1996 **SH 128956**

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

NOVA SCOTIA CROP & LIVESTOCK INSURANCE COMMISSION

- and -

HOWARD BLAIR DeWITT

D E C I S I O N

HEARD: **at Halifax, Nova Scotia before The Honourable Justice Walter R. E. Goodfellow in Chambers December 2, 1996**

DECISION: **December 17, 1996**

COUNSEL: **John R. M. Akerman, Q.C.**
for the Appellant

Howard Blair DeWitt, in person

GOODFELLOW, J.:

1. BACKGROUND

Howard Blair DeWitt is an apple farmer who has insured his crop with the Nova Scotia Crop and Livestock Insurance Commission since 1973.

On January 4, 1995 he filed a form "Record of Tree Fruit Yield 1994" which provided a notice of claim with respect to damage to his crop.

The Commission advised DeWitt, February 6, 1995 that it had determined two-thirds of the loss had been attributable to uninsured perils and forwarded a proof of loss form prepared and completed by the Commission but filled in to the effect of the Commission's determination.

Mr. Dewitt declined signing and returning the filled in proof of loss form.

On April 28, 1995 the Commission wrote DeWitt indicating it required the proof of loss form to be returned within 60 days of Mr. DeWitt being provided with it, and that if it was not received within that time, it would no longer be valid.

Mr. DeWitt filed his claim with Small Claims Court on March 6, 1996. The Small Claims adjudicator filed a detailed and thorough summary report of findings after conducting a hearing the 29th day of April, 1996. The adjudicator concluded that he had

jurisdiction, and that the defence based on a limitation period for failure to file a proof of loss form should be disallowed.

2. ISSUES ON APPEAL

The appellant submits that the adjudicator made three errors in law:

1. That despite clause 13 of the Contract of Insurance and the regulations made pursuant to the **Crop and Livestock Insurance Act** providing for arbitration of disputes with the Commission, he had jurisdiction to hear this claim;

2. There was jurisdiction to hear the portion of the claim dealing with an entitlement to claim for insurance coverage despite the fact that a proof of loss form had not been filed; and

3. A defence based on a limitation period for failure to file a proof of loss form should be disallowed.

3. STANDARD OF REVIEW

The determinations by the Small Claims adjudicator do not involve a finding of fact nor are they based upon any evidentiary ruling by the adjudicator. Each of these issues is strictly a matter of interpretation in law. It follows that the appropriate standard of review in determining if the adjudicator made an error in the interpretation of law is one of correctness.

4. ISSUE #3

A defence based on a limitation period for failure to file a proof of loss form should

be disallowed.

The adjudicator expressed in the alternative that he would exercise his discretion pursuant to s. 3(1) and (2) of the Statute of Limitations, R.S.N.S. (1989) C. 258 and disallow a defence based on the limitation period for failing to file proof of loss.

Interpretation of Section

3 (1) In this Section

(a) "acting" means an action of a type mentioned in subsection (1) of Section 2;

(b) "notice" means a notice which is required before the commencement of an action;

(c) "time limitation" means a limitation for either commencing an action or giving a notice pursuant to

(i) the provisions of Section 2,

(ii) the provisions of any enactment other than this **Act**,

(iii) the provisions of an agreement or contract.

Application to proceed despite limitation period

(2) Where an action is commenced without regard to a time limitation, and an order has not been made pursuant to subsection (3), the court in which it is brought, upon application, may disallow a defence based on the time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which

(a) the time limitation prejudices the plaintiff or any person whom he represents; and

(b) any decision of the court under this Section would prejudice

the defendant or any person whom he represents, or any other person.

The adjudicator made no error in law in his application of the relevant sections of the Statute of Limitations. **Smith v. Clayton** (1994), 133 N.S.R. (2d) 157.

5. ISSUE #2

There was jurisdiction to hear the portion of the claim dealing with an entitlement to claim for insurance coverage despite the fact that a proof of loss form had not been filed; and

On or about June 30, 1994 the respondent filed a NOTICE OF CROP DAMAGE AND REQUEST FOR INSPECTION FORM in which he requested to abandon or destroy part of his alleged damaged crop. Permission was presumably refused. On or about October 17 the respondent filed a further NOTICE OF CROP DAMAGE AND REQUEST FOR INSPECTION REPORT indicating that it was a follow up to previous notification and update. On or about January 4, 1995 the respondent filed a form called RECORD OF TREE FRUIT YIELD 1994, which on the bottom provided NOTICE OF CLAIM.

By letter dated February 6 from Brian H. Mahoney, Manager of the Nova Scotia Crop and Livestock Insurance Commission, the Commission notified the Claimant that,

> "After consideration of information contained on inspection reports, it was evident that much of the loss is attributed to factors other than insurable perils as outlined in the Regulations.

