**NOVA SCOTIA COURT OF APPEAL**
**Citation:** MacIsaac v. Antigonish (County), 2009 NSCA 125

**Date:** 20091208
**Docket:** CA 312674
**Registry:** Halifax

**Between:**

M. Teresa MacIsaac

Appellant

v.

Municipality of the County of Antigonish,
Attorney General of Nova Scotia, and
Nova Scotia Utility and Review Board

Respondents

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| **Judges:** | Saunders, Oland and Hamilton, JJ.A. |
| **Appeal Heard:** | November 23, 2009, in Halifax, Nova Scotia |
| **Held:** | Appeal dismissed |
| **Counsel:** | Daniel J. MacIsaac, for the appellant<br>Donald L. Macdonald, for the respondent Municipality of the County of Antigonish |

**Reasons for judgment**:

[1] This is an appeal from the June 4, 2009 decision of the Nova Scotia Utility and Review Board ("Board"), 2009 NSUARB 83, dealing with the amount of costs payable to the appellant, M. Teresa MacIsaac ("Dr. MacIsaac"), in connection with the expropriation of a portion of her land by the respondent, the Municipality of the County of Antigonish ("Municipality").

[2] The facts are fully set out in the Board's decision. Briefly, the Municipality expropriated Dr. MacIsaac's land in August 2002 after negotiations to purchase it failed. In October 2002 the Municipality made an offer to Dr. MacIsaac in the amount of $47,000 as full compensation for her land. This amount did not include any amount for costs. Dr. MacIsaac rejected this offer. In November 2002 the Municipality paid her $35,250, which was 75 percent of the offered amount, as required by s.16(2) of the **Expropriation Act**, R.S.N.S. 1989, c. 156. In March 2003 Dr. MacIsaac obtained an appraisal which valued the expropriated land at $79,000. A copy of the appraisal was filed in June 2003.

[3] Later in June 2003 the Municipality made a further written offer to Dr. MacIsaac. This offer, which is central to this costs appeal, read:

> My client has reviewed the appraisal you have submitted, and has instructed me to offer Ms. MacIsaac (subject to the proviso set out below) the sum of $34,750 which, with the $35,250 already paid in November 2002, would constitute a total compensation of $70,000. **That figure is intended to be all-inclusive.**
>
> **This offer is subject to approval by the Province, which is involved in funding the road.** I look forward to hearing from you.
>
> (Emphasis added)

Dr. MacIsaac refused this offer.

[4] With the parties unable to reach agreement, the matter proceeded to the Board for a determination of the amount of compensation payable to Dr. MacIsaac. This did not include a determination of the amount of costs payable to her. Following a hearing in December 2003, the Board determined in March 2004 that

she was entitled to compensation of $53,100 for her land. Dr. MacIsaac did not appeal this decision of the Board.

[5] The record suggests that Dr. MacIsaac claimed costs with respect to the expropriation in April 2006 on the basis she was entitled to reimbursement for all costs associated with the expropriation regardless of when they were incurred. The Municipality appears to have taken the position that the amount of costs she was entitled to depended on whether the $53,100 compensation awarded by the Board in March 2004, together with the costs she had incurred to the date of the June 2003 offer, was less than or greater than the $70,000 offered in the June 2003 offer. The resolution of these issues were referred to the Board and resulted in the decision under appeal.

[6] In its costs decision dated June 4, 2009, the Board concluded in paragraph 52 that the $70,000 thus offered "was intended to be a lump-sum figure, in full compensation for all property interest which Dr. MacIsaac lost as a result of the expropriation, together with all costs". That finding has not been challenged on appeal.

[7] The Board held, among other things, that the June 2003 offer was an offer to settle under s. 52 of the **Act.** The Board accepted the Municipality's position that the amount of costs payable to Dr. MacIsaac depended on whether the $53,100 compensation awarded by the Board in March 2004, together with the costs Dr. MacIsaac had incurred to the date of the June 2003 offer, was less than or greater than the $70,000 offered in the June 2003 offer:

> [70] In the result, the Board finds that the June 13, 2003 offer of $70,000 was a valid Offer of Settlement. This means that Dr. MacIsaac will only be entitled to costs incurred after the June 13, 2003 letter if the $70,000 offered in the letter is less than the total of the compensation awarded by the Board, $53,100, and the costs incurred as of June 13th.

[8] In her submissions to the Board and on appeal in this court, Dr. MacIsaac argues that the June 2003 offer does not amount to an offer to settle under s. 52 of the **Act**.

[9] Section 52 of the **Act** provides:

> 52 (1) In this Section, "offer to settle" means a written offer of an amount in full compensation for land expropriated or for injurious affection caused to an owner, or for both, made by an expropriating authority to the owner at least fourteen days prior to the date of a hearing by the Board that is held to determine the amount of the compensation.
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> (2) Subject to subsection (5), an owner whose interest in land is expropriated or injuriously affected is entitled to be paid the reasonable costs necessarily incurred by the owner for the purpose of asserting a claim for compensation.
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> (3) Subject to subsection (5), where an expropriating authority and an owner agree on the amount of compensation, but do not agree on the amount of costs to be paid, the costs to be paid to the owner shall be determined by the Board.
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> (4) Where the compensation awarded to an owner by the Board is greater than the amount offered in the offer to settle, the expropriating authority shall pay to the owner costs as determined by the Board.
>
> (5) Where the compensation awarded to an owner by the Board is equal to or less than the amount offered in the offer to settle, the owner is entitled to costs, as determined by the Board, to the date of service of the offer to settle but the owner shall bear the owners own costs that are incurred after that date.
>
> . . .
>
> (8) In a determination of costs pursuant to subsection (2), (3), (4) or (5), the following shall be taken into account:
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> (a) the number and complexity of the issues;
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> (b) the conduct of any party that tended to shorten or unnecessarily lengthen the duration of the proceeding;
>
> (c) any step in the proceeding that was improper, vexatious, prolix or unnecessary;
>
> (d) the reasonableness and relevance of appraisal and other expert reports, including the cost of the reports;

