SUPREME COURT OF NOVA SCOTIA
Citation: Cron v. Halifax (Regional Municipality), 2010 NSSC 460

Date: 20101217
Docket: Hfx. No. 337014
Registry: Halifax

Between:

Charles C. E. Cron, R. Marie Cron

Applicants

v.

Halifax Regional Municipality, Susan Sheehan

Respondents

Revised decision:	The text of the original decision has been corrected according to the erratum dated December 21, 2010. The text of the erratum is appended to this decision.
Judge:	The Honourable Justice Peter P. Rosinski.
Heard:	December 8, 2010, in Halifax, Nova Scotia
Oral Decision:	December 15, 2010
Written Decision:	December 17, 2010
Counsel:	John A. Keith with Ezra B. van Gelder, for the applicants Karen E. MacDonald, for the respondent, Halifax Regional Municipality Susan Sheehan, Self-represented

By the Court:

[1] In the matter Cron and Cron v. Halifax Regional Municipality and Sheehan. That is Hfx. No. 2010 337014.

Introduction

[2] Dr. and Mrs. Cron request a declaration from this Court that the HRM Municipal Council does not have the legal authority to consider and grant Ms. Sheehan's petition made pursuant to the *Private Ways Act* R.S.N.S. 1989 c. 358 as amended. I will in this Decision refer to the *Private Ways Act* as the PWA.

[3] This petition would otherwise, Ms. Sheehan hopes grant her a private "way or road" or (driveway) over the property of another private free holding landowner within the HRM. HRM supports Ms. Sheehan's position that the Municipal Council has the legal authority to entertain such petitions. It falls to this Court in the absence of any binding or persuasive authority, nor even previous consideration of the interpretation of the PWA to make such a determination.

Background

[4] Susan Sheehan is the owner of a residential property at 9 Milton Drive, HRM. Her immediate neighbours to the northeast are Dr. and Mrs. Cron who own a residential property at 5 Milton Drive, HRM. Both these properties front on the Northwest Arm, a body of water leading to the open waters of the Atlantic Ocean. Ms. Sheehan's property is not accessible by motor vehicles. The nearest public road access for Ms. Sheehan is to the immediate north of the Cron's property. Although Ms. Sheehan can access her property using an easement in favour of the public granted by the Crons along the shore, that "footpath" is insufficient in width to allow vehicular traffic to access Ms. Sheehan's property. The Crons are not willing to grant a larger or further easement over their property to allow vehicular access.

[5] Ms. Sheehan has proposed that she would like to make a petition to the HRM Municipal Council to obtain an easement over the lands owned by the Crons for the purpose of vehicular access. Such a petition is possible by virtue of the *Private Ways Act*, R.S.N.S. 1989 c. 358 as amended. It may strike the average citizen as unusual that pursuant to the PWA, any Municipal Council in Nova Scotia

may grant such a petition by a private citizen and effectively take away the land of another private citizen for the benefit exclusively of the petitioning citizen.

[6] The origins of this legislation date back to 1765. That being *an Act in addition to an amendment of an Act made and passed in the first year of His Majesty's Reign entitled an Act for repairing and mending highways, roads, bridges and streets and for appointing surveyors of highways within the several townships* in this Province, that is S.N.S 1765 c.11.

[7] That Act bestowed the power of establishing private ways by allowing an application to be made to the Court in the relevant county. Section 3 of that Act read:

> And be it further enacted that the surveyors of the highways of each town respectively, be and are hereby empowered to lay out particular and **private ways either open or pent with swinging gates for such town only as shall be thought necessary** by the Justices of the Peace in their general sessions upon application made to them by the persons concerned. Provided that no damage be done to any particular person in his land or property **without due recompense** to be made by the Town, as the surveyors of highways and the party interested may agree or, as shall be ordered by the Justices in general sessions upon inquiry into the same by a jury to be summoned for that purpose.
>
> [My emphasis]

[8] That legislation was most significantly revised by the passing of *An Act Respecting the Laying Out of Private Ways* S.NS., 1926 c. 8. With the exception of minor changes between then and now, that Act is virtually identical to the present PWA. Unfortunately, there are no Hansard materials or evidence available regarding the debates that took place while that legislation was being considered, as there was no transcription during that time period.

[9] The PWA is entitled "An Act Relating To Necessary Private Ways" and today reads in part as follows:

> 17 (1) Any freeholder or freeholders of any municipality may present a petition to the council praying for the obtaining and laying out of a private way or road, either open or pent.

[10] The PWA requires that where the Council is satisfied that an application should be granted, a commissioner is then directed to (a) consider whether the proposed way or road is the "most practical and reasonable means of access", and if so satisfied, (b) shall lay out the road or way in a manner "most advantageous to [the Applicant] and least detrimental to the [affected landowner]".

[11] From there the commissioner lays out the way or road on a plan and by s. 18(2) is required to make the road if so proposed, [no more] than 25 feet in width. Once that is done, if the affected landowner who has received notice does not agree to the [proposed] compensation in question, an arbitration process is established in the Act to deal with that issue specifically.