> The enclosed Proof of Loss lists actual production relative to the guaranteed production. Where some of the insured growers had claims in 1994 due to perils insured, the decision was made to pay for 1/3 of the amount, the balance being attributed to non-insurable perils.
>
> ...
>
> Trusting you can appreciate the position of the Commission in these matters. Upon receipt of signed Proof of Loss, claim payment, as enclosed, can be made."

Under cover of that correspondence, the Commission forwarded a Proof of Loss which was completed and filled in by the Commission itself in which it was stated,

> "Any loss of yield of uninsured causes? YES 2/3 DUE TO UNINSURED PERILS."

A reduction in the total amount claimed was made and the insured, the respondent, was asked under covering letter to swear the Proof of Loss.

By letter dated April 28, 1995, Mr. Mahoney again wrote Mr. DeWitt stating as follows:-

> 'The Contract of Insurance requires that a Proof of Loss be completed within 60 days. Where you have not returned the form within the required time frame, the Commission wishes to confirm that the amount offered for payment on the Proof of Loss is no longer valid and there will be no claim payable."

At no time did the Commission ever indicate to the respondent that he ought to or was required to have the matter arbitrated.

Mr. DeWitt testified that he did not return the Proof of Loss as he didn't agree with its contents and he quite correctly interpreted it to be an admission that a Portion of his claim was uninsured and that he would somehow be giving up rights if he executed the proof and returned it.

The contract specifies in Condition 12(1) that:

> A claim for indemnity in respect of an insured crop shall be made on a proof of loss form provided by the Commission and shall be filed with the Commission not later than sixty days after.

The adjudicator concluded:

> As a condition precedent, if the Commission wishes to rely on Clause 12, it must first establish that it provided the insured with a form of proof of loss. The Commission did not do so. They provided a form that they completed, not a form in blank for the insured to complete and swear to to prove and assert his claim.

I agree with the conclusion reached by the adjudicator. The Commission, in effect, sent to Mr. DeWitt a release and not a form of proof of loss.

6. ISSUE #1

1. That despite clause 13 of the Contract of Insurance and the regulations made pursuant to the Crop and Livestock Insurance Act providing for arbitration of disputes with the Commission, he had jurisdiction to hear this claim.

The **Crop and Livestock Insurance Act**, 1968, c. 6 s. 14; 1978, c. 31, s. 10 was passed to provide farmers with cost-effective insurance on their crops and livestock. Section 5 of the **Act** directs the Commission to carry out certain functions and particularly to:

> "5(h) exercise such powers and perform such duties as are conferred or imposed upon it by or under this or any other **Act**."

Section 7 authorizes the Governor in Council to make regulations:

> "(c) providing for the arbitration by an arbitrator or by a board of arbitration of disputes arising out of the adjustment of losses,
>
> (d) providing for the appointment of arbitrators, determining the constitution of boards of arbitration and regulating the practice and procedure of such arbitrators or boards of arbitration."

Pursuant to this authority the Governor in council then passed the Regulation 13/69, the "Arbitration Proceedings Regulations".

"REGULATIONS MADE UNDER
THE NOVA SCOTIA CROP & LIVESTOCK INSURANCE ACT
1968 (amended C-31 N.S. '78)

'ARBITRATION PROCEEDINGS'

1. There is hereby established a Board of Arbitration consisting of one or more members, to be appointed by the Governor-in-Council and to be known as the "Crop & Livestock Insurance Arbitration Board" and hereinafter referred to as the "Board."

...

3. The Board shall have exclusive jurisdiction to hear and determine all disputes between the Commission and an insured person, arising out of the adjustment of a loss under a Contract of Insurance.

4. Where the Commission and an insured person have failed to resolve any dispute arising out of the adjustment of loss under a Contract of Insurance, and the

requirements of the Regulations made under the N.S. Crop & Livestock Insurance Act (1968) respecting the filing of Proof of Loss Forms have been complied with, the Commission or the insured person may serve, by prepaid first class mail, Notice of Arbitration upon the other of them and upon the Board, stating that it or he, as the case may be, require the matter in dispute to be determined by Arbitration.

5. In any case in which a Notice of Arbitration has been served, the Board shall fix a day which, and at a time and place which, it will consider the matter in dispute and hear the parties, and shall notify the parties accordingly."

These regulations constituted a Board of Arbitration and provided that Board with "exclusive jurisdiction to hear and determine all disputes between the Commission and an Insured Person, arising out of the adjustment of a loss under the Contract of Insurance." (Clause 3). These regulations have remained unchanged since that date.

