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Introduction

Over the past year Canadian courts and tribunals have provide expropriation practitioners with insights and guidance on a range of timely and relevant issues. Over the last twelve months decision-makers have considered and commented on pertinent issues ranging from compensation, to valid public purposes, to limitations periods and the admission of opinion evidence, to the copyright of surveys and plans. A select summary of the cases is presented below in chronological order. For reference, sub-headings containing a brief summary of the issues are provided.

M.C.A. Land Development Corp. v. British Columbia (Minister of Transportation and Infrastructure)[1]

Compensation ● business losses ● relocation costs

The first case is a decision of the British Columbia Court of Appeal that was released in November 2014, shortly after last year's Fall Conference. The appeal concerned the compensation payable by the Province of British Columbia for land taken by an agreement pursuant to section 3 of the B.C. *Expropriation Act*,[2] to construct a portion of the South Fraser Perimeter Road, a 40-kilometer expressway along the south side of the Fraser River.

The property at issue was owned by M.C.A. Land Development Corp. ("MCA") and leased to Keystone Forest Products Ltd. ("Keystone"), a company that operated a lumber sale and distribution business from the expropriated site. Under the Agreement, MCA agreed to transfer part of its land to the Province in exchange for a portion of neighbouring lands that had been acquired by the Province through the B.C. Transportation Financing Authority.[3] As a result of the Agreement, Keystone relocated to a site comprised of the remaining MCA lands and the Provincially-owned neighbouring lands.

During the lengthy negotiations between the parties and on the advice of the Province, MCA purchased an alternative replacement property for Keystone (referred to as the "Bridgeview Property").[4] The day after MCA submitted its bid for the Bridgeview Property, the Province acquired the lands neighbouring MCA's remaining lands (referred to as the "neighbouring lands").[5] As a result of the availability of the neighbouring lands and the high cost of developing the Bridgeview Property to accommodate Keystone's needs, MCA eventually sold the replacement site at a loss of approximately $2,000,000.00, plus $900,000.00 in sunk development related costs.[6]

After the relocation was complete, MCA and Keystone commenced an action for their respective costs, expenses and losses arising from the expropriation. MCA claimed compensation for the

[1] 2014 BCCA 435, [2014] BCWLD 7980 ["MCA"]
[2] RSBC 1996, c 125 ["BC Act"]. Note that Section 3 of the BC Act functions much like Section 30 of the Ontario *Expropriations Act* RSO 1990, c E26 ["Ontario Act"] and allows the parties to transfer the property subject to the provisions of the legislation without the need for a full expropriation process.
[3] MCA, *supra* note 1, para 3.
[4] Ibid at paras 15-16.
[5] Ibid at para 17.
[6] Ibid at para 19.

market value of the lands as well as business losses, injurious affection and disturbance damages related to the failed relocation of Keystone to the Bridgeview Property and eventual relocation of Keystone to the Provincially-owned neighbouring lands.[7] Keystone claimed disturbance damages for the loss of special economic advantage and business losses.[8] The disturbance damages of the parties, MCA and Keystone, were claimed together and consisted of:

- $2,626,631.72 for the purchase and attempted development of the Bridgeview Property, including 5% interest paid on the $2 million loan acquired for the purchase of the property;
- $613,738.07 in costs incurred before the trial for the partial relocation of Keystone to the eventual replacement site, including property taxes, geotechnical services and site preparation (i.e., pre-loading, design, engineering and fencing); and
- $2,054,149.78 in future costs for the partial relocation to the eventual replacement site, including landscaping, building and moving costs.[9]

At trial, the judge found that both MCA and Keystone had occupied and operated their respective businesses on the taken land.[10] MCA's business was to lease the land to Keystone and Keystone's business was to sell and distribute lumber.[11] The trial judge also found that the businesses were 'intertwined' such that they could be considered one entity.[12] Although the two entities were separate corporations, they shared the same principal. On this basis, the trial court awarded MCA and Keystone disturbance damages in the aggregate amount of $3,481,143.30, which included relocation costs for each of their respective businesses.[13]

The Province appealed the decision. The Court of Appeal found that the trial judge had erred in her application of the compensatory scheme, which expressly restricts disturbance damages to "owners" who use or carry on business on the expropriated lands.[14] In her reasons, Justice Smith acknowledged that while a business can be structured in a variety of ways, MCA's leasing of land to Keystone could not be equated with Keystone's operation of a business on the land.[15] Nor were the two businesses intertwined as a single entity as the trial judge had suggested,

