



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Lynch v. St. John's (City)*, 2019 NLCA 30

Date: May 16, 2019

Docket Number: 201801H0097

BETWEEN:

WILLIS LYNCH, WALLACE LYNCH,
COLIN LYNCH, WINFRED LYNCH AND
REGINALD LYNCH

APPELLANTS

AND:

CITY OF ST. JOHN'S

RESPONDENT

AND:

BOARD OF COMMISSIONERS OF
PUBLIC UTILITIES

INTENDED INTERVENOR

Coram: Welsh J.A.

Appealed From: Board of Commissioners of Public Utilities

Application Heard: May 14, 2019

Decision Rendered: May 16, 2019

Counsel for the Appellant: J. Alexander Templeton

Counsel for the Respondent: Daniel Glover

Counsel for the Intended Intervenor: Peter A. O'Flaherty Q.C.

Welsh J.A.:

[1] This is an application by the Board of Commissioners of Public Utilities for leave to intervene in this appeal, which involves a dispute regarding compensation payable by the City of St. John's for the expropriation of land that was owned by the Lynches. The City consents to the application which is opposed by the Lynches.

BACKGROUND

[2] The Board's interest in this appeal arises from the fixing of compensation for expropriated land. Section 19(1) of the *Expropriation Act*, RSNL 1990, c. E-19, provides:

Where

(a) the minister and the owner of land expropriated ... cannot agree on the amount of compensation to be paid for the expropriated land ...

the amount of compensation to be paid shall be fixed by the board.

[3] An amount of compensation ordered by the Board may be appealed to this Court pursuant to section 32(5) of the *Expropriation Act*:

The minister or an owner of land that has been expropriated may, within 30 days after the date of an award, give to the other party notice of an appeal to the Court of Appeal against the findings of the board upon a question of law or fact in connection with the expropriation or upon the question of the amount of compensation awarded by the board.

[4] In this case, the Board made an order for an interim payment of \$105,000, being the amount of compensation offered by the City, to be paid to the Lynches pending determination of the final amount of compensation for the land. The basis for the Lynches' appeal is the Board's denial of an award for interest, litigation costs, and compensation claim costs at this interim stage of the proceedings.

[5] Rule 38 of the *Court of Appeal Rules* provides for an application to intervene in an appeal:

(1) A person who did not participate in the court appealed from may apply to be added as an intervenor for purposes of the appeal.

(2) The application shall state the intervenor's interest in the appeal, explain the failure to apply to intervene in the court appealed from, and indicate the position the intervenor intends to take on the appeal.

(3) In addition to the factors set out in subsection (2), the Court may consider any relevant factors, including whether intervention would delay or prejudice adjudication of the rights of the parties and whether the record of the court appealed from is sufficient for purposes of the intervention.

(4) The Court may define or limit the scope of participation by an intervenor in an appeal.

[6] In applying to intervene in this appeal, the Board states that it “does not assert an interest in and will not take any position on the merits of the within appeal.” Rather, referencing its “unique role” in addressing issues that involve “a number of subject matter areas”:

... The Board expects that it can make useful submissions and be of assistance to this Honourable Court by providing submissions on the nature and sources of the Board's jurisdiction in relation to expropriation proceedings in the province, by providing an explanation of the existing practices and procedures of the Board relating to interim applications for payment of costs and expenses, by providing submissions on the standard of review of decisions of the Board, and by providing an explanation of the record if required.

[7] The focus of the Board's interest in intervening relates to the extent to which appeals of interim orders may impact the Board in the performance of its statutory mandate. As an intervenor, the Board proposes to make submissions based on statutory interpretation supporting the conclusion that the *Expropriation Act* does not authorize an appeal of an interim order with respect to an award for interest, litigation costs, and compensation claim costs.

ANALYSIS

Whether the Board Should be Granted Intervenor Status

[8] Intervention in an appeal is addressed in rule 38 of the *Court of Appeal Rules*. The rule is discussed in detail in *Weir's Construction Limited v. Warford*, 2017 NLCA 1.

