<u>SUPREME COURT OF NOVA SCOTIA</u>

Citation: *United Pentecostal Church of Nova Scotia v. Nova Scotia Power Incorporated*, 2020 NSSC 286

Date: 20200922
Docket: Hfx. No. 467795
Registry: Halifax

Between:

United Pentecostal Church of Nova Scotia

Applicant

v.

Nova Scotia Power Incorporated

Respondent

DECISION

Judge: The Honourable Justice John P. Bodurtha

Oral Decision: September 22, 2020, in Halifax, Nova Scotia

Written Decision: October 13, 2020

Counsel: Bruce T. MacIntosh, for the Applicant
Daniela Bassan and Jennifer Taylor, for the Respondent

By the Court (Orally):

Overview

[1] The Applicant, United Pentecostal Church of Nova Scotia ("UPC"), moves to amend its Notice of Application in Court to provide further particulars and include a claim for *de facto* expropriation.

[2] The Respondent, Nova Scotia Power Incorporated ("NSPI"), opposes the amendments and provides three standalone reasons for the motion to be dismissed:

(a) proportionality and jurisdictional grounds relying on the Supreme Court of Canada decision in *Hryniak v. Mauldin,* 2014 SCC 7;

(b) the amendments do not meet the test under *Civil Procedure Rule* ("CPR") 83.11; or

(c) the amendments are not properly made against NSPI and represent a collateral attack on provincial approvals.

[3] For the reasons that follow, I find the Applicant's motion must be dismissed under CPR 83.11 because the limitation period has expired for the new claim raised by the amendments and, under the *Limitation of Actions Act*, S.N.S., 2014, c. 35 ("LAA"), there is no basis to allow the claim where the limitation period has expired.

Facts

[4] The Applicant's original Notice was filed on August 31, 2017. It alleged that a lease from 1893 authorized the flooding of the Applicant's two properties identified by their respective property identification numbers ("PID") 00505792 and 00505800. The lease agreement expired in 1992, at which time the water levels were not restored.

[5] The causes of action in the original Notice were trespass and nuisance. The Applicant sought damages, a permanent injunction, and an order directing the Respondent to cease flooding the two properties.

[6] The Respondent filed a Notice of Contest on October 13, 2017 and an Amended Notice of Contest on April 4, 2018.

[7] On December 6, 2019, the Applicant served its Notice of Motion seeking to amend its original Notice and, on January 23, 2020, filed a copy of its proposed Amended Notice of Application in Court. In its proposed Amended Notice of Application in Court the Applicant raises the issue of "*de facto* expropriation." Copies of the original Notice and Amended Notice of Application in Court are attached hereto as Appendix "A".

Issue

[8] Should the amendments to the Applicant's Notice of Application in Court be allowed?

Analysis

[9] A Motion to Amend after the expiration of a limitation period depends on both of the following: a) the material facts supporting the cause are pleaded; and b) the amendment merely identifies, or better describes, the cause, see CPR 83.11(3) which reads as follows:

> Amendment by judge
>
> 83.11 (1) A judge may give permission to amend a court document at any time.
>
> (2) An amendment cannot be made that has the effect of joining a person as a party who cannot be joined under Rule 35 - Parties, including Rule 35.08(5) about the expiry of a limitation period.
>
> (3) A judge who is satisfied on both of the following may permit an amendment after the expiry of a limitation period, or extended limitation period, applicable to a cause of action:
>
> > (a) the material facts supporting the cause are pleaded;
> >
> > (b) the amendment merely identifies, or better describes, the cause.

[10] In the case before me, the question under CPR 83.11(3) after determining whether a limitation period has expired is twofold:

> (a) whether *de facto* expropriation is a new "claim" or "cause of action" in the Amended Notice that is supported by material facts from the original Notice, and

(b) whether the amendments "merely add further particulars" to the claim of trespass and nuisance already set out in the Original Notice (the claim of nuisance is no longer being pursued in the amended Notice of Application).

Do the Amendments Raise a New Claim or Cause of Action?