> [55]…There was no evidence that MCA operated its business of acquiring and leasing property on the taken land. To the contrary, the decisions regarding MCA's operation of its business did not require its actual possession or occupation of the property it acquired. The focus of its business was to generate an income stream by renting out the properties it had acquired. This was evident from the scope of the "demised premises" set out in the lease with Keystone, which granted Keystone

[7] MCA, *supra* note 1, para 21.
[8] Ibid.
[9] Ibid.
[10] Ibid at para 22.
[11] Ibid.
[12] Ibid at paras 42-43.
[13] Ibid at para 23.
[14] Ibid at para 54.
[15] Ibid at para 55.

> possession and occupation of the whole of the property included in Lots 255 and 256….
>
> [57] Therefore, with respect, I am unable to agree that *Actton* can be distinguished based on what in my view was an erroneous finding that MCA occupied the taken land with an operating business. Moreover, there is no language in the *Act* that would permit the requirement of s. 31(3) — that, where practical, the value of separate interests in the land taken must be determined separately — to be circumvented because the separate interests of the "owners" are held by corporate entities that are closely connected or "intertwined."[16]

The Court of Appeal further stressed the importance of differentiating interests and the importance of occupation of a site when determining compensation for disturbance damages.[17] Applying this rationale, it concluded that because MCA was only the lessor of the expropriated lands, it was only entitled to claim disturbance damages for the market value of the land taken.[18] Whereas, Keystone, as the lessee and occupant of the expropriated lands, was entitled to claim disturbance damages for the cost of its attempted relocation to the Bridgeview Property and eventual relocation to the eventual relocation to the MCA-Provincially owned replacement site.

The Court allowed the appeal, set aside the award and remitted the matter back to the trial court to determine the compensation for each Respondent's respective interest in the taken lands.

Vincorp Financial Ltd. v. Oxford (County)[19]

Valid public purpose ● powers of a municipal corporation

This decision of the Ontario Court of Appeal was the outcome of an appeal of the Superior Court decision discussed in the 2014 Case Law Update.[20]

The case involved an action initially brought by a landowner and mortgage holder of lands (the "Owners") expropriated by the County of Oxford, which were later transferred to the Toyota Motor Manufacturing North America Inc. ("Toyota"), to among other things, build a car manufacturing plant. The Owners appealed the trial judge's decision dismissing their claims that the expropriation was unlawful and the subsequent sale to Toyota amounted to a "bonus" under the *Municipal Act.*[21]

The Owners argued that the trial judge had erred in failing to find that: (i) the County had given Toyota a bonus in violation of the *Municipal Act* by transferring the lands to Toyota at a market

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[16] MCA, *supra* note 1, paras 55-57.
[17] The Court referenced the test in *Villarbolt Holdings Ltd. v. R*, [1977] FCJ No 1009, 13 LCR 196 (Fed TD) aff'd [1081] FCJ No 546, 22 LCR 257 (Fed CA), which holds that, "Whether a person is in occupation of land is a question of fact and it must be actual physical holding and possession of the land. It differs from mere possession in that possession may be actual or constructive whereas occupation must be actual."
[18] MCA, *supra* note 1, para 59.
[19] 2014 ONCA 876, 113 LCR 77 ["Vincorp"]
[20] 2014 ONSC 2580, 113 LCR 1.
[21] *2001*, SO 2001, c 25 ["Municipal Act"]

value that was not reflective of the proposed development of the site; (ii) the expropriation was illegal as it had been tainted by the concurrent agreement to sell the lands at the expropriated value; and (iii) the County should be liable in trespass for damages for the difference in value.[22]

In considering the issues, the Court of Appeal noted that the Owners' arguments overlooked the fact that the expropriation process and the right of owners to receive compensation for their lands is governed by a specific statutory regime, the Ontario *Expropriations Act*.[23] The Court went on to explain that section 14(4)(b) of the Ontario *Act*, provides that no account is to be given to any increases or decreases in value resulting from the development or proposed development when calculating the fair value to be paid to the owner.[24] Therefore, arguments that the Owners were entitled to damages that reflected the increase in value to the lands attributable to the development were inconsistent with the statute.[25]

The Court deferred to the trial judge's decision finding that there were two separate transactions.[26] It also agreed with the lower court's determination that the transfer of the lands to the car manufacturer was a valid municipal purpose reiterating the finding that,

