S.C.A. No. 02621

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Cite as: Nova Scotia (Assessment) v. Springwell Properties Ltd., 1992 NSCA 15

Jones, Roscoe and Freeman, JJ.A.

BETWEEN:

THE DIRECTOR OF ASSESSMENT	)	Randall R. Duplak, Q.C.
	)	for the appellant
appellant	)	
	)	William L. Ryan, Q.C.
- and -	)	for the respondents
	)	
	)	Appeal Heard:
SPRINGWELL PROPERTIES LIMITED and THE CITY OF HALIFAX	)	November 20, 1992
	)	Judgment Delivered:
	)	December 22, 1992
respondents	)	

THE COURT: Appeal allowed without costs, the order of the Municipal Board set aside and the matter remitted to the Board for determination of the issues per reasons for judgment of Jones, J.A.; Roscoe and Freeman, JJ.A. concurring.

JONES, J.A.:

The appellant, the Director of Assessment, in 1989 made a demand upon the respondent, Springwell Properties Limited, for financial information pursuant to s. 20 of the **Assessment Act**,

R.S.N.S. 1989, c. 214. The information was necessary for the Director of Assessment to complete the 1990 assessment of the respondent's properties. The Director of Assessment never received a reply pursuant to the demand for financial information under s. 20 of the **Assessment Act**. The Director of Assessment assessed the appellant for its properties and issued a Notice of Assessment for the 1990 assessment year.

The respondent appealed the assessment. Upon the receipt of the Notice of Appeal of the assessment, the Director of Assessment, applied to the Regional Assessment Appeal Court to dismiss the appeal under s. 23 of the **Assessment Act** which provides as follows:

> "23 Every person who
>
> (b) neglects, refuses or fails to
>
> (iii) provide information in response to a request under Section 20 or to answer, complete and return the form referred to in Section 20, is guilty of an offence under this Act and, whether or not he has been prosecuted or paid any fine or served any imprisonment to which he has been sentenced, he shall not be entitled to appeal from the assessment of his property for the year in respect of which the information, particulars or form were requested."

The Regional Assessment Appeal Court held a hearing on the Director of Assessment's application on October 24, 1990. The Regional Assessment Appeal Court found that there was **prima facie** evidence of a request being sent and received. The Court, however, went on to find that the respondent, the Director of Assessment, had not established that the request for the information was received by the appellant, and therefore the appeal should not be dismissed on this basis but be set down for normal review and hearing as required.

On the 4th day of December, 1990, the Director of Assessment appealed the decision of the Regional Assessment Appeal Court to the Municipal Board on the ground that the Court erred when it determined that the Director of Assessment's request for information had not been received by the appellant.

The Municipal Board on December 20, 1991, held a preliminary hearing on the issue of

the Board's jurisdiction to hear the appeal. The Board considered two issues in deciding whether or not the Board had jurisdiction to hear the appeal:

> 1. Should the Board entertain appeals from preliminary decisions of the Regional Assessment Appeal Court?
>
> 2. Does the Board have jurisdiction to act under s. 23 of the **Assessment Act** to prevent a person from appealing their assessment where the person has committed or omitted to do any of the acts listed in that section?

On January 24, 1992, the Board rendered its decision dismissing the Director's appeal on the ground that as the Regional Assessment Appeal Court's decision was not final the appeal was premature. The Board stated in its decision:

> "In the Board's opinion, the Director's appeal is premature. The conventional courts limit appeals on other than final decisions of the lower courts.
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> The Board feels that to allow the Director to appeal at this stage of the proceedings offends public policy. Here a governmental authority which has calculated the basis on which a tax is imposed is seeking to avoid a hearing to determine if these calculations are valid by appealing a preliminary ruling rather than the final decision."

Notwithstanding its decision on the first issue, the Board went on to consider the second question. Based on the decision of the Board in **Director of Assessment** v. **Lord Nelson Hotel Ltd.** (1984), 3 - A.M.B.D. 173 the Board held that neither the Board nor the Regional Assessment Appeal Court had jurisdiction to determine whether a person had lost his right of appeal under s. 23 of the **Assessment Act** as such matters were reserved for determination by a judge under s. 94(1) of the **Act** which provides as follows:

> "94(1) The municipality, the Director or any person assessed may apply on originating notice to the Supreme Court or to the county court for the determination of any question relating to the assessment, except a question as to persons alleged to be wrongfully placed upon or omitted from the roll or assessed at too high or too low a sum or whose property is wrongfully classified."