[11] The Amended Notice of Application raises "*de facto* expropriation." The Respondent argues that this is a new claim raised by the Applicant and that it is statute-barred.

[12] In *Annapolis Group Inc. v. Halifax Regional Municipality*, 2019 NSSC 341, Justice Chipman considered a motion for partial summary judgment. HRM argued that Annapolis's claim for *de facto* expropriation had no chance of success. Justice Chipman's findings are useful in determining whether *de facto* expropriation is a claim, or a declaration as argued by the Applicant. Justice Chipman confirmed that:

(a) **Claims** for *de facto* expropriation are relatively rare and restrictive in Canadian law. (para. 28)

(b) To have a chance for success, a claimant for *de facto* expropriation must be able to establish a regulatory action by a statutory authority. (para. 31)

(c) Annapolis's *de facto* expropriation **claim** raises genuine issues of material fact requiring a trial. (para. 44)

[emphasis added]

[13] I am not persuaded by the Applicant that *de facto* expropriation is not a claim but a declaration for the purposes of CPR 83.11. *De facto* expropriation is referred to as a claim in *Annapolis*, *supra*, *Alberta (Minister of Infrastructure) v. Nilsson*, 2002 ABCA 283, and *Nova Scotia (Attorney General) v. Mariner Real Estate Limited*, 1999 NSCA 98.

[14] In my opinion, the claim for *de facto* expropriation is a new and independent claim from the tort claim of trespass in the original Notice. *De facto* expropriation in and of itself is a separate claim and not a declaratory remedy as argued by the Applicant.

[15] CPR 83.11 requires the Court to determine whether the amendments raise a new claim or cause of action for which the material facts were not previously pleaded. The new claim of *de facto* expropriation has extensive amendments to the original pleading to the point that very little content remains from the original pleading (see Appendix A – Amended Notice of Application in Court and Appendix B – Notice of Application in Court). The Applicant argues that very little content remains from the original pleading because the Applicant has better described the claim in the amended pleading.

[16] I find the new claim of *de facto* expropriation introduces a new claim/cause of action that will require the Applicant to establish a regulatory action by a statutory authority. The new claim raises public law issues while the original claims in trespass and nuisance are of a private law nature. This new claim adds a new statutory scheme, the *Expropriation Act,* R.S.N.S., c. 156*,* to be considered at the hearing.

[17] There are new material facts. The Amended Notice describes different properties than those identified in the original Notice as the flooded lands. The two specific parcels of land identified by PID numbers in the Original Notice are crossed out and replaced with generic descriptions of "flooded" and "unflooded" lands at Miller Lake in the amended pleading. The Original Notice refers to 48 acres, while the amended pleading references 150 acres.

[18] The new claim adds the Province, through the Nova Scotia Department of the Environment, regarding the Fall River hydro-electric system approvals, and the Nova Scotia Utility and Review Board ("UARB"). The Amended Notice seeks new remedies such as an Order for *de facto* expropriation by this Court (liability) along with an Order for referral to another body, the UARB, if liability is established, for compensation (compensation).

[19] I find the Applicant's claim for *de facto* expropriation is a new claim and does more than merely identify or describe the cause of action, and the material facts supporting the new claim are not in the original Notice. I will next consider whether the new claim is statute-barred.

Is the New Claim Statute-Barred?

[20] The Applicant seeks "an order that the Respondent's continued and unauthorized overholding of a portion of the Applicant's property at Miller Lake

constitutes *de facto* expropriation, effective December 1, 1992." (see Amended Notice of Application in Court filed January 23, 2020).

[21] December 1, 1992 is the date when a 99-year lease between NSPI and the Applicant's predecessor-in-title expired, and when, the Applicant submits, the alleged act of *de facto* expropriation occurred. Therefore, the limitation period began to run on December 1, 1992.