> …a compelling valid purpose (promotion of economic development), drove Oxford's decision to expropriate the mall lands and sell this land to Toyota for the expropriation price. The fact that the mall lands were transferred to Toyota for the expropriation price does not change the validity of the expropriation power that was exercised. [27]

The Court further noted that even if the subsequent sale and transfer of the lands to Toyota had contravened section 106 of the *Municipal Act* by conferring an illegal bonus, the breach would not have invalidated the expropriation or given rise to an entitlement to damages based on the proposed development. On this basis, the Court found it unnecessary to consider the second and third issues. The appeal was dismissed with costs to the Respondents fixed at the agreed sum of $25,000.00.

The Supreme Court's recent refusal to grant leave to appeal the decision,[28] suggests that the general promotion of economic development and the transfer of lands from a public to a private entity, will remain a valid public purpose at least for the foreseeable future.

[22] Vincorp, *supra* note 19, para 4.
[23] Ontario Act, *supra* note 2.
[24] Vincorp, *supra* note 19, para 9.
[25] Ibid.
[26] Ibid at para 10.
[27] Ibid at para 11.
[28] *Vincorp Financial Ltd v Oxford (County)*, 2015 CarswellOnt 7434 (SCC).

Lynch v. St. John's (City) [29]

Constructive expropriation ● right to compensation

A group of landowners brought an application before the Newfoundland and Labrador Supreme Court for a declaration that a property had been constructively expropriated by the City of St. John's. In the alternative, the Applicants argued that they had a right to compensation under the applicable regulatory scheme.

The action was brought after the Applicants were denied permission by the City to develop residential building lots on a 7.36 acre site because the lands were deemed to be part of the Board Cove River watershed, which serves as a main source of the municipality's water supply.[30]

There were two issues raised by the application. The first was whether the City had constructively appropriated [sic] the property pursuant to sections 101 or 105 of the *City of St. John's Act*.[31] The second was whether the Applicants had a right to compensation pursuant to the regulatory scheme set out in section 42 of the *Water Resources Act*.[32]

On the first issue, the Court agreed that a *de facto* expropriation can give rise to a right to compensation at common law. However, it explained that the taking must meet the test set out by the Supreme Court in *Canadian Pacific Railway v. Vancouver (City)*,[33] which requires that: (i) there is an acquisition of a beneficial interest in the property or flowing from it; and (ii) a removal of all reasonable uses of the property.[34]

The Applicants submitted that groundwater is part of the fee simple bundle of rights that they own and hold as beneficial owners of the property.[35] It was further argued that the Applicants had been denied all reasonable uses of the property, as a consequence of the denial of their application for residential development, combined with the email confirmation by the Manager of Development for the City stating that the property must be kept in its "natural state".[36]

The City responded by stating that the authority to protect the catchment area was regulatory in nature and that it had no general power of expropriation in the catchment area.[37] Even if the authority to expropriate was found to exist, the City contended that there was nothing in the regulation of the Applicants' lands that amounted to an acquisition of a beneficial interest.[38]

The Court accepted the City's argument that its authority under the *City of St. John's Act* was regulatory in nature and did not empower the City to expropriate land or an interest in land. The City lacked the authority in the circumstances to expropriate under the Newfoundland and

[29] 2015 NLTD(G) 2, 1118 APR 309 ["Lynch"]
[30] Ibid at paras 29-32.
[31] RSNL 1990, c C-17.
[32] SNL 2002, c W-4.01.
[33] 2006 SCC 5, [2006] 1 SCR 227.
[34] Lynch, *supra* note 29, para 30.
[35]Ibid at para 15.
[36]Ibid at para 17.
[37] Ibid at para 19.
[38] Ibid at para 20.

Labrador *Expropriation Act*.[39] Although the legislation grants the power to expropriate to a government either its own initiative or where requested by an "authority" to do so, the Court concluded that the definition of "Authority" did not include the City.[40] The Court found no legislation granting the City the general power of expropriation over lands in the catchment area, meaning that there was no basis for a claim of compensation.[41]

The Court further explained that findings of constructive expropriations are rare and referred to statements made by Justice Cromwell in a case called *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General),*[42] where he explained that,

> While de facto expropriation is concerned with whether the "rights" of ownership have been taken away, those rights are defined only by reference to lawful uses of land which may, by law, be severely restricted. In short, the bundle of rights associated with ownership carries with it the possibility of stringent land use regulation.
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> In this country, extensive and restrictive land use regulation is the norm. Such regulation has, almost without exception, been found not to constitute compensable expropriation. It is settled law, for example, that the regulation of land use which has the effect of decreasing the value of the land is not an expropriation.[43]

On this basis, the Court concluded that the regulation of the Applicants' property by the City did not amount to a *de facto* or constructive expropriation. The application was therefore dismissed and the City was entitled to its taxed costs from the Applicants on a party and party basis.

