

SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia (Attorney General) (Re), 2010 NSSC 354

Date: 20100923

Docket: SAR No. 313370

Registry: Annapolis Royal

IN THE MATTER OF: An Application by the Attorney General of Nova Scotia, being designated the Expropriating Authority under subsection 9(1) of the *Expropriation Act*, R.S.N.S. 1989, c. 156

AND IN THE MATTER OF: Section 17 of the *Expropriation Act*, R.S.N.S. 1989, c. 156

AND IN THE MATTER OF: The expropriation of certain lands situate at or near Tupperville, in the County of Annapolis, Province of Nova Scotia, on the 1st day of November, 2001, claimed by Marion Inglis

Judge: The Honourable Chief Justice Joseph P. Kennedy

Heard: April 16, 2010 in Annapolis Royal, Nova Scotia

Counsel: Mark Rieksts for the Applicant, the Attorney General
Blaine Garfield Schumacher for the Respondent, Marion Inglis

By the Court:

[1] The Attorney General has brought this application pursuant to s. 17 of the *Expropriation Act* for a determination of the nature and extent of title claimed by the Respondent, Marion Inglis ("Inglis"), in an expropriation matter before the Utility and Review board.

Facts

[2] The lands in question comprise 1.622 hectares of land situated in Tupperville, Annapolis Valley ("Tupperville property"). The expropriated lands are part of the land parcel identified as PID No. 05160304.

[3] The Province of Nova Scotia filed expropriation documents for the lands on November 1, 2001, for the public purpose of constructing Highway 101, however, these expropriation documents were filed ten years after the construction of Highway 101 across the property had been accomplished.

[4] The Province does not contest that the Respondent had title to the lands described in the expropriation documents. The present application is brought for a

determination as to whether the compensation for lands expropriated should include the highway improvements which the Department of Transportation ("the Department") constructed over the lands prior to the expropriation.

[5] The Respondent Inglis' case is based upon the argument that the Department was a trespasser on the land before expropriation and stands or falls on this finding. Inglis claims that the improvements were constructed over her land without her consent, and therefore constitute attachments to her land, placed there by a trespasser.

[6] Inglis takes the position that she, therefore, is entitled to compensation on the basis that the lands expropriated do include the highway improvements.

[7] The Attorney General submits that the nature or extent of the expropriated lands is unimproved forest resource lands, or as the lands existed prior to the construction of the highway over these lands, and does not include the highway improvements.

Issues

[8] Do the expropriated lands for which compensation is sought include the highway improvements?

The Application

[9] The present application is brought pursuant to s. 17 of the *Expropriation Act* R.S.N.S. 1989, c. 156. Section 17 reads as follows:

17 (1) Where the expropriating authority, at any time after the registration of the expropriation document at the appropriate office of the registrar of deeds, is in doubt as to the persons who had any right, estate or interest in the land to which the expropriation document relates, or as to the nature or extent thereof, it may apply to the Court to make a determination respecting the state of the title to the land or any part thereof and to order who had a right, estate or interest in the land at that time and the nature and extent thereof.

...

(3) After the hearing the Court shall either judge for the purposes of this Act what persons had any right, estate or interest in the land expropriated and the nature and extent thereof or direct an issue or issues to be tried for the purpose of enabling the Court to make such an adjudication.

Background

[10] Approximately 20 - 25 years ago the Department was building, extending the limited access Highway 101 through the Annapolis Valley region of this province.

[11] In the process it became necessary to construct that highway over lands owned by Inglis.

[12] There were, in fact, two separate and distinct Inglis properties that were involved.

[13] The first was known as the "Round Hill" lot. This was the lot first accessed by the Department. In May of 1988, it was expropriated in the usual manner, the highway was constructed over it and eventually compensation was paid.

[14] The second property, the 1.622 hectare Tupperville land, that is the subject of this application, is a woodlot located a substantial distance east of the Round Hill property. (In fact, this property is composed of two abutting lots, however, this is not relevant to this application.)

[15] Eventually the Department constructed the highway across the Tupperville property as well, however, did not expropriate the land before doing so.

[16] In fact, the Tupperville lot was not expropriated until August 31, 2001 approximately ten years after the construction had been accomplished.

[17] The Department argues that prior to expropriation, it was not a trespasser on these lands.

[18] It submits that a body with expropriation powers is not a "trespasser" in the ordinary sense of that term.

[19] In support it cites *Ruttan v. Canadian Northern Railways* 1906 CarswellOnt 222, 7 O.W.R. 568 Ontario Weekly Court (Mabee, J.).

[20] Although over 100 years old, the facts in this case are similar to the matter under consideration.

[21] In *Ruttan* the Appellant railway had expropriation power under the *Railway Act* to take privately held land for purposes of "rights of way of the main line and sidings ..." and for "the construction of engine houses, yard space and appurtenant terminal structures".

[22] There were complications with the expropriation proceedings and the railway made improvements on the lands before the expropriation proceedings were commenced.

[23] The arbitrators had determined that the railway company in so doing became a trespasser upon the land and thus, as stated at para. 8, "... all these expenditures made by them, being fixtures, became part of the land itself and the property of the land-owner, ...".

[24] The arbitrators concluded that the value of the fixtures was to be included in the compensation paid at expropriation.

[25] On appeal from the arbitration, Mabee J. finds again at para. 8:

. . . I do not think the company were trespassers upon these lands . . . The company were always clothed with authority to obtain a title by using the expropriation clauses of the Railway Act, and in all probability their delay in putting the matter under way was the dispute as to who should be paid by the company. It is inconceivable that the law can be in such a condition that this company must pay to these land-owners . . . for the improvements the company themselves have made upon the lands.