[22] Using the Applicant's effective date of December 1, 1992, the claim would have become statute-barred as of December 1, 1998 (see s. 2(1)(e) of the former *Limitation of Actions Act*, R.S.N.S. 1989, c. 258). Alternatively, allowing the Applicant to use section 8(1)(a) of the LAA still provides a statute-barred date of September 1, 2017. The Applicant has provided no evidentiary basis for me to conclude that *de facto* expropriation can be "continuing" for the purposes of s. 8(3) of the LAA.

[23] Justice Chipman in *Dyack v. Lincoln*, 2017 NSSC 187, provides a discussion on the purpose of limitation periods that I adopt and provide for reference:

Purpose of Limitation Periods

> 27 In *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 (S.C.C.), at paras. 22-24, the Supreme Court of Canada identified three rationales that underlie limitations legislation. They have been described as the certainty, evidentiary and diligence rationales:
>
> > Statutes of limitations have long been said to be statutes of repose. ... The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations. ...
>
> The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim. ...
>
> Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion. ...
>
> 28 There are also economic and public interest reasons for limitations legislation:
>
> > People who provide goods and services may be adversely affected by the uncertainty of potential litigation. Economic consequences will directly flow. A potential defendant faced with possible liability of a magnitude unknown may be unable or unwilling to enter into other business transactions. Others may be unaware of a specific claim until many years

> after an event upon which the claim is based. The cost of maintaining records for many years and obtaining adequate liability insurance is ultimately passed on to the customer.[1]

29 Finally, there are judgmental reasons for limitation periods:

> If a claim is not adjudicated until many years after the events that give rise to it, different values and standards from those prevailing at the time the events occurred may be used in determining fault. Because of changes in cultural values, scientific knowledge, and societal interests, injustice may result. Can it be said that the conduct of the "reasonable person" as perceived by a court today would accord with the view taken by a judge of an earlier generation?[2]

30 Accordingly, limitations legislation serves many important purposes. Over the last two decades, Alberta, Saskatchewan, Ontario, New Brunswick and Nova Scotia have all reformed their limitations legislation to serve those purposes more effectively. Furthermore, in 2005, the Uniform Law Conference of Canada (ULCC) adopted the *Uniform Limitations Act*, a model uniform limitations statute based on the modernized legislation enacted in Alberta, Ontario and Saskatchewan.

31 Nova Scotia is the most recent province to overhaul its limitations legislation. In drafting the *Discussion Paper on Limitation of Actions Act* the Nova Scotia Department of Justice relied on the discussion papers and modernized legislation of other provinces, along with the ULCC's *Uniform Limitations Act*.[3] The *Limitation of Actions Act*, S.N.S. 2014, c. 35, came into force on September 1, 2015.

[24] Section 23 of the LAA contains the transition provisions for claims that occurred before September 1, 2015, the day the LAA came into force. The Application was commenced on August 31, 2017 nearly two years after the LAA came into force. Subsection 23(2) of the LAA says that subsection 23(3) applies to claims based on acts or omissions that took place before the effective date and in respect of which no proceeding has been commenced before the effective date. This is a claim being added by the Applicant to an existing proceeding. There has been no proceeding commenced in respect of the particular acts or omissions underlying the *de facto* expropriation claim. Subsection 23(3) reads as follows, with the relevant dates inserted:

> 23(3) Where a claim was discovered before the effective date [i.e, September 1, 2015], **the claim may not be brought** after the earlier of
>
> > (a) two years from the effective date [i.e. September 1, 2017]; and
> >
> > (b) the day on which the former limitation period expired or would have expired [i.e., December 1, 1998].

[emphasis added]

[25] It is agreed between the parties that the new claim for *de facto* expropriation is based on acts that took place before the effective date of the LAA, being September 1, 2015. The new claim relates to an event that took place on December 1, 1992. The Applicant commenced their proceeding on August 31, 2017. The Amended Notice, filed on January 23, 2020, raised for the first time the claim of *de facto* expropriation. I am of the view that the new claim is statute-barred by s. 23(3) of the LAA because it was not brought by the earlier of:

(a) September 1, 2017 (representing the end of the two-year transition period under the LAA); and

(b) December 1, 1998 (representing the expiry of the former limitation period of six years from December 1, 1992)