1595759 Ontario Ltd. v. Peel (Regional Municipality)[44]

Compensation ● disturbance damages ● refinancing costs

This case concerned a dispute over compensation for the 'partial taking' of a commercial property. Specifically, whether refinancing costs should be compensable as a part of the claim for disturbance damages.

The Claimant, a numbered company, owned a commercial property located in the Town of Caledon, which housed a convenience store and car sales business. The Regional Municipality of Peel expropriated a strip of 18.73 feet of land along the entire frontage of the property to widen an

[39] RSNL1990 c E-19 ["Newfoundland and Labrador Act"].
[40] Lynch, *supra* note 29, para 48.
[41] Ibid at para 64.
[42] (1999), 177 DLR (4th) 696, 178 NSR (2d) 294 (NSCA).
[43] Lynch, *supra* note 29, paras 39, 42.
[44] 2015 CarswellOnt 912, 114 LCR 129 ["1595759"].

arterial road called Airport Road near the boundary of the City of Brampton.[45] As a result of the expropriation, the Claimant also lost six parking spaces.[46]

The dispute between the parties centered on the fair market value of the lands (including the cost to cure), disturbance damages and delay. The Region offered the Claimant $59,200.00 for the expropriated lands, including the cost to cure the loss of asphalt.[47] The amount was to be split between the owner (the Claimant) and the tenant on the property (the owner of the car sales business), in the amount of $54,320.00 and $4,880.00, respectively.[48] Whereas, the Claimant argued that the fair market value of the partial taking was $73,000.00.[49]

Based on the evidence presented by both parties and their appraisers, the Board determined that the value was higher that the amount offered by the Municipality but lower than the amount requested by the Claimant.[50] On the issue of compensation for the cost to cure the lost asphalt and sod, the Board accepted the Region's offer of $6,824.00, finding that there was little to distinguish the position of the parties on the issue.

The real dispute between the parties was on the issue of disturbance damages. The Claimant claimed that it was entitled to additional compensation for refinancing costs estimated in the range of $25,000.00 to $35,000.00.[51]

The claimed refinancing costs arose from the long and complicated mortgage history of the property. In December 2003, the Claimant purchased the property for $625,000.00.[52] The purchase price was secured by a first mortgage of $375,000.00 and a second mortgage of $130,000.00.[53] The Claimant was then reported to have undertaken improvements valued at $225,000.00.[54] In December 2006, the property was mortgaged for $650,000.00 at 9.5% interest to a firm named DAST Properties Limited ("DAST").[55]

The Region served its Notice of Application for Approval to Expropriate in 2008. Around that time, the DAST loan became due and the Claimant again sought replacement financing, which was eventually provided by the company's accountant, Mr. Bansal, who advanced $650,000.00 of

[45] 1595759, *supra* note 44, para 9.
[46] Ibid at para 10.
[47] Ibid at para 25.
[48] Ibid at para 25.
[49] Ibid at para 3.
[50] Ibid at para 54.
[51] Ibid at para 40.
[52] Ibid at para 20.
[53] Ibid.
[54] Ibid.
[55] Ibid at para 71.

his own money at a rate of 10% interest.[56] Six months later a second mortgage in the amount of $110,000.00 at 10% interest, for a total mortgage liability of $760,000.00 on the property.[57]

The principal of the Claimant company, Mr. Patel, requested that the Municipality's payment of Section 25 monies be used to address his cash flow problem and high-cost loans, including credit card debt that had been accumulated.[58] The issue with the request was that the Ontario *Expropriations Act*,[59] specifies that in an expropriation, security holders are entitled to a defined payment unless there is a release stating otherwise.[60]

After unsuccessful attempts to obtain releases from parties the Region had deemed security holders, the Claimant again sought refinancing. In April 2010, the Claimant obtained refinancing on more favourable terms in the form of a new mortgage for $847,000.00, with a lower rate of 8.13% interest.[61] But in the process of refinancing the Claimant had to pay a brokerage fee, lenders fee and related legal fees.