[12] Section 26 governs the commissioner's report to Municipal Council: "the Council may confirm or disallow" the proposed road or way and / or compensation.

[13] Under s. 29 of the Act, the compensation: "shall be paid by the Council, and may be charged against" the polling district, or in whole or in part from the applicant / petitioner.

[14] Section 31 provides that the agreed to plan or award, once registered in the Registry of Deeds:

> ...shall be held to vest the title as an easement to the land or rights of the person or persons applying for such private way or road.

[15] Section 32 provides an appeal of the Municipal Council's decision to a Court.

[16] Section 33(1) reads:

> 33 (1) The council may direct gates to be placed on private ways or roads...

[17] Thus, the PWA can be seen to have retained the basic attributes of its ancient predecessor legislation.

Position of the parties

[18] It is these attributes and their ancient origins that underlie the argument by the Crons herein, that the PWA:(1) is only relevant in cases where the affected landowner consents to the transfer of title to their property. Non-consensual takings of lands by Municipal Councils from private landowners are not permitted any longer under the PWA the Crons argue because: (a) It has outlived its usefulness which was during the early stages of municipal development in Nova Scotia; (b) HRM council cannot rely on it to affect the Cron's property because [Firstly]: HRM council can only "expropriate" land pursuant to the *Expropriation*

Act on a proper statutory interpretation of sections 3, 4 of the *Expropriation Act*; section 65(3) of the *HRM City Charter*, S.N.S., 2008 c. 39; and s. 52(3) of the *Municipal Government Act*, which although not applicable to HRM, provides that the *Expropriation Act* applies to all "expropriation proceedings by a municipality [other than HRM] or a village".

[19] Secondly, the Crons argue that the granting of an easement by HRM to Ms. Sheehan can only be accomplished by HRM first by "taking" the Crons land. Whether that is outright in fee simple or by taking only an easement pursuant to statutory authority. They note that a statutory easement was discussed in the Supreme Court Canada decision *Paul v. Canadian Pacific Ltd.* [1988] 2 S.C.R. 654, and that such actions are defined as being squarely within the *Expropriation Act*.

[20] If we examine the *Expropriation Act* definitions, we find as follows:

Section 3(1)(c)	"expropriate" means the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers but does not an include a reservation under Section 13 of the *Public Highways Act* or a designation under Section 106 of the *Environment Act*;

Section 3(1)(i) "land" includes any estate, term, easement, right or interest in, to, over or affecting land;

[21] Section 6:

Where a statutory authority desires to expropriate land it shall be expropriated in accordance with the provisions of this Part but only for the purposes authorized by its statute and to the extent set forth therein.

[22] Section 3(1)(p):

"statutory authority" means Her Majesty the Queen in right of the Province or any person or body empowered by statute to expropriate land or cause injurious affection;

[23] Section 7 of the Act, provides that:

Notwithstanding Section 6, an expropriating authority shall not expropriate land without the approval of the approving authority.

[24] Section 8(a) of the Act defines:

...approving authority means

(e) the appropriate city council in respect of land expropriated by

> (i) the city of Halifax
>
> ...

[25] Moreover, although the *Expropriation Act* and PWA may appear to be inconsistent, they cannot be so because s. 4(3) of the *Expropriation Act* specifically notes that:

> Where there is a conflict between a provision of this Act and provisions of any other general or special Act, the provision of this Act prevails.

[26] In response HRM argues that;

> 1. It is not an "expropriating authority" as defined in the *Expropriation Act* because under the PWA it acts "merely as an intermediary between" being a quote from their factum, private landowners who are not able to agree on a placement or price for "an easement or right in land". This is a reference to s. 16(c) of the *Private Ways Act*. This "private remedy" which vests the land in a private freeholder is what "takes the PWA outside of the purview of the *Expropriation Act*", according to HRM.

2. HRM says there is no action [by HRM] as defined in the *Expropriation Act*: “expropriate”, because there is no “taking of land” by HRM since the land does not vest in HRM.

3. HRM argues there is no “taking of land” or expropriation because s. 65 of the *City Charter*, which authorizes HRM to “expropriate” also restricts that “taking of land” to cases where HRM does so “for a purpose for which it may spend money”. HRM argues since it cannot spend money unless statutorily authorized, and such authorizations grounded in s. 79 of the *City Charter* are on review, all for the benefit of the public or have a public purpose, HRM cannot “expropriate” land under its Charter by s. 65(3), except under the *Expropriation Act*. Thus, since HRM is not authorized to spend money for the taking of land under the PWA, it cannot be an expropriation under the *Expropriation Act* or under s. 65(3) of the *City Charter*.

[27] Finally HRM argues, that transferring land interests between private landowners without the consent of one party under the PWA is not “*de facto* expropriation” as referred to in *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)* [1999] N.S.R. (2d) 294, and that is a Court of Appeal decision, because

HRM says the pre-conditions to such a finding upon which the Crons could argue under the PWA there is an “expropriation” are not satisfied.

[28] That is, transferring a property under the PWA does not have the effect of expropriation because (1) merely proving that an affected landowner’s property use or value has been reduced is insufficient according to *Mariner*, paras. 42, 47 and 48 and; (2) “to constitute a *de facto* expropriation, there must be a confiscation of ... all reasonable private uses of the lands in question” and granting a private way would not reach that threshold in the case at Bar.