[26] The Applicant argues that the relevant provision under the LAA is section 22 which "governs the addition of expired claims to an existing proceeding where the amendment would not add a new defendant or change the capacity in which a defendant is sued.": *Dyack*, *supra*, at para. 47. However, in order for section 22 to apply, the limitation period at issue must be one "established by this Act", meaning the LAA. Section 22 reads as follows:

> 22 Notwithstanding **the expiry of the relevant limitation period established by this Act,** a claim may be added, through a new or amended pleading, to a proceeding previously commenced if the added claim is related to the conduct, transaction or events described in the original pleadings and if the added claim
>
> (a) is made by a party to the proceeding against another party to the proceeding and does not change the capacity in which either party sues or is sued;
>
> (b) adds or substitutes a defendant or changes the capacity in which a defendant is sued, but the defendant has received, before or within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits; or
>
> (c) adds or substitutes a claimant or changes the capacity in which a claimant sues, but the defendant has received, before or within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits, and the addition of the claim is necessary or desirable

> to ensure the effective determination or enforcement of the claims asserted or intended to be asserted in the original pleadings.
>
> *[emphasis added]*

[27] The words "established by this Act" must 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": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.

[28] This is a transition case that falls under section 23 of the LAA because the relevant acts occurred before September 1, 2015. There is no limitation period established by the LAA for the purposes of section 22. Reading those words with the "modern principle" to statutory interpretation, I find that section 23 governs transition cases but does not establish limitation periods; therefore, section 22 of the LAA does not apply to the Applicant's amended pleadings.

[29] I find further support for this interpretation by reviewing the table of contents for the LAA. Section 23 falls under the transitional provisions, consequential amendments and effective date portion and not under the parts dealing with general limitation periods, exceptions to the general limitation periods, or claims brought after expiry of limitation period. Although not determinative, it does provide some guidance as to what was in the mind of the drafters of the legislation.

[30] For the foregoing reasons, I would dismiss the Applicant's motion to amend its Notice of Application in Court. If I am incorrect in my interpretation that section 22 is not triggered in these circumstances, I would still dismiss the Application because the Applicant's new claim of *de facto* expropriation is not sufficiently "related to the conduct, transaction or events described in the original pleadings."

[31] The new pleading is much broader. In determining whether to allow the new amendments, "the key is whether the proposed amendments simply elaborate on existing allegations or whether they broaden the scope of the Plaintiff's claims beyond the parameters of the original pleadings." (see *513320 Alberta Inc. v. St. Jean*, 2015 ABQB 826, at para. 38, cited in *Dyack*, *supra*, at para. 54).

[32] Justice Wood (as he then was) in *Krishna v. Gauthier*, 2018 NSSC 305, considered whether the proposed amendments should be allowed in a personal injury case. In the original claim, the Plaintiff sued the driver and Adecco, their mutual employer, for personal injuries suffered by the Plaintiff in a motor vehicle accident. The proposed amendments related to "the manner in which Adecco dealt with her alleged disabilities and their impact on her employment." (See para. 14).

[33] In refusing the amendments based on CPR 83.11 and section 22 of the LAA, Justice Wood (as he then was) said at paras. 16 and 17:

> 16 In this case the material facts supporting the new allegations are not found in the existing pleading, nor could it be said that the amendment merely better describes the cause of action. As a result, neither of these requirements are met and the proposed amendment cannot be authorized under this Rule.
>
> 17 For the above reasons I am satisfied that the limitation period has expired in relation to the claims to be included in the proposed amendment. There is no real connection between the new allegations and the original claim for personal injuries arising out of the motor vehicle accident. Amendment is not available under *Rule 83.11(3)*. For all of these reasons, the plaintiff's motion for a leave to amend is dismissed.

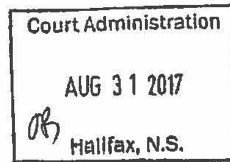
[34] As mentioned above, I find that the amended pleadings do not meet the requirements of CPR 83.11(3). The new amended pleadings raise new material facts, new statutory schemes, new remedies, new parties, and new land. The material facts supporting the new claim for *de facto* expropriation are not found in the original pleading, nor can I find that the amendment merely better describes the original causes of action being trespass and nuisance.