[9] In assessing whether leave to intervene should be granted in this case, I begin with the factors set out in rule 38. First, the *Expropriation Act* provides for an appeal of the Board's decision at first instance to this Court. Accordingly, this is the first opportunity available to the Board to apply to intervene.

[10] Second, granting leave to appeal will not result in delay. The appeal is set to be heard on June 14, 2019. If granted leave, the Board has undertaken to provide its factum not later than May 30, 2019. Further, as an intervenor, the Board would bear its own costs, and the submissions of the Board, which would be limited in scope, should not have an impact on the parties' costs.

[11] Third, the Board is not seeking to add to the record, which is sufficient for purposes of the intervention.

[12] In seeking to intervene, the Board submits that the appeal engages a matter of public interest insofar as it is directed to the practices and procedures of the Board, particularly regarding the Board's approach to interim orders and their effect, and whether such orders may be appealed under the legislation.

[13] The Lynches rely on the decision in *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147, in submitting that the Board does not satisfy factors relevant to granting leave to intervene. In addressing the issue of the Energy Board's standing to bring an appeal, Rothstein J., for the majority, summarized:

[59] In accordance with the foregoing discussion of tribunal standing, where the statute does not clearly resolve the issue, the reviewing court must rely on its discretion to define the tribunal's role on appeal. While not exhaustive, I would find the following factors, identified by the courts and academic commentators cited above, are relevant in informing the court's exercise of this discretion:

(1) If an appeal or review were to be otherwise unopposed, a reviewing court may benefit by exercising its discretion to grant tribunal standing.

(2) If there are other parties available to oppose an appeal or review, and those parties have the necessary knowledge and expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes.

(3) Whether the tribunal adjudicates individual conflicts between two adversarial parties, or whether it instead serves a policy-making, regulatory or investigative role, or acts on behalf of the public interest, bears on the degree to which impartiality concerns are raised. Such concerns may weigh more heavily where the tribunal served an adjudicatory function in the proceeding that is the subject of the appeal, while a proceeding in which the tribunal adopts a more regulatory role may not raise such concerns.

[14] While these factors may be relevant in assessing an application to intervene in an appeal, there is a difference between standing to bring, or

participate as a party in, an appeal, as in the *Ontario Energy Board* case, and an application to intervene. Intervention involves limited participation by the intervenor, taking account of the public interest and the interests of the parties and their ability to present their case.

[15] The Lynches submit that the City, as a party, is making submissions on the question of whether an appeal of the interim order is authorized by the legislation, and that, accordingly, the Board's intervention is unnecessary. However, I am satisfied that the Board may bring a broader perspective regarding its approach to interim orders, which may have general application. This may include, for example, the rationale underlying the Board's interpretation of the legislation in respect of interim orders.

[16] Further, the Lynches express concern regarding the impartiality of the Board given that the Board will ultimately be required to make a final determination on compensation. They submit that, for this reason, the Board should not be permitted to take a position on an appeal of its interim decision. That submission is not persuasive. The Board has undertaken not to assert an interest in or take a position on the merits of the Lynches' appeal. The Board's concern is to ensure that the Court has comprehensive argument regarding interpretation of the legislation insofar as it applies generally, and from a public interest perspective, to interim orders. A determination as to the operation of the legislation in respect of interim orders will not affect the merits of the Lynches' claim for compensation, including claims for interest, litigation costs, and compensation claim costs, when the matter is finally determined.

[17] In light of the above considerations, I am satisfied that the Board's application to intervene in this appeal should be granted, subject to a determination of the scope of that intervention.

Scope of the Intervention

[18] The Board may make submissions regarding the nature, scope and sources of its jurisdiction in relation to expropriation proceedings in the Province based on the legislation, as relevant in the context of this appeal. Submissions may address the question of whether the legislation authorizes an appeal from an interim decision or order of the Board, and may include an explanation and discussion of the Board's practices and procedures regarding interim orders, together with the underlying rationale.

Disposition

[19] The Board's application to intervene in this appeal is granted subject to the limits on the scope of its submissions set out in paragraph 18, above. The Board shall file its factum not later than May 30, 2019. There will be no order for costs of this application.

B. G. Welsh J.A.