[29] Although this case does satisfy the other pre-conditions, which are: that the expropriation was based on (a) valid legislation, primary or subordinate or is action taken lawfully with legislative authority; and secondly that valid legislation entitled the affected landowner compensation for the resulting restrictions on their enjoyment of private land according to para. 38 in *Mariner*.

[30] Ms. Sheehan was also present at the hearing and she adopted the arguments put forward by HRM. She also pointed out that her property is a residential address of longstanding. See for example the reported decision in *Sheehan v.*

Sheehan 2010 N.S.S.C. 428 (2010) N.S.J. 601, paras. 14 - 20 and *Finley v. Sutherland*, an unreported decision of Coffin, J. of this Court, found at tab 5 of the HRM Book of Authorities, which decision the Nova Scotia Supreme Court Appeal Division affirmed, by Cooper, JA in [1969] 4 D.L.R. (3d) 586 [1969] N.S.J. 133.

[31] Ms. Sheehan noted that as such, the property should have the municipal infrastructure to permit public services to access the property by vehicles: police, emergency responders, fire department vehicles, emergency measures personnel and such. All these services are permissible expenditures under s. 79 of the *City Charter*, and as can be seen by s. 79(1)(ab) which allows expenditures for "**private roads**, culverts retaining walls, sidewalks, curbs and gutters that are associated with **private** roads and are identified and approved for expenditure by Council". [My emphasis]

[32] Also in issue here in the oral argument was the applicability of s. 79(1)(aw) of the *City Charter* to the circumstances of someone in Ms. Sheehan's position. It reads:

> All other expenditures

> (i) Authorized by this Act or another Act of the Legislature,
>
> (ii) That are required to be made under a contract lawfully made by, or on behalf of, the Municipality,
>
> (iii) Incurred in the due execution of the duties, powers and responsibilities by law vested in, or imposed upon, the Municipality, the Mayor Council or Officers.

[33] I am satisfied that these three subsections of s. 79(1)(aw) are to be read disjunctively based on my examination of the surrounding sections of s. 79(1) and the notion that it is unlikely that the drafters of the intended "catch all" subsection, intended to limit that subsection to contractual payments only as that would be the result of reading the sections conjunctively.

Legal Analysis

[34] Of relevance to this matter are three statutory bases for the taking of land from a private landowner by a public body.

> (1) The *Private Ways Act* R.S.N.S. 1989 c. 358 as amended. Specifically sections 17, 26, 29 and 31 which allow the taking of private property and vesting of it in another private person's name.

(2) *Halifax Regional Municipality Charter*, which is referred to as the *City Charter*, S.N.S., 2008 c. 39 as amended, and which has been in force since January 13, 2009; sections 65 and 189 particularly, which allow the taking of private property and vesting it in the name of the Municipality; though I note that the Municipality can sell that property, once expropriated, on to a private person, such as under s. 61(5).

(3) *Expropriation Act* R.S.N.S. 1989 c. 156 as amended, specifically s. 11(2) which allows the taking of private property and vesting of it in the name of "the expropriating authority". Though I note the expropriating authority, as with the municipality, may sell that property on to a private person once it's acquired pursuant to s. 67. It may also in fact, "abandon" the property and it may become re-vested in those persons from whom it was taken, pursuant to s. 20.

[35] Notably, s. 65(3) of the *City Charter* states:

> The *Expropriation Act* applies to expropriation proceedings by the municipality.

[36] Question: Does the *Expropriation Act* also apply to proceedings taken by HRM or in fact any other municipality under Part 2 of the PWA? The answer to this question requires the Court to carefully consider the statutory context and the principles of statutory interpretation.

[37] Did the Nova Scotia Legislature intend that the PWA **not** be subject to the *Expropriation Act*?

[38] In *MacDougall v. Nova Scotia* 2010 N.S.C.A. 92 [2010] N.S.J. 579, a decision of our Court of Appeal, Chief Justice MacDonald, speaking for the Court had to consider the "true meaning" of s. 27(1)(b) of the *Nova Scotia Workers' Compensation Act*. Regarding statutory interpretation, he stated at para. 28:

> The Supreme Court of Canada had endorsed the modern approach to statutory interpretation as proposed by Elmer Driedger, Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) at page 87:
>
> > ... the words of an Act are to be read in their entire context, and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[39] Also of assistance will be the *Interpretation Act* R.S.N.S. 1989 c. 235 as amended, which applies to all Acts of the *Nova Scotia Legislature* unless otherwise

stated pursuant to section 6. Of particular relevance in the *Interpretation Act* is s. 9:

> 9 (1) The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.
>
> (5) Every enactment shall be deemed remedial and interpreted to ensure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
>
> (c) the mischief to be remedied;
>
> (d) the object to be attained;
>
> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and
>
> (g) the history of legislation on the subject.

