimants submit or resubmit to the Respondent, if need be, the detailed invoices and any supporting vouchers of all and any amounts claimed now from the Respondent under Section 35 of the **Expropriation Act.**
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> 2. That if the amount claimed or an amount satisfactory to the Claimants is not paid forthwith on receipt of the invoice, the Claimants may proceed in the usual course (on notice by appointment before Arthur E. Hare, Q.C., taxing

> master) to tax the bill presented on a solicitor client basis having regard to the criteria contained in section 35 of the **Expropriations Act**, namely the cost of one appraisal and the legal and other costs reasonably incurred by the Claimants prior to the institution of these proceedings to determine compensation.
>
> 3. If not already paid, the Respondent on receipt of the taxed bill, shall pay the amount so taxed, thereby obtaining whatever credit may be due the Respondent under section 35(2) of the **Expropriation Act.**
>
> 4. That any active party be and is hereby at liberty to apply to the Board for such further or other directions necessary.

Issues with respect to the appraisal bill, such as whether it is for one appraisal, are matters for the Board, not the taxing master, whose jurisdiction arises from other statutes and is limited with respect to s. 35(1) to solicitor's fees and disbursements. If the Board's order is unclear that the appraiser's account for one appraisal must be paid as submitted, it should be read in this light. In my view the order in all other respects is a lawful exercise of the Board's jurisdiction under the **Expropriation Act.**

With respect to the first and third grounds of appeal, I am satisfied the Board did not exceed its jurisdiction under s. 52 of the **Expropriation Act** to award costs, and that the Board did not err in interpreting s. 35 of the **Expropriation Act**. With respect to the second ground, the appellant states the issues as follows:

> 2. Did the Board err at law in that
>
> (a) it made an Order without the benefit of evidence under oath in either affidavit or *viva voce* form?
>
> (b) it granted the request for relief when the relief requested was not made by application to the Board but was raised during the pre-hearing conference? and
>
> (c) it made its decision without the benefit of legal argument with respect to the Board's jurisdiction as well as the substantive issues surrounding the relief requested.

The Board controls its own procedure and it was quite appropriate that a pre-hearing conference be held to streamline proceedings at the compensation hearing.

The solicitor for the present respondents had given notice in December 1994, a month before the conference, that he intended to raise the issue of s. 35 reimbursement, which was subsequently refused by the appellant. The appellant was represented by counsel at the hearing and does not appear to have been restricted in making argument or presenting evidence. I would dismiss this ground of appeal, and dismiss the appeal.

I would order that the respondents have costs actually incurred by them on this appeal, to be taxed.

Freeman, J.A.

Concurred in:

Chipman, J.A.

Flinn, J.A.

C.A. No. 114628

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

ATTORNEY GENERAL OF NOVA SCOTIA Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
	)	FREEMAN, J.A.
RICHARD AND ALICE WILLIAMS Respondents	)	