Conclusion

[35] The Applicant's motion to amend its Application in Court is dismissed with costs to the Respondent because the amendments raise a new claim under CPR 83.11 for which the limitation period has expired and there is no basis to allow the claim post-expiry under the LAA. If the parties are unable to agree to costs, I will receive submissions within 30 days of today's date. I would ask Counsel for the Respondent to prepare the Order.

Bodurtha, J.

APPENDIX "A"



2017 Hfx No. 467795

SUPREME COURT OF NOVA SCOTIA

BETWEEN:

UNITED PENTECOSTAL CHURCH OF NOVA SCOTIA

Applicant

\- and -

NOVA SCOTIA POWER INCORPORATED

Respondent

Notice of Application in Court

To: Nova Scotia Power Inc.

The applicant requests an order against you
The applicant is applying to the court for an order:

1. Damages resulting from the continuing trespass upon the Applicant's properties;

2. A permanent injunction prohibiting the Respondent from flooding the Applicant's properties;

3. An order directing the Respondent to cease flooding the Applicant's properties;

4. Costs; and

5. Such further and other relief as this Honourable Court may deem appropriate in the circumstances.

The applicant started this application by filing this notice on the date certified by the Prothonotary.

Grounds for the order
The applicant is applying for the order on the following grounds:

1. The Applicant, United Pentecostal Church of Nova Scotia, is a body corporate, with its head office in St. Stephen, New Brunswick and at all material times is the owner of two properties located on Miller Lake, Fall River, bearing property

identification numbers 00505792 and 00505800 (the "Applicant's Properties").

2. The Respondent, Nova Scotia Power Inc. is a body corporate, with its head office in Halifax, Nova Scotia and at all material times is the owner and operator of the Fall River Hydro Electric System (the "Dam").

3. A Flowage Rights Agreement (the "Agreement") was executed on December 1, 1893 authorizing the flooding of the Applicant's Properties.

4. The Agreement expired on December 1, 1992.

5. The water levels were not restored to their original levels upon the expiration of the Agreement.

6. Since December 1, 1992 the Respondent has intentionally and continuously trespassed on the Applicant's land by operating the Dam to store water in Miller Lake to generate electrical power. The Respondent's actions have caused approximately 48 acres of the Applicant's Properties to become submerged under water.

7. The Applicant's submit that the water which now covers part of the Applicant's Properties constitutes a continuing trespass and nuisance.

Witnesses for applicant

The applicant expects to file affidavits from the following witnesses, dealing with the following subjects:

Name of witness	*Subject*
Rev. George Luke,II	All matters at issue in this application
Expert	Valuation of damages
Further witnesses	History of the flooding of the Applicant's lands since 1992

Motion for directions and date

At11:00 a.m. on Wednesday, October 4, 2017, the applicant will appear before a judge at the Law Courts 1815 Upper Water Street, Halifax, Nova Scotia to make a motion for an order giving directions and appointing a time, date, and place for the hearing. The judge may provide directions in your absence, if you or your counsel fail to attend.

Affidavit on motion for directions
The applicant files the affidavit of Stacey L. England, sworn on August 30, 2017, as evidence on the motion for directions. A copy of the affidavit is delivered to you with this notice.

You may participate
You may file with the court a notice of contest, and any affidavit for the motion for directions, no more than fifteen days after this notice is delivered to you or you are otherwise notified of the application. Filing the notice of contest entitles you to notice of further steps in the application.

Possible final order against you
The court may grant a final order on the application without further notice to you if you fail to file a notice of contest, or if you or your counsel fail to appear at the time, date, and place for the motion for directions.

Filing and delivering documents

Any documents you file with the court must be filed at the office of the Prothonotary 1815 Upper Water Street, Halifax, NS B3J 1S7, Phone: (902) 424-8962, Fax: (902) 424-0524.