The Claimant argued that these refinancing costs should be compensable as disturbance damages on the grounds that the fees would not have occurred had it now been for the expropriation. It claimed that the fees and costs were attributable to the fact that the Region had unreasonably delayed payment of the compensation to the Claimant and insisted on releases from security holders that no longer had an interest in the property.[62] Therefore, the Claimant argued that it was entitled to a higher rate of 12% interest.

The Region responded by arguing that the new financing had been negotiated at a lower rate, which saved the Claimant $28,424.00 in interest over two years, effectively offsetting any alleged consequence or damages arising from the refinancing.

In considering the issues, the Ontario Municipal Board first clarified that refinancing costs may be a legitimate category of disturbance damages noting that,

> …in theory, refinancing costs might be a legitimate category of disturbance damages, if (a) the expropriation were demonstrably the cause whereby refinancing became necessary, (b) the refinancing were functionally analogous to the original financing, and (c) the costs were net. However, none of those circumstances were demonstrated here. [63]

[56] 1595759, *supra* note 44, para 22.
[57] Ibid at para 26.
[58] Ibid.
[59] Ontario Act, *supra* note 2.
[60] Ibid, s 17.
[61] 1595759, *supra* note 43, para 31.
[62] Ibid at para 37.
[63] Ibid at para 62.

In the circumstances, the Board was unconvinced that the expropriation was a direct cause of the original creditor calling in his loan, finding that it was most likely due to the lender's discontent with the Claimant.[64] Nor was the Board persuaded that the cost of negotiating a new larger loan was a consequence of the expropriation.[65] Finally, the Board highlighted that even if the refinancing costs had been due to the expropriation the refinancing had resulted in a new lower interest rate and therefore there was no net "cost" to the Claimants.[66] Therefore the refinancing costs did not amount to a compensable disturbance damage and denied the claim for refinancing costs as consequential damages.

Finally on the issue of delay, the Board found evidence of unreasonable delay on the basis that there were three and four month delays between the time that the Region was informed that certain security holders were no longer entitled to section 25 monies and efforts were made to advance the matter.[67] For the two periods of delay, the Board ordered interest at 12% interest on the compensation payable.[68]

R. Jordan Greenhouses Ltd. v. Grimsby (Town)[69]

Compensation ● injurious affection where no land taken

This decision concerned a claim for injurious affection where no land was taken, resulting from road works undertaken by the Town of Grimsby.

The Claimant owned and operated a greenhouse and a garden centre solely accessible from a narrow two-lane road located in Grimsby called Main Street West. For economic reasons, the Claimants shifted their long-standing commercial greenhouse operation to a retail business in March 2010. Less than a month after the grand opening of the retail business, the Town began construction on the adjacent roadway to install a new sewer main and related pipes in front of the Claimant's property.

Applying the test set out in *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*,[70] the Board determined that the Claimant's property had been injuriously affected by the Town's works. The Board referenced the Supreme Court statements in that case, noting that under the Ontario *Expropriations Act* successful claims for injurious affection where there is no taking must show that: (i) the damage results from an action taken under statutory authority; (ii) the action must give rise to liability but for that statutory authority; and (iii) the damage must result from the construction and not the use of the works.[71]

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[64] 1595759, *supra* note 43, para 64.
[65] Ibid at para 65.
[66] Ibid at para 66.
[67] Ibid at para 82.
[68] Ibid at para 83.
[69] 2015 CarswellOnt 2187, 114 LCR 249 ["Jordan Greenhouse"].
[70] 2013 SCC 13, [2013] SCJ No 13 (SCC) ["Antrim"].
[71] Jordan Greenhouse, *supra* note 69, para 113.

Based on the facts, the Board answered the first and third questions in the affirmative finding that the works were taken under the statutory authority of the Town and that the request for compensation was from the construction of the works and not the use of it.[72] The analysis turned on the hypothetical question of whether the Claimant would have been able to successfully sue for damages in nuisance, if highway construction had not been done under statutory authority.

