Date: 20011107
Docket: S. T. No. 09331

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: Juurlink v. East Hants (Municipality) , 2001 NSSC 159]

BETWEEN:

HERMAN JUURLINK and HENRIKA JUURLINK

PLAINTIFFS

- and -

MUNICIPALITY OF EAST HANTS

DEFENDANT

D E C I S I O N

HEARD: **At Truro, Nova Scotia, in Chambers before the Honourable Justice C. Richard Coughlan, on October 16th, 2001**

DECISION: **November 7th, 2001**

COUNSEL: **Dennis James, for the Plaintiffs**
Joseph A. MacDonell, for the Defendant

COUGHLAN, J.:

[1] This is an application by Herman Juurlink and Henrika Juurlink for an order pursuant to s. 12 of the **Commercial Arbitration Act**, S.N.S. 1999, c. 5 appointing an arbitrator to arbitrate the claim advanced by them for damages for injurious affection pursuant to s. 17(5) of the **Water Act**, R.S.N.S. 1989, c. 335.

[2] The facts are as follows:

[3] Douglas B. Snide and Mary Snide owned land at Shubenacadie, Hants County, Nova Scotia. Mr. and Mrs. Snide wanted to sell their land and entered into an agreement to sell the land to the Nova Scotia Farm Loan Board dated May 15th, 1972. Herman Juurlink, his father and brother, submitted the Snide offer, together with an application for a farm loan to the Board on May 15th, 1972. By letter dated June 5th, 1972, the Board conditionally agreed to loan money for the Juurlinks to acquire the property.

[4] On August 14th, 1972, instructions, including an agreement to be signed by the Juurlinks and the Board, and the terms of the Juurlinks' ownership interest were sent to the Juurlinks' solicitor. A deed from Mr. and Mrs. Snide to the Board dated July 18th, 1972 was recorded on September 14th,

1972. After the Juurlinks paid the indebtedness to the Board, the lands were conveyed to Herman Juurlink and Henrika Juurlink in March, 1994.

[5] On February 22nd, 1968 lands surrounding Snide's Lake, including part of the Juurlink farm, were designated as the Shubenacadie Watershed area pursuant to the **Water Act**. A regulation which prohibited certain activities within the designed area was enacted August 2nd, 1972.

[6] On September 13th, 1972, Douglas Snide and Mary Snide entered into an agreement with the Municipality of East Hants which provided for the construction of a fence fifteen feet from Snide's Lake and prohibited grazing of animals or application of manure inside the fence line between the fence and the Lake. The Municipality agreed to pay the owners One Hundred Dollars per year beginning in 1973.

[7] In 1975, the Juurlinks entered an agreement with the Municipality setting out the use of the area within twenty feet from Snide's Lake.

[8] In 2000, the plaintiffs listed their property for sale and concerns were raised by the defendant about the agricultural use of the watershed lands. The plaintiffs claim the defendant's position has adversely affected their ability to sell their farm and seek the appointment of an arbitrator.

ANALYSIS

[9] The **Water Act**, as amended by c. 64 of the **Acts** of 1968, assented to April 11th, 1968, provided for a claim for compensation for injurious affection as follows:

> (5) Where by reason of a designation under subsection (1) or an order made under subsection (2) property is injuriously affected, the owner thereof, in respect of any matter or thing that has not been the subject of any compensation or payment made under this Act or by the Minister, the Commission or some other person shall be entitled to receive compensation for such injury from the person operating the water works.
>
> (6) Any question as to whether any property is injuriously affected by a designation or by an order and as to the amount of payment and compensation shall be determined by arbitration and the provisions of the Arbitration Act shall apply.

[10] Section 17 of the **Water Act** was repealed by the **Environment Act**, S.N.S., 1994-95, c. 1, effective January 1st, 1995. The **Environment Act** continued the protected water areas designated pursuant to the **Water Act**:

> 106(5) Any protected water area designated pursuant to the *Water Act*, prior to the coming into force of this Act remains so designated.

[11] And concerning claims for injurious affection:

> 106(8) No claim for injurious affection lies against any person as the result of a designation of a protected water area.

[12] Does s. 106(8) of the **Environment Act** have retroactive effect so as to defeat a claim for injurious affection pursuant to s. 17 of the **Water Act**?

[13] The effect of the repeal of a statute is dealt with in the **Interpretation Act**, R.S.N.S. 1989, c. 235 in s. 23(1):

> (1) Where an enactment is repealed, the repeal does not
>
> ....
>
> (b) affect the previous operation of the enactment so repealed or anything duly done or suffered under it;
>
> (c) affect a right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment;
>
> ....
>
> (e) affect an investigation, legal proceeding or remedy concerning any right, privilege, obligation, liability, penalty, forfeiture or punishment acquired or incurred under the enactment.