In coming to that conclusion the Board relied on two decisions of O Hearn, J.C.C. in

Dartmouth Yacht Club v. **City of Dartmouth** (1979), 32 N.S.R. (2d) 285 and **Director of Assessment** v. **Wedgewood Motel Ltd. et al** (1980) - C.H. No. 33165 (unreported).

The appellant was granted leave to appeal the decision of the Board to this Court pursuant to s. 34(1) of the **Municipal Board Act**, R.S.N.S. 1989, c. 297 which provides for appeals from any order of the Board upon any question as to its jurisdiction or upon any question of law with leave of a judge of this Court. The grounds are as follows:

> "That the Nova Scotia Municipal Board erred in law when it determined that the appeal from the Regional Assessment Appeal Court is premature and should not be dealt with until after the Regional Assessment Appeal Court has had full opportunity to hear and determine the appeal before it.
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> That the Nova Scotia Municipal Board erred in law when it determined that neither the Board or the Regional Assessment Appeal Court had jurisdiction to determine that a party has lost its right to appeal pursuant to Section 23 of the **Assessment Act**."

Section 85 of the **Assessment Act** provides as follows:

> "Any person aggrieved by a decision of the assessment appeal court, including the clerk on behalf of the municipality and the Director, may appeal therefrom to the Nova Scotia Municipal Board."

The right of appeal in any given case depends on the wording of the statute. In **Woodlawn Shopping Centre** v. **Nova Scotia Municipal Board**, 96 N.S.R. (2d) 93, the Assessment Appeal Court refused to extend the time for filing a notice of appeal. On appeal, the Municipal Board ruled that it lacked the power to consider the appeal. Chief Justice Clarke, in delivering the judgment of this Court allowing the appeal stated at p. 94:

> "The Board ruled that it lacked the power to consider the appeal because it 'is a jurisdictional matter and as such is not subject to review by the Board'. It considered the decision of the assessment appeal court was not an appealable decision. It further observed that even if it had the necessary authority to review, it lacked the power to effectively deal with the appeal, meaning to decide the merits of the application.
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> The appellants allege the Board erred in law. They were

> granted leave to appeal by Mr. Justice Pace on November 20, 1989, pursuant to s. 35 of the **Municipal Board Act**, S.N.S. 1981, c. 9.
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> In our respectful opinion, the Board erroneously concluded that where an issue arises under s. 98(1) and the assessment appeal court renders a decision thereon, such decision cannot be appealed to the Board. Absent an express provision in the **Act** prohibiting an appeal on s. 98(1) matters, then the decision rendered by the assessment appeal court under s. 98(1) may follow the statutory course provided by the legislation. Counsel have not shown us any provision in the **Act** which prohibits an appeal from decisions on subjects falling within the scope of s. 98(1). There can be no doubt that when on March 17, 1989 the assessment appeal court dismissed the appellants' application, it rendered a decision.
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> From there on it is a matter of tracking the plain and unambiguous language of the **Act**. By s. 99, quoted above, the appellants may appeal the decision to the Board. Section 101 provides:
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> > '(1) The Nova Scotia Municipal Board shall inquire into the matter **de novo**, and shall examine such witnesses and take all such proceedings as are requisite for a full investigation of the matter.
> >
> > (2) On the appeal the Board shall have all the powers of the regional assessment appeal court.'
>
> By s. 101(1) the Board 'shall' hear the appeal **de novo**. By s. 101(2) it shall decide whether the appellants had 'sufficient cause' for the grant of their application.
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> If on a **de novo** hearing the Board finds the appellants have 'sufficient cause' then it would refer the matter to the assessment appeal court to hear the assessment appeal. If, on a **de novo** hearing, the Board finds the appellants lack 'sufficient cause' it would dismiss the appeal.
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> It is our unanimous opinion that the Board erred in law. For the reasons given, the appeal is allowed without costs and the decision of the Board is set aside. The matter is remitted to the Board to be dealt with according to this decision."

With respect that decision applies in this case. There has been no substantive change in the appeal provisions in the **Assessment Act** since the **Woodlawn** decision. Section 99 is now s.

85 of the **Act**.