Based on the facts, the Board members concluded that the Town's works substantially interfered with the Claimant's use and enjoyment of the lands. This was evidenced by the fact that the Town had initiated a sewer construction program that commenced in the spring months of the year, which was the busiest season for the business.[73] The impacts to the business, which depended on direct vehicular access, had been exacerbated by the fact that the construction lasted for 40 working days and resulted in the closure of at least one lane and the closure of the entire road for two weeks.[74]

The Board quoted the Supreme Court in *Antrim* where it noted that, "…while temporary interferences may certainly support a claim in nuisance in some circumstances, interferences that persist for a prolonged period of time will be more likely to attract a remedy."[75] In the circumstances, the three member panel found it unreasonable to expect that the Claimant should bear all the interference that was caused to its business by the Town's careless construction planning, supervision and contract enforcement without compensation.[76] It found that the temporary inconvenience "…fell well outside the normal give and take of life that should be properly accepted as an individual's part of the cost as living in an organized society."[77]

On this basis, the Board concluded that the claimant had been injuriously affected by the Town's works to the adjacent roadway and awarded the owners damages in the amount of $115,000.00.

1739061 Ontario Inc. v. Hamilton-Wentworth District School Board [78]

Purpose of expropriation ●abandonment of lands

This case involved a situation in which the landowner sought to compel the authority to return the expropriated property on the grounds that the lands were no longer needed for the originally stated purpose of the taking pursuant to s. 41(1) of the Ontario *Expropriations Act*.[79]

In 2011, the applicant purchased the lands to redevelop the site as a seniors' centre and applied to the City of Hamilton to rezone the property.[80] The Applicant's redevelopment plans were

[72] Jordan Greenhouse, *supra* note 69, para 114.
[73] Ibid at para 117.
[74] Ibid.
[75] Ibid at para 124.
[76]Ibid at para 129.
[77] Ibid.
[78] 2015 ONSC 1442, 114 LCR 207 ["Hamilton-Wentworth"].
[79] Ontario Act, *supra* note 2.
[80] Hamilton-Wentworth, *supra* note 78, para 3.

interrupted by the Respondent's expropriation. In 2013, the Hamilton-Wentworth District School Board expropriated the Applicant's land to build a school and related amenities.[81]

The School Board subsequently took action to transfer the expropriated lands to a third party, the City of Hamilton, to rezone and redevelop the site as a seniors' residence similar to that which the applicant had previously proposed.[82] The transfer prompted the Applicant to request that the School Board provide notice confirming that the subject property was required for its original purposes.

The Applicant argued that section 41(1) of the Ontario *Act* requires that if the expropriated land is no longer needed for its original purpose by the expropriating authority and compensation to the expropriated owner has not been paid in full, then the authority must provide notice to the previous owner permitting it to take back the land.[83] The Owner further argued that the obligation to return the property is mandatory and that there is no discretion which permits the authority to sell the expropriated land to a third party.

In response, the Respondent School Board adopted the position that it was not abandoning the lands nor had it found the lands to be unnecessary.[84] It highlighted its intention to construct a new school on at least part of the lands and that the City intended to build a recreational facility on the south part of the property, which would be used by citizens of the City as well as staff and students of the school. Further that the recreational facility fell under the category of "related amenities" for the school, noted in the expropriation Notices.

The Court agreed that, "…it is not open to an expropriating authority to redefine the purposes after the fact so as to avoid an inquiry on the true purpose of the expropriation."[85] But ultimately found that the Applicant would not suffer irreparable harm that could not be compensated by damages.[86] It further noted that the Respondent School Board had undertaken an elaborate consultation process concerning the purposes for which the land would be used.[87]

In Justice Whitaker's view, "the courts should be reluctant to interfere with school board policy choices regarding whether or not facilities such as parking lots, pools and recreational centres are referable to the term "related amenities" as that was used un the Notice of Expropriation".[88]

Therefore, it was determined that the School Board had met its obligations under the *Education Act*[89], which broadly defined site to include lands and premises for broader school purposes. The Court concluded that the applicant landowner failed to make its case and dismissed the application, awarding costs and disbursements to the School Board in the amount of $58,815.46.

[81] Hamilton-Wentworth, *supra* note 78, para 3.
[82] Ibid at para 4.
[83] Ibid at para 6.
[84] Ibid at para 10.
[85] Ibid at para 6.
[86] Ibid at para 11.
[87] Ibid at para 12.
[88] Ibid at para 12.
[89] RSO 1990, c E.2.

Dartmouth Crossing Ltd., Re[90]

Injurious affection ● limitations period ● particulars

This recent decision of the Nova Scotia Utility and Review Board addressed the ever important question of what constitutes adequate notice when making a claim for injurious affection. The Board's reasons provide much needed guidance to parties as to the information that is required to fulfill the legislative requirements to provide "particulars" within one year after injurious affection is sustained or becomes known to the landowner.