[40] To further set the statutory context, I note that s. 52(3) of the *Municipal Government Act* S.N.S. 1998, c. 18 as amended, which is the equivalent for non-HRM municipalities in Nova Scotia that the *City Charter* would be for HRM, is

identical in it's wording to s. 65 of the *City Charter*. Specifically s. 52(3) of the *Municipal Government Act* reads:

> (3) The Expropriation Act applies to expropriation proceedings by a municipality or a village.

[41] Thus, all municipalities in Nova Scotia which expropriate land are governed by, in first instance, the *Expropriation Act*. What then, if another Act of the Nova Scotia Legislature, such as the PWA, appears to conflict with the *Expropriation Act*? Which should be paramount? Must one Act be "read down" to preserve the notions that the Legislature is aware of all of its legislation in existence, and would not intend those Acts to conflict?

[42] I refer for example, to Cromwell, JA. in his comments in *Morine v. L & J Parker Equipment Inc.* 2001N.S.C.A. 53 [2001] N.S.J. 114 at para. 41.

[43] The *Expropriation Act* provides for this situation in s. 4 however. Which resolves any conflicts or inconsistencies between the *Expropriation Act* and the other Acts by deeming the *Expropriation Act* to be the Act that must prevail in case of any conflict.

[44] Section 4 of the *Expropriation Act* reads:

> 4 (1) Notwithstanding any general or special Act, where land is expropriated or injurious affection is caused by a statutory authority, this Act applies.
>
> (2) The provisions of any general or special Act providing procedures with respect to the expropriation of land or the compensation payable for land expropriated or for injurious affection shall be deemed to refer to this Act and not to the Act in question.
>
> (3) Where there is conflict between a provision of this Act and provisions of any other general or special Act, the provision of this Act prevails.

[45] As can be seen, understanding and properly interpreting s. 4 of the *Expropriation Act* will answer the key question herein. Can HRM use the PWA to grant Ms. Sheehan an easement across the Cron's property?

[46] I accept that in interpreting statutes which allow a public authority to expropriate land, the provisions of such statutes should be strictly construed, largely because they involve un-consented to taking of property by a statutory body whose powers are limited to the expressed provisions of the statutes, giving it such powers - See *Gillis v. Municipality of Pictou* (1886) 19 N.S.R. (128), a

decision of this Court, which dealt with whether a town by-law purporting to allow expropriation was *ultra vires* or beyond the competency of the town.

[47] In that case, the Majority of Justices found that, although the town had the power to lay out new streets under the Act incorporating Pictou, the power to expropriate land to effect the laying out of new streets, should not be implied; especially since the town could have acquired the land through the predecessor to the PWA. That being: *of laying out roads, other than certain great roads* R.S.N.S. 1873 (4th series) Chapter 44.

[48] Back to the *Expropriation Act*, s. 4(1) refers to: “where land is expropriated or injurious affection is caused”; Section 4(2) refers to: “procedures with respect to the expropriation of land or the compensation payable for land expropriated or for injurious affection”. The *Expropriation Act* defines some of these terms in s. 3(1):

> (c) "expropriate" means the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers but does not include a reservation under Section 13 of the Public Highways Act or a designation under Section 106 of the Environment Act;
>
> (d) "expropriating authority" means Her Majesty in right of the Province and in all other cases any person or body empowered by statute to expropriate land;

(h) "injurious affection" means

(i) where a statutory authority acquires part of the land of an owner,

(A) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and

...

(ii) where the statutory authority does not acquire part of the land of an owner,

(A) such reduction in the market value of the land of the owner, and

(B) such personal and business damages, resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute,

(i) "land" includes any estate, term, easement, right or interest in, to, over or affecting land;

(p) "statutory authority" means Her Majesty in right of the Province or any person or body empowered by statute to expropriate land or cause injurious affection;

[49] In Part 2 of the *Expropriation Act*, which is entitled “Acquisition and Abandonment of Land”, we find sections 7 and 8, which clarify that no “expropriating authority” shall expropriate land “without the approval of the

approving authority". Which in the case at Bar, is defined as the Municipal Council of HRM.

[50] Section 6 of the *Expropriation Act*, limits expropriation. It reads:

> 6 Where a statutory authority desires to expropriate land, it shall be expropriated in accordance with the provisions of this Part but only for the purposes authorized by its statute and to the extent set forth therein.

[51] In determining whether "expropriate" in the *Expropriation Act*, includes the petition process in the PWA, it may be useful to remind oneself, what the *Expropriation Act* states are the objectives of the Act. Section 2 of the *Expropriation Act*, is prefaced " Purpose of Act" and reads as follows:

> 2 (1) It is the intent and purpose of this Act that every person whose land is expropriated shall be compensated for such expropriation.
>
> (2) Further, it is the intent and purpose of this Act that where a family home is expropriated the position of the owner in regards to compensation shall be such that he will be substantially in the same position after the expropriation as compared with his position before the expropriation.
>
> (3) Recognizing that strict market value is not in all cases a true compensation for a family home that is expropriated since it may not provide equivalent accommodation to the owner of the family home, this Act shall be interpreted broadly in respect of the expropriation of a family home so that effect is given to the intent and purpose set forth in subsection (2).