When you file a document you must immediately deliver a copy of it to the applicant and each other party entitled to notice, unless the document is part of an ex parte motion, the parties agree delivery is not required, or a judge orders it is not required.

Contact information
The applicant designates the following address:

Stacey L. England, Burchell MacDougall, P.O. Box 1128 (710 Prince Street), Truro NS B2N 5H1, Phone (902) 843-4248, Fax: (866) 857-6078.

Documents delivered to this address are considered received by the applicant on delivery.

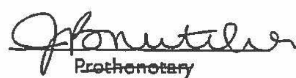
Further contact information is available from the Prothonotary.

Signature
Signed August 30, 2017

Stacey L. England
Counsel for the Applicant

Prothonotary's certificate

I certify that this notice of application was filed with the court on August 31, 2017.

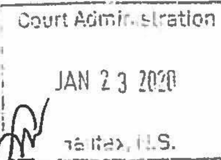


~~Prothonotary~~

JESSICA BOUTILIER
Deputy Prothonotary

2017 Hfx No. 467795

SUPREME COURT OF NOVA SCOTIA



BETWEEN:

UNITED PENTECOSTAL CHURCH OF NOVA SCOTIA

Applicant

- and -

NOVA SCOTIA POWER INCORPORATED

Respondent

Amended Notice of Application in Court

(Amended: February 25, 2020)

To: Nova Scotia Power Inc.

The applicant requests an order against you
The applicant is applying to the court for ~~an order~~:

1. An order that the Respondent's continued and unauthorized overholding of a portion of the Applicant's property at Miller Lake constitutes *de facto* expropriation, effective December 1, 1992;

2. Upon such adjudication of (1) above, an order staying these proceedings and referring this file to the Nova Scotia Utility & Review Board for adjudication of compensation, pursuant to the provisions of the Nova Scotia *Expropriation Act*;

3. Upon such referral, an order staying the alternative remedies of trespass, conversion and permanent injunction described in paragraph (4) below;

4. ~~(2)~~ Alternatively, if *de facto* expropriation is not referred to the Nova Scotia Utility & Review Board for adjudication, then:

   a. ~~1.~~An order assessing damages resulting from the acts of conversion and continuing trespass upon the Applicant's properties; plus

b. An order directing the Respondent to forthwith cease and desist flooding of the Applicant's properties; and

c. An order granting a permanent injunction prohibiting the Respondent from continued flooding of the Applicant's properties, upon such terms and conditions as this Honourable Court shall determine.

2.A permanent injunction prohibiting the Respondent from flooding the Applicant's properties;

3.An order directing the Respondent to cease flooding the Applicant's properties;

5. 4.Costs; and

6. 5.Such further and other relief as this Honourable Court may deem appropriate in the circumstances.

The Applicant started this application by filing its Notice of Application certified by the Prothonotary as of August 31, 2017 this notice on the date certified by the Prothonotary.

Grounds for the order
The applicant is applying for the orders on the following grounds:

1. The Applicant, United Pentecostal Church of Nova Scotia, is a statutory body corporate incorporated under the laws of the Province of Nova Scotia, with its head office in St. Stephen, New Brunswick and at all material times is has been and remains the owner of two properties located on, around, under or about Miller Lake, Fall River, Nova Scotia, as more fully described in Deed dated May 24, 1963 from Nelson Miller to United Pentecostal Church and in a further Deed dated November 4, 1966 (commonly known as the 150 acre lot) from Nelson Miller to United Pentecostal Church, both of which Deeds have been migrated in the name of the Applicant and are a matter of public record. Excluding therefrom however a small island consisting of 0.5 acres more or less, conveyed to Her Majesty the Queen by Certificate of Purchase dated April 10, 1979 and registered at the Registry of Deeds Office in Halifax in Book 3594 at Page 462. And further excluding those conveyances out of the original metes and bounds description of the aforedescribed 150 acre lot as more fully appears within the migration records of the Applicant's properties, particulars of which shall be provided by Abstract of Title and certification of Catherine S. Walker, Q.C. bearing property identification numbers 00505792 and 00505800 (the "Applicant's Properties").

