**C.A. No. 100206**

# NOVA SCOTIA COURT OF APPEAL

**Cite as: R. v. Research Island AG, 1994 NSCA 126**

**Hallett, Freeman and Roscoe, JJ.A.**

**BETWEEN:**

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| HER MAJESTY THE QUEEN<br><br>Appellant<br><br>- and -<br><br>RESEARCH ISLAND AG<br><br>Respondent | ) | David G. Giovannetti<br>for the Appellant<br><br>David B. Ritchey, Q.C.<br>for the Respondent<br><br>Appeal Heard:<br>May 13, 1994<br><br>Judgment Delivered:<br>May 30, 1994 |

**THE COURT:** Appeal dismissed per reasons for judgment of Freeman, J.A., Hallett and Roscoe, JJ.A. concurring.

**FREEMAN, J.A.:**

The issue in this appeal is whether the Nova Scotia Utility and Review Board erred in holding that the respondent's claim for compensation for injurious affection resulting from the provincial Crown's expropriation of six acres from its 751-acre block of land on Seal Island off the southwest coast of Nova Scotia was not barred by s. 31(1) of the **Expropriation Act**, R.S.N.S. 1989, c. 156. That section provides:

> 31(1) Subject to subsection (2), a claim for compensation for injurious affection shall be made by the person suffering the damage or loss in writing with particulars of the claim within one year after the damage was sustained or after it became known to him, and, if not so made, the right to compensation is forever barred.

The expropriation was approved by Order in Council dated August 16, 1989 "for a public purpose, namely, the encouraging of the fishing industry". Apparently there had been "flashings" or complaints by fishermen that the respondent's ownership of the bulk of the land on the island, which lies 29 kilometres off the Nova Scotia mainland, had interfered with uses they traditionally made of it. On August 25, 1989, the respondent's solicitors were notified of the expropriation and were asked to provide information as to claims for compensation. Apparently no claim was made for some time.

The appellant had the property appraised and the appraisal report was sent to the respondent by letter dated January 21, 1991. The appraisal report expressed the opinion that "the taking of this portion of land has no injurious affection on the remainder."

The respondents engaged their own appraiser February 11, 1991 and his report dated March 3, 1992, contained an opinion that the respondent's remaining lands had been injuriously affected to the value of $123,600.

The Board was specifically asked to rule on the appellant's proposed s. 31(1) defence with respect to the injurious affection claim as a preliminary matter on the basis of an agreed statement of facts, not on evidence developed in the course of a hearing on the merits. The Board concluded:

> Based on the facts summarized above, the Board is satisfied that the Claimant in this proceeding did not have meaningful knowledge amounting to a real apprehension of loss or damage to its remaining lands (especially loss in market value) at or about the time of the expropriation. The Claimant only acquired that level of knowledge upon the delivery of its appraiser's report in March, 1992. The Claim for compensation was filed in August, 1992, and accordingly is not barred by Section 31(1).

The position of this court with respect to a finding of fact of this kind, related to a limitation period, was expressed by Jones, J.A. in **The American Home Assurance Company v. Royal Trust Corporation of Canada and Douglas Ruck** (S.C.A. No. 02734--April 5, 1993--Unreported):

> "We have carefully reviewed the decision of the learned trial judge and we agree with her conclusion. The insured was required to give the insurer notice "after learning of a happening which may give rise to a claim". That was a question of fact for the trial judge which included an assessment of Mr. Ruck's evidence. We see no basis for interference with her decision on that issue. See **Jeans v. Carl B. Potter Limited** (1977), 24 N.S.R. (2d) 106."