The "Tree Fruit Crop Insurance Plan" regulations were passed for the first time in 1978. From 1978 to 1992 these regulations provided that any dispute between the Commission and the Insured Person be resolved by arbitration (Regulation Numbers 164/78, 36/83, 153/83, 267/83, 57/84, 86/89, 133/90 and 263/92). The regulations provided that the Insured Person had to give notice if s/he wished to take the dispute to arbitration. There was no provision for the Commission to take a matter to Arbitration.

In 1995 Regulation Number 6/95 was passed and Clause 17 was changed to provide that either the Commission or the Insured Person may take a matter to Arbitration. It is the Appellant's submission that the clear intent of the Governor in Council and the Legislature was to ensure that matters arising as a result of disputes over the adjustment of

insurance contracts should be determined by arbitration. The Adjudicator has determined that Clause 17 makes Arbitration an option and allows the Insured Person to take matters to Court if s/he chooses.

The Adjudicator's interpretation of Clause 17 can only be correct if it operates to repeal the Arbitration Proceedings Regulation of 1969. Ruth Sullivan, **Driedger on the Construction of Statutes** (3d) (Butterworths: Toronto & Vancouver 1994), p. 185:

> "The presumption of coherence applies to regulations as well as to statutes. It is presumed that regulatory provisions are meant to work together, not only with their own enabling legislation but with other Acts and other regulations as well."
>
> At page 179:
>
> "Where provisions overlap without conflict, it is presumed that each is meant to apply."

It follows that to the extent there is an overlap and such is not inconsistent it must be so read that they can be reconciled.

At pp. 38, 39:

> "**Modern purposive approach.** Modern courts do not need an excuse to consider the purpose of legislation. Today purposive analysis is a regular part of interpretation, to be relied on in every case, not just those in which there is ambiguity or absurdity. As Matthews, J.A. recently wrote in *R. v. Moore*:
>
> > ' From a study of the relevant case law up to date, the words of an Act are always to be read in light of the object of that Act. Consideration must be given to both the spirit and the letter of the legislation.'
>
> ...

...*Thomson* v. Canada (Minister of Agriculture) (1992), 1 S.C.R. 385 at 416, L'Heureux-Dubé J. wrote:

> '[A] judge's fundamental consideration in statutory interpretation is the purpose of legislation.' "

The legislative intent, in enacting the arbitration proceeding regulations of 1969, is clear that all disputes arising from the adjustments of losses from the contract of insurance be resolved through arbitration. For seventeen years the Crop Insurance Regulations in general, and the Tree Fruit Regulations specifically provided the insured person could take a matter to arbitration upon giving appropriate notice to the Commission.

The 1995 change simply allowed the Commission or the insured to proceed to arbitration upon giving appropriate notice. The only way that can be read is to be consistent with the 1969 regulations as allowing either party to require arbitration but restricting them to arbitration. The entire scheme was established with the intent to exclude judicial determinations and have all disputes arising from the contract insurance to be determined by the Crop and Livestock Insurance Arbitration Board which was granted exclusive jurisdiction.

Crop Insurance schemes are vehicles to provide farmers with economical insurance to protect them from perils that might destroy their crops. These contracts are freely entered into by the farmers and there is no compulsion upon them to participate.

The legislature clearly contemplated a farmer would be prevented from proceeding to court when it passed the **Crop and Livestock Insurance Act.** This conclusion may be drawn from s. 7(2) of the **Act** which provides that "the decision of an arbitrator or of a Board of Arbitration under the Regulation is final". The contract of insurance ousts the jurisdiction of the courts. **National Construction Ltd. v. Tippins Inc.** [1991] N.S.J. No. 14 Action No. S.C.A. 02339 where our Court of Appeal considered a situation where a building contract included an arbitration clause. Clarke, C.J.N.S. for the Court dismissed an appeal from the determination of Judge S. J. MacDonald in Chambers, where Justice MacDonald determined the arbitration clause in a contract operated to exclude recourse to a mechanics' lien.

I conclude, therefore, that the adjudicator erred in law in determining that the option existed for original jurisdiction of the court.

In addition, I conclude that the adjudicator erred in not giving effect to the contract of insurance.

> " Arbitration
> 13 Where the Commission and the insured person fail to resolve any dispute respecting the adjustment of a loss under this contract, the matter shall be determined in accordance with the arbitration regulations."

RESULT - The adjudicator erred in concluding jurisdiction existed for the farmer to proceed

to court. The Nova Scotia Crop and Livestock Insurance Commission had a duty to provide a proof of loss form which it had failed to do, and therefore upon providing Mr. DeWitt with the proof of loss, he has sixty (60) days to complete and file the same after which the matter will proceed to arbitration.

J.