2. The Respondent, Nova Scotia Power Inc. is a body corporate, with its head office in Halifax, Nova Scotia and at all material times is the owner and operator of the Fall River Hydro Electric Dam System (the "Dam"), which Dam causes material portions of the Applicant's lands to be flooded (the "Flooded Lands").

3. A 99 year lease signed by the Applicant's predecessor in title ~~Flowage Rights Agreement (the "Agreement")~~ was executed on December 1, 1893, authorizing the flooding of a portion of the Applicant's 150 acre lot by Benjamin Wilson, and his successors in title, including the Respondent. ~~Properties~~.

4. The 99 year lease expired on December 1, 1992.

5. At all material times from the expiry of the Lease to the commencement of this Application, the Respondent acknowledged in various written and oral communications with the Applicant the aforedescribed property ownership of the Applicant, without any claim or colour of right or of prescription. The Applicant states that the first assertion of any colour of right by the Respondent occurred subsequent to the commencement of this Application, in the notice of contest filed herein.

6. At all material times from the expiry of the Lease to the commencement of this Application and thereafter, the Applicant has claimed and sought to exercise full right of ownership over the lands described herein, including the aforedescribed flooded lands. At no material time did the Applicant acquiesce in or grant permission to the Respondent to continue to flood the Applicant's property without consent or acknowledgment of compensation. To the contrary, at all material times and in all communications with the Respondent, the Applicant insisted upon either just compensation or return of its property to an unflooded state.

7. From or about October 1983 or earlier, to commencement of these proceedings, the Respondent always acknowledged the full right of ownership of the Applicant and repeatedly sought consent of the Applicant for a Flowage Rights Agreement on unjust terms and conditions that the Applicant refused to accept.

8. At various times and under various circumstances during such timeline, the Respondent insisted that the Applicant must sign a perpetual Flowage Rights Agreement without compensation, without depths of flooding parameters and upon terms that required the Applicant to indemnify the Respondent for the granting of such perpetual flooding rights. In all such approaches, the Applicant refused such demands and instead sought either just compensation or return of its property to an unflooded state. At all material times during such exchanges between the Applicant and the

Respondent with respect to such a perpetual easement, approximately 50 acres of the Applicant's properties remained submerged under water without the consent of the Applicant.

9. On one or more occasions, the Respondent threatened to advise adjacent neighbours of the Applicant on Miller Lake that the Applicant was to blame for the threatened significant lowering of the water level at Miller Lake.

10. Pursuant to the provisions of the *Nova Scotia Power Privatization Act*, the Respondent is an authorized expropriating authority. The Applicant states that the Respondent has *de facto* expropriated its flooded property without compensation and without compliance with the provisions of the Expropriation Act, as required by Section 19 of the *Nova Scotia Power Privatization Act*.

11. The Respondent by its continued flooding has *de facto* confiscated all reasonable private uses of the Applicant's lands. In doing so, the Respondent acts pursuant to the authority granted it by successive Ministerial Approvals issued by the Minister of Environment for operation of the Miller Lake Hydro Dam. While the Applicant has suffered confiscation of all reasonable uses and rights and interests in respect of the flooded lands, the Respondent has simultaneously acquired the beneficial use and enjoyment of the flooded lands. Such loss of property rights in the flooded lands constitutes *de facto* expropriation, entitling the Applicant to compensation pursuant to the provisions of the *Expropriation Act*, R.S.N.S., 1989, c.11, as amended.

12. The water levels of Miller Lake were not restored to their original levels upon the expiration of the 99 year lease, ~~Agreement~~ but instead the Respondent continued to artificially flood Miller Lake at levels which have caused approximately 48- 50 acres of the Applicant's properties to remain submerged under water.

13. In addition, the continued trespass and acts of conversion by the Respondent have diminished and adversely impacted the use of the remaining unflooded lands of the Applicant, constituting injurious affection to those adjacent lands owned by the Applicant, thereby entitling the Applicant to compensation for such injurious affection, pursuant to the *Expropriation Act*.