Section 30 of the **Utility and Review Board Act**, S.N.S. 1992, c. 156, provides for an appeal to this court "upon any question as to its jurisdiction or upon any question of law." That provision does not extend the jurisdiction of this court to findings of fact by the Board. They are therefore protected from review by the statute. Errors

of fact are material on an appeal only when they are so egregious as to amount to errors of law. The standard of review as to law and jurisdiction is the standard of correctness: the Board cannot be wrong in law. Section 31(a) of the **Expropriation Act** applies notwithstanding provisions in the **Limitation of Actions Act** giving courts jurisdiction to disallow a defence based on a limitation when it is equitable to do so. Section 31(1) is not clear-cut, as it would have been if it prohibited injurious affection claims made more than a year after notice of the expropriation. Instead it requires such claims to be made "within one year after the damage was sustained or after it became known to (the person suffering the damage or loss) . . . ." Therefore time does not necessarily start to run when notice of expropriation is received. Neither does the section impose a duty of due diligence upon the person expropriated from to become informed as to injurious affection within a year of receiving notice of the expropriation. Time only begins to run when the expropriated owner knows of the damage, which, in the context of the section, must mean when he or she knows of the damage in certain enough detail that it can be particularized. The clock only starts when he or she has actual knowledge of the damage sustained, not when he or she should, by due diligence, have known.

By way of illustration, a duty to notify an insurer upon becoming aware of the possibility of a claim, the duty in question in the **Ruck** case cited above, is clearly distinct from the s. 31(1) requirement to make a written claim setting out particulars of the claim. The former is required at the first apprehension of risk. The first apprehension of injurious affection is the notice of expropriation, but a claim cannot be made in writing until it is understood in sufficient detail for it to be particularized. In many cases that would require evaluation of the effects of expropriation by experts.

The jurisprudence relating to s. 33(1) has developed at the tribunal level and we were referred to no appellate decisions. I find the reasoning of the tribunals, for the most part specialized and possessed of expertise relevant to the issues, to be persuasive.

Section 22(1) of the Ontario **Expropriations Act** is similar to s. 31(1) of the Nova Scotia statute. In considering it in **Calgas Investments Ltd. v. Regional Municipality of York** (1983), 29 L.C.R. 297 the Ontario Municipal Board stated at p. 309:

> The Oxford Dictionary defines the word "known" as it is used in s. 22 as to have become cognizant of a fact; to have apprehended with the mind; to have understood; in short to have, as Mr. Waque put it, "real apprehension" of the damages flowing from the construction of that tower in that place. It is not knowledge that a water tower was to be constructed, but knowledge that that water tower had caused or would cause damage to the remaining lands that is relevant.

**Calgas** was followed by the former Nova Scotia Expropriations Compensation Board, the jurisdiction of which is now exercised by the Utility and Review Board, in **Summit Realty Ltd. v. County of Halifax** (1990) 44 L.C.R. 120 at p. 127. That Board held:

> In **Calgas** the board was obviously of the view that the section required a high order of knowledge and not a suspicion or an uninformed guess. **Calgas** suggests that an element of certainty must be present. This board agrees with this approach and on the facts of this case is satisfied that the claimant did not know of loss or damage until the date of the transmittal of Mr. Speed's [appraisal] report through its solicitors. Accordingly, the claim is not barred by s. 31(1).

A similar conclusion was reached by the Land Compensation Board of Ontario in **Eddy v. Minister of Transportation and Communications** (1974), 7 L.C.R. 120 in which it was held:

> The onus was on the respondent (expropriating authority) to establish that **Eddy** had failed to give "particulars" of his claim for damages for injurious affection within a year "after it became known to him". There was no evidence that **Eddy** had any knowledge from the mere fact of the expropriation that his remaining lands would be reduced in value and if so to what extent. The only date as of which he learned of the injurious affection was **after he received his appraiser's report** of July 24, 1973. [Emphasis added.]

The appellant cited **Aquino et al. v. Ministry of the Environment et al**.(1990), 44 L.C.R. (3d) 48, a case involving injurious affection without expropriation, as authority for the proposition that mere awareness of the existence of a claim for injurious affection, such as an owner might infer from a notice of expropriation, is sufficient to give an owner knowledge that his or her remaining lands are injuriously affected within the meaning of s. 31(1). The Ontario Municipal Board held:

> "It is the acquisition of the knowledge of the facts giving rise to the cause of action that starts the clock."