[14] No statute shall be construed to have retroactive effect unless the Act clearly provides for it. In dealing with the question of retroactivity, Bateman, J.A. stated in **Workers' Compensation Board (N.S.) v. Muise et al.** (1998), 170 N.S.R. (2d) 253 at p. 261:

The scope of these presumptions was addressed by Dickson, J., for the majority in **Gustavson Drilling (1964) Ltd. v. Minister of National Revenue**, [1977] 1 S.C.R. 271; 7 N.R. 401. He wrote at p. 279:

> "First, retrospectivity. The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the **Act**. An amending enactment may provide that it shall be deemed to have come into force on a date prior to its enactment or it may provide that it is to be operative with respect to transactions occurring prior to its enactment." (Emphasis added)

At p. 282:

> "Second, interference with vested rights. The rule is that a statute should not be given a construction that would impair existing rights as regards person or property unless the language in which it is couched requires such a construction: **Spooner Oils Ltd. v. Turner Valley Gas Conservation Board**, [1933] S.C.R. 629, 638. The presumption that vested rights are not affected unless the intention of the legislature is clear applies whether the legislation is retrospective or prospective in operation. A prospective enactment may be bad if it affects vested rights and does not do so in unambiguous terms. This presumption, however, only applies where the legislation is in some way ambiguous and reasonably susceptible of two constructions. It is perfectly obvious that most statutes in some way or other interfere with or encroach upon antecedent rights, and taxing statutes are no exception." (Emphasis added)

[15] The **Environment Act** does not clearly provide that s. 106(8) has retroactive effect. I therefore find s. 106(8) does not have retroactive effect.

[16] The **Water Act** provides an arbitration pursuant to it, is governed by the provisions of the **Arbitration Act**, R.S.N.S. 1989, c. 19. On June 17th, 1999, the **Commercial Arbitration Act** came into force. The relevant provisions of the **Commercial Arbitration Act** are as follows:

61 Chapter 19 of the Revised Statutes, 1989, the *Arbitration Act*, is amended by adding immediately after Section 3 the following Section:

3A Notwithstanding anything contained in this Act, this Act does not apply to an arbitration commenced pursuant to the *Commercial Arbitration Act.*

....

59(1) Subject to Section 4 and clause 60(1)(a), this Act applies to an arbitration conducted under an arbitration agreement entered into before the coming into force of this Act if the arbitration is commenced on or after the coming into force of this Act.

(2) The *Arbitration Act* applies to arbitrations commenced before the coming into force of this Act.

....

4(1) This Act applies to an arbitration conducted under an arbitration agreement or authorized or required pursuant to an enactment unless

(a) the application of this Act is excluded by an agreement of the parties or by law; or

(b) Part II of the *International Commercial Arbitration Act* applies to the arbitration.

(2) Where there is a conflict between this Act and another enactment that authorizes or requires the arbitration, the other enactment prevails.

....

> 3(3) Where a matter is authorized or required pursuant to an enactment to be submitted to arbitration, a reference to this Act to an arbitration agreement is a reference to the enactment, unless the context otherwise requires.

[17] Any claim for injurious affection pursuant to the **Water Act**, the arbitration of which was not commenced, prior to the coming into force of the **Commercial Arbitration Act** is arbitrated pursuant to the **Commercial Arbitration Act**.

[18] Section 19(2) of the **Commercial Arbitration Act** provides:

> 19(2) The arbitral tribunal may determine any question of law that arises during the arbitration.

[19] An arbitral tribunal appointed pursuant to the **Commercial Arbitration Act** may determine any question of law that arises during an arbitration, even if the question is whether the matter is arbitrable. Such questions of law should be initially determined by the arbitral tribunal. In dealing with the question of an arbitral tribunal deciding questions of law, Cromwell, J.A. stated in **Nova Scotia Union of Public Employees, Local 2 v. Halifax Regional School Board** (1999), 171 N.S.R. (2d) 373 at p. 381:

> In this case, there has been no determination by an arbitrator of whether the complaint set out in the statement of claim is arbitrable. This is an important aspect of the question of whether the court has jurisdiction. The interests of ensuring that matters do not fall between the two jurisdictions are better served by having a determination of arbitrability made first at arbitration. In that way, the court will know when it rules on the question of its jurisdiction the full implications of its decision.

(e) Summary

> In my view, each of the four factors just discussed supports the conclusion that, where there is doubt about the arbitrability of the dispute, that issue should generally by determined initially at arbitration.

[20] Any questions of law concerning the claim for injurious affection should initially be dealt with by the arbitral tribunal.

[21] I, therefore, allow the application that Peter J. MacKeigan, Q.C., be appointed pursuant to s. 12 of the **Commercial Arbitration Act** as the sole arbitrator of the dispute between the parties concerning the plaintiffs' claim for damages for injurious affection pursuant to the provisions of s. 17(5) of the **Water Act**.

[22] I will receive written submissions from the parties as to costs.

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C. Richard Coughlan, J.