> (e) the skill, labour and responsibility involved;
>
> (f) the amount of the award or settlement;
>
> (g) any other matter relevant to the question of costs. . . .

[10] Dr. MacIsaac argued that the Board erred when it found that the June 2003 offer was governed by s. 52 because: first, the June 2003 offer was conditional (it was "subject to approval by the Province") and therefore should not be considered an offer to settle under s. 52; and second, offers to settle cannot include costs as had the June 2003 offer.

[11] On the facts of this case, it is not necessary to decide whether the appropriate standard of review is reasonableness or correctness, as I am satisfied the Board did not err whichever standard of review is applied. Given the narrow record in this case and the limited submissions of counsel on the subject, I would prefer to leave it to another case to decide which is the proper standard of review.

[12] I am satisfied the Board did not err in rejecting the appellant's argument that the condition in the June 2003 offer, making it subject to the approval of the Province, ousted the application of s. 52. The Board stated:

> [47] On this issue, the Board in general rejects the arguments made by Counsel for Dr. MacIsaac. While it can be argued that nothing in the provisions of Section 52 refers to the possibility of an offer being conditional upon approval by the Provincial Government in this way, it is also true (in the Board's opinion) that nothing in those provisions prohibits it (expressly or even impliedly) from being so.
>
> [48] Moreover, the Board (using the purposive approach) considers the new costs provisions to have as an intention the encouragement of fair settlements, reached as expeditiously as possible. The evidence before the Board points to the school, and the access road which the Municipality expropriated for it, as being a program in which both the Municipality and the Provincial Government shared responsibilities. In this instance, the Municipality handled certain tasks, such as negotiation and the actual expropriation itself, while Provincial responsibilities included such things as being a source of funding for the overall project. In the view of the Board, such shared-cost programs, with different levels of government handling different functions in a cooperative way, in order to achieve

> an agreed-upon societal goal (such as public education), are not only common, but essential.
>
> [49] As the Board has already noted, such earlier cases as *Dell*, and the more recent Court of Appeal decision in *Superior Propane*, refer to the purposive interpretation of expropriation legislation. The purposive approach, while found in the common law, is also reflected in certain provisions of the *Interpretation Act*: see, for example, Section 9 (5), which directs that interpretation of legislation consider, among other things, the mischief to be remedied, the object to be obtained, and the consequences of a particular interpretation.
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> [50] To accept the interpretation urged upon the Board by Counsel for Dr. MacIsaac would mean that, in many instances, cooperative activities by different levels of government with respect to such matters as negotiating a settlement price, could be significantly impaired. The Board sees this as inconsistent with the attainment of a principal object of the legislation, which, as the Board has already noted, it sees as the encouragement of fair and expeditious settlements.

[13] I am also satisfied the Board did not err in finding that all-inclusive offers, such as the June 2003 offer covering full compensation for the value of the expropriated property interests as well as costs, can be offers to settle within s. 52. The Board stated:

> [53] Counsel for Dr. MacIsaac['s] . . . principal argument is that none of the provisions in the Act (including Section 52 (1)), make any reference to the possibility of costs or interest being included in an Offer of Settlement.
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> [54] In reply, Counsel for the Municipality says that none of the *Act's* provisions are inconsistent with the view that an offer can indeed be all inclusive.
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> [55] Adopting the interpretation of Counsel for Dr. MacIsaac would mean that even if the parties wanted it, no all-inclusive settlements (which, among other things, avoid having to itemize, and agree upon, or litigate, particular cost items) could be done. In the view of the Board, an important purpose of the *Act* is to encourage settlement. The interpretation which Counsel for Dr. MacIsaac urges the Board to accept would not, in the opinion of the Board, be at all consistent with such a purpose.
>
> [56] Following the purposive analysis, and indeed adopting the approach which the Board has already used in relation to Issue 2, the Board finds that a conditional offer (in the particular circumstances of this proceeding) of the type made by the Municipality, is an Offer of Settlement within the meaning of

> Section 52. The fact that an offer is all-inclusive does not, in and of itself, mean that it cannot be an Offer of Settlement.

[14] Section 12 of the **Act** also appears to support the Board's conclusion. It specifically authorizes expropriating authorities to form agreements with land owners which **include** costs:

> 12 A statutory authority has the authority to make and form an agreement with an owner in respect of any claim of the owner under this Act, including any costs of the owner.

[15] In order to conclude such all inclusive agreements, it is logical to suppose that offers which are said to include costs may be made and would be governed by s. 52.

[16] For the foregoing reasons, I would dismiss the appeal without costs, as none were requested, and remit the matter to the Board so that costs, if any, may be determined in accordance with the Board's decision.

Hamilton, J.A.

Concurring:

Saunders, J.A.

Oland, J.A.