[52] Lastly, subsection 4:

> (4) The protection given by subsections (2) and (3) shall not extend to any person whose land is a money asset or investment and not a family home.

[53] "Expropriate" is expressly defined in the *Expropriation Act*. Does that definition include actions taken under the PWA? The Crons argue it does because HRM has an expressed power to "expropriate" in section 65 of its Charter and the Charter expressly makes the *Expropriation Act* applicable to any such "expropriation".

[54] Moreover, s. 4 of the *Expropriation Act*, reinforces the notion that all "expropriations" by HRM, must fall under the *Expropriation Act*. The Crons argue that even if the property vests in Ms. Sheehan rather than HRM, HRM is "taking" land.

[55] HRM argues that it is the fact that the property never vests in HRM, that makes the enforced transfer of property to another private person, not fall within the definition of "expropriate" in the *Expropriation Act*.

[56] HRM reinforces their position by arguing that its *City Charter* does **not** authorize spending money as compensation for the enforced transfer of property to another private person, which would be the case under the PWA. The compensation due to the affected land owner is not ultimately payable by HRM under the PWA, but rather such amounts paid by the Council initially, pursuant to s. 29, "may be charged against and recovered from any polling district in which the private way or road is made, or in whole or in part from the applicant or applicants therefor, as Counsel may direct".

[57] In summary, it seems that the **object** of the *Expropriation Act* is to take land without consent, for the benefit of the public, whereas the **object** of the PWA is to transfer land without consent from one private person to another. While "the occasion and necessity" for the *Expropriation Act* and PWA may be articulated as similarly different, that is, namely to allow **private roads and ways** during the early development of real property boundaries and settlements, as opposed to allow **public maintained roads** from those early years onward, nevertheless, these two pieces of legislation or their predecessors, have coexisted in one form or another since at least 1900.

[58] For example, in R.S.N.S. 1900, we find (1): under Part 4; “Of Public Revenue” - chapter 17 and included therein, “of the expropriation of lands for public purposes”; (2) under Part 10; “Of Public Highways” - chapter 76 included therein, “of laying out and closing roads and landings”; (3) under Part 19; “of Real Property” - chapter 138 “of necessary private ways”.

[59] By 1926, *An Act Respecting the Laying Out of Private Ways* S.N.S. 1926 c. 8, as amended, provided that, as with the present PWA, a freeholder could petition the Municipal Council and without the affected landowner’s consent, the Council could transfer land, specifically including an easement, from one private landowner to another.

[60] Notably, the *Halifax City Charter* also had expropriation provisions of its own that co-existed with the *Expropriation Act* and PWA. Certainly as early as 1864, S.N.S. 1864, c. 81 *An Act Concerning the City of Halifax*, [regarding] s. 26 entitled “Streets”, we see a reference in the Nova Scotia Supreme Court decision *Hawkins v. City of Halifax* (1913) 10 D.L.R. 747 [1913] N.S.J. No. 6, in which case the Court considered the pre 1914 *Halifax City Charter* ordinances and bylaws which remained similar, and specifically I note the 1914 Charter under s.

677, provided for the “Expropriation of Lands”, which also specifically provided for the expropriation of easements.

[61] Thus, if the *Expropriation Act* does subsume the PWA, when did this happen, given their long standing co-existence and why was the PWA not amended or repealed entirely?

[62] This inquiry prompts a narrower one: When did s. 4 of the *Expropriation Act* come into force?

[63] The *Expropriation Act* R.S.N.S. 1967 c. 96, did **not** contain such wording. By 1969, the *Expropriation Procedure Act* S.N.S. 1969 c. 9 was enacted and in force October 1, 1970. It contained the predecessor to s. 4 of the present *Expropriation Act*.

[64] Sections 2 and 3 of the *Expropriation Procedure Act* read:

> 2 (1) This Act applies to every expropriation authority and in respect of every expropriation power and expropriation notwithstanding the provisions of any general or special enactment.

(2) The requirements of this Act applicable to an expropriation authority or in respect of an expropriation of power or expropriation are in addition to the requirements of any other enactment.

3 (1) No expropriation authority shall expropriate after this Act comes into force unless the expropriation authority has complied with this Act.

(2) If an expropriation authority expropriates without complying with the provisions of this Act after this Act comes into force, the owner of the land expropriated may apply to a judge to have the expropriation declared void.

[65] In that Act, "**expropriate**" was defined in s. 1(b) as:

Means the entry upon, taking or **expropriating** of land without the consent of the owner of the land in exercise of an **expropriation** power.

[66] Section 1(c) read:

Expropriation power means the power or authority granted by an enactment to enter upon, take, and **expropriate** land without the consent of the owner of the land.

[My emphasis]

[67] These statutory definitions require an examination of the non-statutory definitions.

Dictionary definitions of "expropriate"

[68] The Oxford Universal Dictionary, (3rd ed. reprinted 1955, Clarendon Press, Oxford, England) defines expropriate in part as: “to dispossess of ownership”; and goes on to note: “now chiefly to deprive of property for public use, generally with compensation”.