The case involved an expropriation by the Halifax Regional Municipality of several permanent and temporary easements for sewer construction from the Claimant, the owner of in the area of a large retail, commercial and residential development called Dartmouth Crossing Limited. At issue was whether the information provided by the Claimant to the expropriating authority during the one-year limitation period met the requirements of s. 31(1) of the Nova Scotia *Expropriation Act*.[91] The Nova Scotia *Act*, like its Ontario counterpart,[92] provides that:

> … a claim for compensation for injurious affection shall be made by the person suffering the damage or loss in writing with particulars of the claim within one year after the damage was sustained or after it became known to him, and, if not so made, the right to compensation is forever barred.

Not long after the expropriation, the president of the Claimant company wrote to the Municipality noting that the taking would harm the residual lands and cause serious consequences on the design and marketability of the planned medium and high density residential development in the area.[93]

Counsel for both parties continued to correspond and the issue of injurious affection was discussed in the communications, all within the one-year limitation period. The Board found that one of these communications summarized the nature of the loss claimed by Dartmouth Crossing but failed to provide an estimate as to the cost.[94] Approximately one month after the expiry of the limitations period, counsel for the Claimant again wrote the Municipality and provided excerpts from an expert report which provided information on injurious affection.[95]

The Municipality argued that these communications were insufficient and that the statutory requirement for particulars imposed on claimants necessitated the provision of a full expert report and a specific dollar amount.

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[90] 2015 CarswellNS 204, 2015 NSUARB 48 ["Dartmouth"].
[91] RSNS 1989, c 156 ["NS Act"].
[92] Ontario Act, *supra* note 2, s 21(1).
[93] Dartmouth, *supra* note 90, para 17.
[94] Ibid at para 28.
[95] Ibid at para 31.

The Board sided with the Claimant. Based on the evidence in the case, the panel found that the limitation period had begun to run when the work was completed.[96] was at that point in time that the Claimant became aware that it had suffered some damage or loss.

It was determined that the Claimant had met the requirements of the NS *Act*. The Board explained that while the NS *Act* does not define the term "particulars", the case law on the interpretation of section 31(1) requires only that the owner disclose information to the expropriating authority which is sufficient:

- to inform the expropriating authority of the existence of the claim;
- to inform the expropriating authority of the nature of the claim;
- to allow for preservation of evidence.[97]

The Board outright rejected the notion that Claimants were required to provide a specific dollar amount for the compensation claimed, that the dollar amount had to be accurate and that it had to provide expert reports such as an appraisal report or similar documentation.[98] It stressed that the law does not require that level of detail. Accordingly, the Municipality's application was dismissed and it was determined that the claim for injurious affection could be heard on its merits.[99]

Westerhof v. Gee Estate [100]

Experts ● opinion evidence

This decision of the Ontario Court of Appeal follows the much discussed *Moore v. Getahun*[101] decision on communicating with experts, covered during last year's Fall Conference. Like the Court's earlier decision in *Moore*, this case provides guidance on the involvement and role of expert witnesses in the expropriation process. In particular, guidance on the potential admissibility of 'non-expert' opinion evidence from project participants such as project staff, engineers and surveyors, in expropriation proceedings.

The decision arose from two personal injury cases heard together involving car accidents.[102] The issue on appeal was whether Rule 53.03 in the *Rules of Civil Procedure*,[103] which sets out the pre-conditions for introducing expert evidence at trial, only applies to litigation experts or applies more

[96]Dartmouth, *supra* note 90, paras 20-21.
[97]Ibid at para 186.
[98] Ibid at para 188.
[99] Ibid at paras 192-194.
[100] 2015 ONCA 206, [2015] OJ No 1472 ["Westerhof"].
[101] 2014 ONSC 237.
[102] Note that the full style of cause referencing both cases is: *Jeremy Westerhof v The Estate of Wlliam Gee and Kingsway General Insurance*; *Daniel McCallum and James Baker*.
[103] RRO 1990, Reg 194 ["Rules"].

broadly to all witnesses with special expertise who give opinion evidence. Specifically, the extent to which medical witnesses could give opinion evidence at trial.