That case was brought eight or nine years after the earth under the claimant's home settled following construction of a well and pumping station. The damage was known, but the claimant did not know it was caused by the well until less than a year before the claim was brought. The board held the claim was not statute barred. The fact situation in **Aquino** is the mirror image of the present one. In **Aquino** damage was known but causation was not. In the present case the owner knew the expropriation could cause injurious affection, but it did not know that damage had actually resulted until the appraisal report was received. With respect, that case does not stand for the proposition for which it was advanced; its principles are not in conflict with **Calgas**.

In **Summit** the Board referred to **Coates** and **Waque**, in **New Law of Expropriation** (1986), at p. 10-191, where the following observation is made with respect to the consideration of s. 22(1) in Ontario:

> The Board has gone to great lengths to prevent the use of this defence against a bona fide claim for reduction in market value of the owner's remaining lands or for personal business damages where some of the owner's land was taken by expropriation, and there is only one clear-cut decision where the defence has been successfully invoked by an expropriating authority.

An owner who receives notice of expropriation may become aware immediately that his or her remaining lands are worth less, but that bald realization is not the knowledge necessary to support a claim in which particulars must be stated. The s. 31(1) limitation period is triggered by knowledge, not belief.

Injurious affection can arise in various ways at various times. In the present case the owner would have been aware that a lot with about 1,000 feet of shore frontage was taken for the use of fishermen. But it might take some time to discover the actual effect of the expropriation. For example, it might be found that the expropriation would make it impossible to discharge water from a sewage treatment plant at the only feasible site on the island; or that the remaining lands could no longer be advantageously subdivided. Or the Crown in the course of encouraging the fishing industry might consent to a use of the expropriated land--construction of an offal holding facility, for example--which would diminish the usefulness of the remaining lands for other purposes. Section 31(1) appears to contemplate claims for injurious affection in the context of expropriation that become known at any time before the expropriation claim is settled. On the sparse facts before the board in the present case, the owner either did not know its lands were injuriously affected by the expropriation or, more plausibly, it did not know the effect of the injurious affection on market value.

Like all enactments, s. 31(1) must be considered remedial and construed liberally. However its effect is to protect an expropriating authority from the necessity of meeting claims on their merits when an owner whose land has been taken fails to respond aggressively enough. For that reason any doubts which arise in the interpretation of the section should be resolved in favour of the expropriated owner. Similarly, the burden of proving the existence of knowledge of the owner sufficient to justify a defence based upon the s. 31(1) limitation period must fall upon the expropriating authority.

In the Ontario Municipal Board stated in **Calgas** at p. 308:

> We take it as settled that when the respondent alleges, as it does here, that s. 22 has not been complied with, the onus of establishing this defence rests on the respondent. We further take it as settled that if any doubt exists as to when the fact of injurious affection became known to the claimant it should be resolved in favour of the claimant.

Quite apart from the language of the statute, the Crown cannot be heard in the present case to say that the respondent should have known of the existence of an injurious affection claim from the time of notice of expropriation: more than a year after notice was given, the Crown offered the opinion to the respondent, through its appraisal report, that no injurious affection had been suffered. That adds weight to the respondent's assertion that it did not know its remaining lands would be injuriously affected until it received the report of its own professional appraiser, which it had instructed to consider the injurious affection issue.

In my view the Board was justified in finding on the facts as presented to it that the owner had no knowledge of its injurious affection claim until receipt of the report by its appraiser, and it committed no error of law in finding that the respondent's claim for injurious affection was not barred by limitation under s. 31(1). I would dismiss the appeal with costs of $500 plus disbursements.

Concurred in:

Hallett, J.A.

Roscoe, J.A.