[69] Webster’s New International Dictionary, (2nd ed. 1934, unabridged) defined expropriate as: “ to deprive of possession of proprietary rights; to take or transfer the ownership of from one owner to another; formerly to surrender the ownership of...; the action of the State in taking or modifying the property rights of individuals in the exercise of it’s sovereignty...”.

[70] As to legal dictionaries, as we look to Black’s Law Dictionary, (9th ed. 2009, West Publishing, Thomson - Reuters company), expropriation is defined as: “A governmental taking or modification of an individual’s property rights especially by eminent domain...” also termed in England “compulsory purchase” and in Scotland “compulsory surrender...”

[71] “Eminent domain” is defined in that dictionary as: “(18th century) the inherent power of a government entity to take privately owned property; especially

land, and convert it to public use, subject to reasonable compensation for the taking...”

[72] My sense of these definitions, legal and non-legal, is that expropriation is: essentially an act of the State by which it takes for itself, a private person’s property interest and converts it to a public use for which the State pays reasonable compensation. Thus, while an expropriation always involves “taking” of property by the State, not all “taking” of property is an “expropriation”. This distinction was recognized in the *Expropriation Procedure Act*, S.N.S., 1969 c. 9, which expressly included “taking or expropriating” and “take and expropriate” in the definitions of “expropriate” and “expropriation power” respectively.

[73] What that Act makes clear is that expropriation is a process. It involves several steps.

1) “entry upon” the property;

2) “taking of” the property which is an entering upon the property, taking possession of it, and divesting the owner of title in the property;

> 3) "expropriation of" the property, which completes the process by paying compensation to the private owner of that property.

[74] After the 1969 *Expropriation Procedure Act*, the Legislature enacted the *Expropriation Act* 1973, S.N.S. 1973 c. 1, which was in force June 20, 1974.

[75] The relevant definitions in the *Expropriation Act* 1973, and the present *Expropriation Act*, are identical except as to the definition of "expropriate" which is only slightly different.

[76] In the 1973 definition, the exceptions to expropriate referred to "a reservation under section 13 of the *Public Highways Act* or a prescription under section 16 of the *Water Act*", whereas in the present *Expropriation Act*, "expropriate" excepts out "a reservation under s. 13 of the *Public Highways Act* or a designation under s. 106 of the *Environment Act*".

[77] Most significantly, s. 4 in the present Act is identical to s. 4 in the *Expropriation Act* 1973. Thus the answer to the question: when did s. 4 of the *Expropriation Act* come into force; is June 20, 1974, although as early as the 1969

Expropriation Act, a similar provision in s. 2 made the *Expropriation Act* applicable to all “expropriations”.

[78] The Crons argue that the PWA could have been exempted similarly out of the definition of “expropriate” as had been reservations under s. 13 of the *Public Highways Act*.

[79] I will point out that, in the 1973 Act as in the present Act, the reference to s. 13 of the *Public Highways Act*, and when I looked, it appears to me that it should properly be, I believe, a reference to s. 12. Nevertheless, that section provides that there shall be no compensation for persons where a reservation is made by the Minister and then property, for example, housing is built thereon.

[80] In relation to the 1973 Act and a prescription under s. 16 of the *Water Act*, again, I looked at the Act and it appeared to me the reference should be to s. 17. Nonetheless, that section provides where compensation may be paid for the designation of an area as a protected water area, which causes injurious affection to a property.

[81] In the present *Expropriation Act*, reservations are still allowed under s. 13 of the *Public Highways Act*, but now we have a designation under s. 106 of the *Environment Act.* That is essentially a designation of a protected water system and in many respects is similar to s. 16 of the *Water Act*.

[82] However, I note s. 106(8) of the *Environment Act* reads:

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

[83] Having gone through those two exceptions, I note that the Crons are arguing that not being so exempted, the Legislature must have intended the PWA to be included in the *Expropriation Act*. I note however, the difference between the *Public Highways Act* and the *Environment Act* exceptions from the *Expropriation Act*, and the PWA, is that only the PWA transfers **private property to another private property owner**. Both the *Public Highways Act* reservation and the *Environment Act* designation are for the expressed benefit of the public. I therefore, do not find this argument to be persuasive.

[84] The Crons rely on the reasoning of our Court of Appeal in *Haverstock Estate v. Armoyan Properties Limited* (1995), 140, N.S.R. (2d) 286, in support of their position that the PWA like the *Ditches and Water Courses Act* at issue in *Haverstock*, insofar as it allows a non-consensual taking of an interest in land, from a private landowner, is a process that necessarily entails an "expropriation" under the *Expropriation Act*.

[85] Consequently, since s. 4 of the *Expropriation Act* requires that such expropriations can only proceed under the Act, therefore in the case at Bar, the PWA like the *Ditches and Water Courses Act* in *Haverstock*, can not be used to effect the transfer of property that Ms. Sheehan's petition would propose.

[86] The *Haverstock* decision, has not been judicially considered. Furthermore, there are differences in the *Ditches and Water Courses Act* and the PWA that deserve mention.

1. The *Ditches and Water Courses Act* does not "vest" the affected landowner's property in another person or the public authority.