And at para. 10 the Justice continues:

I do not think the railway company stand in the same position as an ordinary trespasser going upon lands; they have what the ordinary trespasser has not got, namely, a statutory right to acquire a title; it can be obtained in spite of the owner, and without any conveyance from him; it is only a question of compensation, and I do not think that the common law rule that the trespasser, who builds upon the lands of another, dedicates his structures to the owner, has any application to a situation such as the present. The structures are erected with the view of the acquisition of the title; provision is made in the Act for a company obtaining possession before the arbitration is had, it is true upon the observance of certain preliminaries; the company taking possession in the manner shewn here does so irregularly, but I think not as a trespasser within the old common law rule, which had its existence long before these and similar statutory powers were conferred upon corporations. . . .

[26] There is logic in that decision that supports the Department's position herein.

[27] The Department, however, claims that even were it capable of being a trespasser pending expropriation, it was not so in this specific because it had the consent of the landowner to be on the subject land for highway construction purposes.

[28] Central to this application is the issue of consent . There is dispute - Inglis says that the construction of the highway across that Tupperville land was accomplished without her knowledge or consent.

[29] Inglis by her affidavit (para. 12) states:

I was adamantly opposed to the construction of Highway 101 as the construction of this highway would have a disastrous effect on our fruit growing and sales operation centred on Highway 201. I refused to grant my permission to enter upon any of our lands for land clearance or construction purposes related to the construction of a limited access highway now known as Highway 101. . . .

And subsequently:

I was never approached by any representative of [the Department] on any matter related to the construction of a limited access highway now known as Highway 101 across our Tupperville properties Block 1 and 2 other than [about] the survey of a proposed centre line.

[30] James Inglis is the son of Marion and was involved in these matters at times pertinent as his mother's representative.

[31] He said that both he and his mother refused the Department's request to enter upon the property to construct a highway except for the purpose of surveying a centre line for the proposed highway. He states at para. 5 of his affidavit:

. . . It was our position at the time that we would not agree to any settlement and that [the Department] would have to proceed with the acquisition of the lands through legal process being expropriation.

[32] The Department claims otherwise. It says that it had permission to construct the highway across the Tupperville property prior to its expropriation.

[33] In evidence is the affidavit of one Walter Jackson dated December 16, 2009.

[34] He was the right of way officer with the Department who acted for the province at the time of the negotiations specific to the Tupperville property.

[35] By letter dated August 15, 1989, he sent Marion Inglis a Memorandum of Agreement which would give the Department permission to enter onto the land in question "for the purposes of carrying on construction upon award of the contract".

[36] That agreement was never executed by Marion Inglis, however, Jackson states the Department did obtain her verbal agreement to be on the lands for construction purposes while the expropriation process was ongoing.

[37] Attached to the Jackson affidavit as Exhibit "L" is a "Memo to File" dated 16/7/91 made by Jackson which reads:

Bruce Gillis, Inglis lawyer phoned to confirm that DOT continue to have their verbal agreement to be on their land for construction purposes.

[38] The land in question is not further identified but it would seem to be the Tupperville property in that the Round Hill property had been expropriated prior to that date.

[39] Bruce Gillis, Q.C., in his affidavit dated January 8, 2009, at para. 14 states:

. . . but at no time did I advise that the Department or its agents or servants had permission from Marion Inglis, the sole owner, to go onto the Tupperville lands for clearing of trees and vegetation from that property, or for any other purpose, except for surveying the centre line of the proposed highway.

[40] However, the Applicant has produced in evidence a letter written by counsel Gillis acting for Marion Inglis. This letter is dated 10 October 2000 and is directed to Gwendolyn M. Fountain, counsel for the Nova Scotia Department of Justice. After noting that the Round Hill property was expropriated in 1988, Mr. Gillis, referring to the subject Tupperville property, writes:

I have reviewed this with Mrs. Inglis and it would appear that you're correct that she has never signed the property over to the Department, but granted verbal permission for the contractor to proceed with construction.

[41] This letter would seem to contradict the denial made in para. 14 of the Gillis affidavit.

[42] When asked about this portion of the letter at the hearing, Mr. Gillis said, "I may have overstated".

[43] I find the reasonable and proper interpretation of the letter is that in response to a suggestion by Fountain to Gillis that the Department had verbal permission to construct across the land prior to expropriation, Gillis reviewed the issue with his client, Marion Inglis, and as a result he is confirming to the Department that she granted verbal permission for the contractor to construct across the property.

[44] This supports Jackson's evidence which is further supported by the Memo to File dated July 1991, to the effect that there was a verbal agreement in place as to construction.

Conclusion

[45] I am satisfied, after considering all of the evidence, that Walter Jackson's evidence is correct. Although Inglis did not execute the Memorandum of Agreement that was prepared by the Department, she did have knowledge of the construction of the highway across the Tupperville property and did give verbal consent for the construction to take place as confirmed by her counsel in the 10 October 2000 letter.

[46] Having so found, I conclude that even were the Province capable of being a trespasser it was not a trespasser when it constructed the highway across the Tupperville property, having obtained the owner's verbal consent to do so.

[47] This finding nullifies any claim by Inglis for compensation with respect to highway improvements.

[48] The nature and extent of the expropriated lands, as they existed prior to the construction of the highway over these lands and the highway improvements, are not to be considered in the compensation process.

[49] If necessary, I will receive written submissions as to costs.

Kennedy, C.J.