I agree with the appellant that s. 85 should not be given a restrictive interpretation. It is desirable that appeals on issues affecting assessments should go to the Assessment Appeal Court and the Municipal Board. With respect a broad interpretation of s. 85 does not offend public policy where that is clearly the intention of the Legislature. The fact that the appeal is a **de novo** hearing confirms that view. Courts limit appeals in cases where the Legislature restricts the right of appeal, for example, where leave to appeal is required or a right of appeal is confined to a final decision.

It is also clear from **Woodlawn** that because an appeal raises a jurisdictional question that does not deprive an appellant of a right of appeal. As I have noted the Board in this case went on to hold that the issue of whether the respondent had lost its right of appeal had to be determined under s. 94(1) (formerly s. 108) of the **Assessment Act** which provides as follows:

> "**Application to Supreme Court or county court**
>
> 94(1) The municipality, the Director or any person assessed may apply on originating notice to the Spreme Court or to the county court for the determination of any question relating to the assessment, except a question as to persons alleged to be wrongfully placed upon or omitted from the roll or assessed at too high or too low a sum or whose property is wrongfully classified."

Under s. 53(1) of the **Assessment Act** the Director on completion of the assessment roll is required to give a notice of assessment.

Section 54(3) of the **Act** provides:

> "Any person having an interest in the property may appeal from the assessment."

Section 72(1) states:

> "The court, after hearing the appellant and any witnesses he produces, and the respondent and any witnesses he produces, and the assessors, if necessary, shall determine the matter."

Section 74 sets out the broad powers of the Court on an appeal. I have examined the decisions of Judge O Hearn referred to by the Board and with respect they do not limit the power of

the Board to determine preliminary questions relating to jurisdictional matters. **Dartmouth Yacht Club** v. **City of Dartmouth,** 32 N.S.R. (2d) was decided in 1979. The appeal was under the **Assessment Act,** R.S.N.S. 1967, c. 14. The respondent raised a preliminary objection to the jurisdiction of the court, urging that the questions to be dealt with did not fall within the powers reserved for the court by the **Assessment Act**. At that time an appeal from the Regional Assessment Appeal Court was to the County Court. A constitutional argument was raised under s. 96. It was also argued that s. 101(2) of the **Act** limited the County Court to the powers given to the Assessment Appeal Court and that s. 108 vested an originating summons procedure to deal with jurisdictional questions. At p. 301, O Hearn, C.C.J. stated:

> "That is sufficient to dispose of the objection, but there may be more fundamental ways of dealing with it. With respect to the existence of s. 108, there is, for example, nothing in the **Act** to indicate that it is a strict alternative to the appeal to the county court, provided by ss. 99 to 101. It appears rather to be the civil counterpart in assessment cases of the stated-case procedure under the **Criminal Code** and the **Summary Proceedings Act**. That is, a way of by-passing the Assessment Appeal Court to get to lawyer-law courts quickly and by a simple process. Nothing in the structure of the **Act** requires that the jurisdiction of the county court be ousted thereby, or exercisable only through this narrow procedure."

Judge O Hearn obviously saw no conflict in the provisions.

In **Director of Assessment** v. **Lord Nelson Hotel**, 70 N.S.R. (2d) this Court held that s. 108(1) of the **Assessment Act** did not preclude an appeal from the Municipal Board under s. 35(1) of the **Act** on a jurisdictional issue.

In **Public Service Commission of Halifax** and **Municipality of the County of East Hants et al** 103 D.L.R. (3d) Coffin, J.A. in delivering the judgment of this Court stated at p. 649:

> "In **Dartmouth Yacht Club** v. **City of Dartmouth**, No. C.H. 25612 (unreported [since reported 32 N.S.R. (2d) 285]), decided April 30, 1979, Judge O Hearn reviewed this problem with care. The dispute, he said, was 'mainly about the assessment classification of the property'.
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> The jurisdictional objections were that: (1) the legal questions involved were such that only a s. 96 Court could deal with

> them; and (2) the **Assessment Act**, by s. 101(2), limits the County Court to the powers of the Regional Assessment Appeal Court given by ss. 89 and 91, and the **Act** creates, by s. 108, an originating summons procedure to deal with such questions.
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> These are precisely the objections taken here by Mr. Niedermayer on behalf of the Municipality of East Hants.
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> I shall not quote all these sections, but s. 108 provides:
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> > '108(1) The town or municipality, the director or any person assessed may apply on originating summons to the Supreme Court or to the county court for the determination of any question relating to the assessment, except a question as to persons alleged to be wrongfully placed upon or omitted from the roll or assessed at too high or too low a sum or whose property is wrongly classified. [am. 1976, c. 2, s. 15; 1978, c. 18, s. 26]
> >
> > (4) An appeal lies in the usual manner from the judgment of the Supreme Court or of the county court.'"