2. Under the *Ditches and Water Courses Act* an engineer lays out a ditch or drain or an alteration to an existing ditch or drain, if he considers it "necessary" being so appointed to examine the issue, to ensure no overflow or flooding and then reports to the Municipal Council who send the proposed plans to interested parties. These parties can appeal to a Court which may "set aside, alter or affirm" the engineer's award, as its called, pursuant to s. 12 of the *Ditches and Water Courses Act*.

3. Thus, the *Ditches and Water Courses Act* allows the non-consensual creation or alteration of ditches and drains, based on a demonstrated public need.

4. The PWA does not require a "public" need. It deals with cases of a "private" need as suggested by its title, "*Private Ways Act*".

5. It is much easier to view the *Ditches and Water Courses Act*, as an expropriation than the PWA process. As I earlier noted, "expropriation" in my view in its essence, apart from statutory definitions, is an act of the State by which it takes for itself, a private person's property interest and converts it to a public use for which the State pays reasonable compensation.

6. Nevertheless, the *Ditches and Water Courses Act*, is more akin to a *de facto* expropriation and in 1995, when *Haverstock* was argued, the *Mariner* case of 2001, was not available to the Court. The principles in *Mariner*, suggest that today the *Ditches and Water Courses Act*, would likely be considered more like a *de facto* expropriation, yet it seems the pre-conditions for a *de facto* expropriation would not be met in a case with *Haverstock's* facts today. In those circumstances, the outcome would be that the process in the *Ditches and Water Courses Act*, would not be considered precluded by s. 4 of the *Expropriation Act* because it does not involve an "expropriation".

[87] Section 4 of the *Expropriation Act* or its predecessor have existed since 1970. If s. 4 of the *Expropriation Act* precludes proceedings under the PWA, Part 2, it is noteworthy that in the case where the PWA was considered, albeit, spoken in *obiter dicta*, the *Expropriation Act* was not raised as a concern by the Court of Appeal.

[88] I refer to *Hebb v. Wile* (1988) 89 N.S.R. (2d) 1, [1988] N.S.J. No. 428 (CA) at para. 28 for MacDonald, JA when he made reference to the *Private Ways Act*.

[89] Considering the different context between the PWA and the *Ditches and Water Courses Act* and the above noted observations, I conclude that the *Haverstock* reasoning does not necessarily compel me to find that the PWA process is one of "expropriation" as defined in the *Expropriation Act* and therefore, s. 4 of the *Expropriation Act* is not applicable to the PWA necessarily.

[90] The Crons also argue that the effect of the PWA's transfer of property of an easement which seems to be an issue in the case at Bar, is a *de facto* expropriation as discussed in *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*, as authored by Cromwell, JA, as he then was.

[91] *De facto* expropriation is a legal concept that allows regulatory decisions by the State which substantially interfere with the private landowner's property interest to be considered as if they were outright expropriation of property under the applicable legislation, which would be the *Expropriation Act* in the case at Bar.

[92] In the context of land use regulation, where the private owner's lands were designated as a "beach" under the *Beaches Act*, R.S.N.S. 1989 c. 56 as amended,

Cromwell, JA set out the pre-conditions that must be met to qualify for the claim of a *de facto* expropriation to be successful. (1) the regulatory action must be lawful; (2) compensation may only be ordered to the extent the primary or subordinate legislation so authorizes and; (3) “there must be a confiscation of all reasonable private uses of the lands in question”, which is a combined citation of his citing from a case and his own words at paras. 47 to 48.

[93] *De facto* expropriation is difficult to assess in the context of the case at Bar. No petition for a transfer of property rights has been presented, nor has a proposed parcel or interest in the Cron’s land been determined to be appropriate by the Municipal Council.

[94] Moreover, the PWA is distinct from the “land use” cases, where restrictions are placed on the present owner’s usage of the land, as opposed to a transfer of some of their interest in the property to another private person under the PWA.

[95] While under the PWA an “easement” over the affected property is specifically permitted (see the definition of “land”), such easement or “way” would not likely “constitute a confiscation of all reasonable private uses of the lands in

question" and would not likely therefore constitute a *de facto* expropriation in this case in my view.

[96] Certainly, the *City Charter* contemplates, as does s. 17 of the PWA, the laying out of "private roads". See for example s. 323 regarding Civic Addresses as opposed to "streets" which are defined s. 317 of the Charter and noted to be "vested absolutely in the Municipality" by s. 318.

[97] Once HRM's Charter acknowledges that civic addresses are possible on "private roads" and it retains the power to "name or rename any street or private road", surely its infrastructure of services should reasonably be accessible to such properties.

[98] Services such as the police, emergency responders, fire department, utilities, are part and parcel of the notion of a residential address and property I would think. Thus HRM could consider the creation of a "private road" as well as a "private way" under the PWA, and it is unlikely that either would amount to a "*de facto* expropriation".

[99] However, whether they would or not in fact, is not my concern at this stage. I am merely asked to make a declaration as to whether HRM Municipal Council has the jurisdiction to entertain the proposed petition by Ms. Sheehan or in fact, anyone else for that matter, pursuant to the PWA, or is that apparent jurisdiction of any municipality overridden by the provisions of the *Expropriation Act*?

