

**CASE NO.**

**VOL. NO.**

**PAGE**

Cite as: Nova Scotia (Attorney General) v. Mariner Real Estate Ltd., 1999 NSCA 98

ATTORNEY GENERAL OF  
NOVA SCOTIA, representing  
Her Majesty the Queen in Right  
of Nova Scotia

MARINER REAL ESTATE LIMITED,  
2102660 NOVA SCOTIA LIMITED,  
and LAMONT MOSHER and CAROLE  
ANNE MOSHER

- and -

(Appellant)

(Respondents)

C.A. 152833

Halifax, N.S.

CROMWELL, J.A.  
HALLETT, J.A.

(Concurring by Separate Reasons)

**APPEAL HEARD:**

May 13, 1999

**JUDGMENT DELIVERED:**

August 18, 1999

**SUBJECT:**

**Beaches Act, R.S.N.S. 1989, c. 32 - Expropriation Act, R.S.N.S. 1989, c. 54 - whether designation under Beaches Act is an expropriation**

**SUMMARY:**

The respondents' lands from the highwater mark landward were designated as a beach under the **Beaches Act**. The **Act**, and Regulations made under it, impose stringent land use limitations on designated lands. Some activities are prohibited absolutely while others, including building on the lands, are allowed only if a ministerial permit is granted. The respondents, none of whom had been granted building permits prior to the designation, applied to build single family residences with full concrete foundations on three of their lots. In considering these applications, the Minister had before him an environmental report indicating that construction of houses with traditional concrete basements was damaging to the dune system. The applications were refused. With respect to the other of the respondents' lots, the evidence was that construction of residences would not be permitted quite apart from the designation on two of them and that no application for a permit to build was made with respect to a third. The evidence about the actual use of the property by the respondents indicated that it was used for traditional recreational purposes which could be authorized by permit under the **Act** and Regulations. No permits, with respect to such recreational uses, had

been applied for or refused.

The respondents brought an action for a declaration that their lands had been expropriated and that they were entitled to compensation under the **Expropriation Act**. The trial judge granted the declaration holding that the respondents had established both the loss of an interest in land and an acquisition of an interest in land by the Province. He held that the respondents' loss was established by evidence that there had been a virtually complete loss of the economic value of their lands and a taking away of virtually all of the "bundle of rights" of ownership. The acquisition by the Province was established, in the judge's view, because the designation enhanced the value of the Crown land from the highwater mark seaward.

The Crown appealed.

**ISSUE:**

Did the trial judge err in finding:

- (i) that the respondents had been deprived of an interest in land within the meaning of the **Expropriation Act**?
- (ii) that the Province had acquired an interest in land within the meaning of the **Expropriation Act**?

**RESULT:**

Appeal allowed and action dismissed. There was no challenge to the legality of the designation or the exercise of discretion which that designation conferred on the Minister. The sole issue in the case is whether the respondents' lands had, in fact, although not in form, been expropriated within the meaning of the **Expropriation Act**. To bring themselves within the compensation provisions of the **Expropriation Act**, the respondents had the burden of proving that they had lost all reasonable private uses of the lands in question as a result, either of the designation or as a result of the designation coupled with the regulation flowing from it. In considering the effect of regulation, the actual exercise of the regulatory authority, as opposed to its potential, must be examined.

The loss of economic value is not the loss of an interest in land within the meaning of the **Expropriation Act**. The designation, on its own, does not constitute an expropriation. The designation subjects the land to stringent regulation but it is the manner in which that regulatory authority is actually exercised which must be considered.

The respondents established they had been denied permits to build

houses with standard concrete foundations on three of the lots. Neither the respondents nor the Province appear to have explored the possibility that development specifically designed in a way consistent with protection of the dunes might occur. With respect to three of the respondents' lots, there had been no application to build and with respect to two of these, residential construction was probably impossible, quite apart from the designation. Other reasonable or traditional uses of the dune property may be allowed by permit but no applications for permits relating to these other uses had been made, let alone refused. In short, there was an absence of evidence relating to environmentally appropriate development plans on the land in question and an absence of evidence of refusal of permission for the respondents to engage in other reasonable or traditional uses. They, accordingly, failed to establish that virtually all incidents of ownership had, by the effect of the **Act** and Regulations, been taken away.

There was no acquisition of land by the Province. In general, the enhancement of value of public land is not the acquisition of an interest in land within the meaning of the **Expropriation Act**. There was no evidence that the economic value of the Crown's land was enhanced. Even if its value could be considered to have been enhanced in some other sense, such enhancement is not an acquisition of land for the purposes of the **Expropriation Act**.

**This information sheet does not form part of the court's decision. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 56 pages.**