After reviewing the authorities Coffin, J.A. concluded at p. 653:

> "In my view, these authorities dealing with jurisdiction of labour boards and municipal boards as well as the reasoning of Judge O Hearn in the **Dartmouth Yacht Club** case, support the appellant's position that the Regional Assessment Appeal Board had jurisdiction to deal with this appeal. Accordingly, the County Court and this Court also have jurisdiction."

Ballou v. **Municipal Board (N.S.) Antigonish County** and **Director of Assessment**, 70 N.S.R. (2d) 73 was an appeal from a decision of the Municipal Board holding that it had no jurisdiction to hear an appeal from a decision of an appeal court which was based on a lack of jurisdiction rather than on the merits. The Assessment Appeal Court following prior decisions of the Board decided that it had no jurisdiction to determine a matter of exemption and that an application for exemption had to be referred to the Supreme or County Court under s. 108(1). This Court held that it was "not an exemption case but, rather, the question for determination was and is whether the Regional Director of Assessment erred in making the determination that the appellant's

property had ceased to be used for forestry purposes". I would have thought that resolved any jurisdictional issue. However, the Court went on to suggest that the right of appeal from decisions of the Assessment Appeal Court to the Municipal Board was restricted to decisions made within jurisdiction. The **Ballou** decision was not argued in this Court in the present case.

In **Harelkin** v. **University of Regina**, [1979] 2 S.C.R. 561 Beetz J. in delivering the majority judgment of the Supreme Court of Canada stated at p. 586:

> "Furthermore, and even if it can be said that the decision of the council committee was a nullity, I believe it was still appealable to the senate committee for the simple reason that the senate committee was given by statute the power to hear and decide upon appeals from the decisions of the council, whether or not such decisions were null. In **Provincial Secretary of Prince Edward Island** v. **Egan**, a county court judge had reversed in appeal the decision of the Provincial Secretary to refuse a licence to Egan. There was no right of appeal to the county court judge but his decision was appealable to the Supreme Court of Prince Edward Island and it was held that the latter court should have allowed the appeal and set aside the decision of the county court judge. Sir Lyman Duff C.J. wrote at p. 399:
>
> > The fact that the Country Judge has acted without jurisdiciton does not, in my opinion, affect this right of appeal. Once the conclusion is reached that the section intends to give an appeal to the Supreme Court, even where the County Court Judge is exercising a special jurisdiction and not as the County Court, I can see no reason for limiting the scope of the appeal in such a way as to exclude questions of jurisdiction. As the Attorney-General observed in the course of his argument, lawyers are more familiar with the practice of dealing with questions of jurisdiction raised by proceedings by way of **certiorari** and prohibition. A tribunal exercising a limited statutory jurisdiction has no authority to give a binding decision upon its own jurisdiction and where it wrongfully assumes jurisdiction it follows, as a general rule, that, since what he has done is null, there is nothing to appeal from. But here we have a statute and this is only pertinent on the point of the meaning and effect of the statute.

> It has always seemed to me that the proceeding by way of appeal would be the most convenient way of questioning the judgment of any judicial tribunal whose judgment is alleged to be wrong, whether in point of wrongful assumption of jurisdiction, or otherwise. There is no appeal, of course, except by statute and, I repeat, the question arising upon this point is entirely a question of the scope and effect of this statute."

The broad power of appeal conferred on the Assessment Appeal Court and the Municipal Board under the **Assessment Act** must be viewed in the light of the statement of Duff, C.J. The views expressed in **Woodlawn** are definitive and consistent with the earlier decisions of this Court as set out by Coffin, J.A. in the **East Hants** decision, **supra.**

In my view the appeal to the Municipal Board was not premature and both the Municipal Board and the Regional Assessment Appeal Court had jurisdiction to determine whether a party had lost the right of appeal pursuant to s. 23 of the **Assessment Act**. I would allow the appeal, set aside the order of the Board and remit the matter to the Municipal Board for a determination of that issue.

There should be no order as to costs on the appeal.

J.A.

Concurred in:
Roscoe, J.A.
Freeman, J.A.