The nature of declaratory relief

[100] Declaratory relief is an extraordinary remedy which this Court has jurisdiction to entertain. When a Court is asked to make a declaration regarding the relevant law applicable to a case, generally it should be satisfied that (1) there is a sufficient factual and / or legal foundation in place to avoid giving "declarations in the air" as noted in *Babiuk v. Calgary* (1992) 95 D.L.R. (4th) 158 at para. 18 as cited by our Court of Appeal in *Oakland / Indian Point Residents Association v. Seaview Properties Ltd.* [2010] N.S.C.A. 66 at paras. 45 - 49 per Oland, JA; (2) There are not available effectual alternative remedies; and (3) in all the circumstances, the interest of justices favour making the declaration on the question in issue.

[101] In this case, the controversy about the "footpath" is ongoing and the factual legal matrix is fixed, except that Ms. Sheehan has not made a request by petition under the PWA to HRM Council. The latter fact is not a sufficient reason to decline a declaration in this case.

[102] The Applicants seek "an order declaring that Susan Sheehan's proposed petition for a private way [to be granted in her favour as registered owner of 9 Milton Dr, HRM, PID No. 002 80271] under the *Private Ways Act*, R.S.N.S. 1989 c. 358 is beyond the competency of HRM Municipal Council". The Applicants thereby wish to forestall Ms. Sheehan's proposed use of the PWA to gain vehicular access to her property. They have allowed the public, including Ms. Sheehan to have access to the "footpath" by virtue of accepting the quit claim deed from the Federal Crown with such an easement or right-of-way included therein. See Exhibit B in the affidavit of Ms. Cron, sworn October 1, 2010.

[103] An existing public easement or right-of-way in a quit claim deed, in my view, is not an effectual alternative remedy. Although, it may defeat an argument that a right-of-way of necessity must therefore exist if a property is landlocked - See *Finley v. Sutherland* (1969) 4 D.L.R. (3rd) 586 at para. 37.

[104] Ms. Sheehan asks for an access that is linked specifically to her property and for the vehicular use of whoever owns that property. The Applicants argue in their November 30, 2010 brief that: “the only evidence... is the affidavit of the Applicant. There is no evidence of any public need interest. There is similarly no evidence of any private need on the part of... Susan Sheehan”.

[105] As I indicated above, a complete factual context is not required for me to make a declaration in the case at Bar. I am, on the consideration of all the interests, satisfied that this is an appropriate case for a declaration.

Conclusion

[106] While I understand that the PWA may have significant consequences for affected landowners, there are procedural protections and a means of compensation built into the PWA.

[107] Moreover, in spite of those potentially significant consequences, I do not conclude that the process under the PWA constitutes “expropriation” as contemplated by the *Expropriation Act*.

[108] Therefore, I declare that as a matter of law in Nova Scotia, Part 2 of the PWA is operative legislation, and any Municipal Council petitioned for the "obtaining and laying out of a private way or road" may properly consider the petition as per the provisions of the PWA.

J.

SUPREME COURT OF NOVA SCOTIA
Citation: Cron v. Halifax (Regional Municipality), 2010 NSSC 460

Date: 20101221
Docket: Hfx. No. 337014
Registry: Halifax

BETWEEN:

Charles C. E. Cron, R. Marie Cron

Applicants

v.

Halifax Regional Municipality, Susan Sheehan

Respondents

ERRATUM

Revised judgment: The original judgment has been corrected according to this erratum dated **December 21, 2010**

HEARD: December 8, 2010 in Halifax, Nova Scotia

DECISION: December 17, 2010

COUNSEL: John A. Keith with Ezra B. van Gelder, for the applicants
Karen E. MacDonald, for the respondent,
Halifax Regional Municipality
Susan Sheehan, Self-represented

Erratum:

Paragraph 63 is replaced by the following:

"The *Expropriation Act* R.S.N.S. 1967 c. 96, did **not** contain such wording. By 1969, the *Expropriation Procedure Act* S.N.S. 1969 c. 9 was enacted and in force October 1, 1970. It contained the predecessor to s. 4 of the present *Expropriation Act*."

Paragraph 86 sub-para. 5 is replaced by the following:

"It is much easier to view the *Ditches and Water Courses Act*, as an expropriation than the PWA process. As I earlier noted, "expropriation" in my view in its essence, apart from statutory definitions, is an act of the State by which it takes for itself, a private person's property interest and converts it to a public use for which the State pays reasonable compensation."

Paragraph 90 is replaced by the following:

"The Crons also argue that the effect of the PWA's transfer of property of an easement which seems to be an issue in the case at Bar, is a *de facto* expropriation as discussed in *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)*, as authored by Cromwell, JA, as he then was."

Paragraph 104 is replaced by the following:

"Ms. Sheehan asks for an access that is linked specifically to her property and for the vehicular use of whoever owns that property. The Applicants argue in their November 30, 2010 brief that: "the only evidence... is the affidavit of the Applicant. There is no evidence of any public need interest. There is similarly no evidence of any private need on the part of... Susan Sheehan"."

J.