~~14. Since December 1, 1992 the Respondent has intentionally and continuously trespassed on the Applicant's land by operating the Dam to store water in Miller Lake to generate electrical power. The Respondent's actions have caused approximately 48 acres of the Applicant's Properties to become submerged under water.~~

15. In the event this Court finds against the motion for *de facto* expropriation, T the Applicant's submits that the continued flooding of the Applicant's properties constitutes a continuing trespass and acts of conversion, for which compensation is due and payable and for which permanent injunctive relief is sought, directing removal of the flooding waters from the Applicant's properties on terms and conditions to be determined by this Honourable Court.

Witnesses for applicant
The applicant expects to file affidavits from the following witnesses, dealing with the following subjects:

Name of witness	*Subject*
Rev. George Luke,II; Rev. Dean Dickinson; Rev. John Mean	Matters at issue in this application
Expert: Allan J. Owen, Nova Scotia Land Surveyor Catherine S. Walker, Q.C.	Opinion evidence to NSUARB re: acreage of flooded lands of the Applicant, for purposes of valuation of damages. Abstract of Title and certification re: Applicant's properties
Further witnesses	History of the flooding of the Applicant's lands since 1992 None

Motion for directions and date
On February 25, 2020, the Applicant shall seek amendment of the Application herein to allow for the amendments herein, including the claim of *de facto* expropriation, following which the Applicant shall request a scheduling of a Motion for Directions, including *inter alia*, an early adjudication of *de facto* expropriation. At11:00 a.m. on Wednesday, October 4, 2017, The Applicant will appear before a judge at the Law Courts 1815 Upper Water Street, Halifax, Nova Scotia to make a motion for an order giving directions and appointing a time, date, and place for the hearing of all matters pertaining to this Application. The judge may provide directions in your absence, if you or your counsel fail to attend.

Affidavit on motion for directions
The applicant has fileds the affidavit of Stacey L. England, sworn on August 30, 2017, as evidence on the motion for directions. A copy of the affidavit has been

delivered. The Applicant shall seek further directions from this Honourable Court following presentation of the motion to amend.

You may participate
You may file with the court an amended notice of contest, and any affidavit in support thereof, ~~for the motion for directions~~ no more than fifteen days after this notice is delivered to you or you are otherwise notified of the application. Filing ~~the~~ your notice of contest entitles you to notice of further steps in the application.

Possible final order against you
The court may grant a final order on the application without further notice to you if you fail to file a notice of contest, or if you or your counsel fail to appear at the time, date, and place for the motion for directions.

Filing and delivering documents

Any documents you file with the court must be filed at the office of the Prothonotary 1815 Upper Water Street, Halifax, NS B3J 1S7, Phone: (902) 424-8962, Fax: (902) 424-0524.

When you file a document you must immediately deliver a copy of it to the applicant and each other party entitled to notice, unless the document is part of an ex parte motion, the parties agree delivery is not required, or a judge orders it is not required.

Contact information
The applicant designates the following address:

~~Stacey L. England, Burchell MacDougall, P.O. Box 1128 (710 Prince Street), Truro NS B2N 5H1, Phone (902) 843 4248, Fax: (866) 857 6078.~~

c/o Bruce MacIntosh, Q.C.
MacIntosh, MacDonnell & MacDonald
610 East River Road, Suite 260
New Glasgow NS B2H 3S2
Tel. (902) 752-8441; Fax. (902) 752-7810
Email: bmacintosh@macmacmac.ns.ca

Documents delivered to this address are considered received by the applicant on delivery.

Further contact information is available from the Prothonotary.

Signature
Original Signed August 30, 2017.

Amended Notice Signed January 22, 2020.

BRUCE MACINTOSH
Counsel for the Applicant

CONSENTED AS TO FORM:

DANIELA BASSAN
Counsel for the Respondent

Prothonotary's certificate

I certify that this Amended notice of application was filed with the court on , 2020.

PROTHONOTARY