In the first case, *Westerhof*, the trial judge held that as a general matter the various medical practitioners who had treated the Plaintiff could not give opinion evidence due to a lack of compliance with Rule 53.03.[104] In the second case, *McCallum*, the trial judge permitted several medical witnesses to give opinion evidence, finding that because the witnesses were treating medical practitioners, they could give opinion evidence without complying with Rule 53.03.[105]

The Court determined that Rule 53.03 applies to "litigation experts" (i.e. persons retained or engaged on behalf of the party). But that it does not apply to "participant experts" or "non-party experts" (i.e. a treating or attending physician or professional).[106] The Court clarified that Rule 53.03 does not apply to participant experts because unlike litigation experts, these witnesses are not engaged by a party to the litigation to form and give an opinion.[107]

The Court of Appeal rejected the lower court's conclusion that the type of evidence – fact or opinion- is the determining factor as to whom Rule 53.03 applies.[108] It instead concluded that,

> … a witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence for the truth of its contents without complying with rule 53.03 where:
>
> - the opinion to be given is based on the witness's observation of or participation in the events at issue; and
> - the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience while observing or participating in such events.[109]

Justice Simmons went further to note that Rule 53.03 does not apply to the opinion evidence of a non-party expert where the non-party expert has formed a relevant opinion based on personal observations or examinations relating to the subject matter of the ligation for a purpose other than the litigation.[110] At the same time, he cautioned that if participant experts or non-party experts were to give opinions which extended beyond the scope of the opinion formed in the course of personal observations or examinations relating to the subject matter, a court could require the witness to comply with Rule 53.03.[111] A court could also exercise its gatekeeper function to exclude evidence of the witness where it did not otherwise meet the test for admissibility.[112]

[104] Westerhof, *supra* note 57, para 87.
[105] Ibid at para 153.
[106] Ibid at para 5.
[107] Ibid at para 6.
[108]Ibid at para 59.
[109] Ibid at para 60.
[110] Ibid at para 62.
[111] Ibid at para 63.
[112] Ibid at para 64.

For these reasons, the Court of Appeal allowed the appeal of the lower court's decision in the *Westerhof* case, set aside the jury's verdict and ordered a new trial.[113]

Keatley Surveying Ltd. v. Teranet Inc.[114]

Land surveyors ● copyright

This decision of the Ontario Court of Appeal concerns a class action brought by land surveyors, Keatley Surveying Ltd. The Surveyors claim that the provision of copies of drawings, maps, charts and plans of surveys (collectively referred to as "plans of survey") to users of the electronic land registry system by government service provider, Taranet Inc., infringes their copyright. Although the case is not specifically concerned with expropriations, the resolution of this case has practical implications for the access and use of the plans and drawings relied upon in the day-to-day work of those involved in real estate acquisition/expropriation.

Documents prepared by Surveyors are registered and provided through Teranet's electronic service portals, Teraview and GeoWarehouse. Teranet provides copies of the registered plans of survey to members of the public for a statutorily prescribed fee, collected by Teranet on behalf of the Ontario government. No fees or royalties are paid to the land surveyors who prepare the plans.[115]

The Surveyors claim for copyright infringement is based on the argument that plans of survey are "artistic works" that are protected by the *Copyright Act*.[116] Further, that section 3(1) of the *Copyright Act* gives copyright owners the sole right to produce, reproduce and publish a work, as well as the sole right "to communicate the work to the public by telecommunication."[117] By making digital copies of plans of survey and storing copies of the same in its database and making the copies available to the public for a fee, the Surveyors submit that Taranet has infringed these exclusive rights.

Teranet responded relying on several defences, two of which are that the plans of survey are published by or under the direction and control of the Crown, and once registered become the property of the Crown.[118] The Respondent further plead that any infringing uses were fair dealing for research and private study or were justified by their "significant public benefit."[119]

The Surveyors sought certification of the action as a class proceeding on behalf of the estimated 350 land surveyors in private practice in Ontario whose survey documents are in Taranet's database.[120] The initial class proceedings judge refused to certify the action on the basis that the

[113] Westerhof, *supra* note 57, para 184.
[114] 2015 ONCA 248, 125 OR (3d) 447 ["Keatley"].
[115] Ibid at para 3.
[116] 1985, c. C-42, s 5(1)
[117]Keatley, *supra* note 113, para 15.
[118]Ibid at para 16.
[119] Ibid.
[120] Ibid at para 4.

Surveyors had failed to show an identifiable class. The Surveyor appealed the decision to the Divisional Court, which certified the action. Teranet then appealed to the Court of Appeal.

The Court of Appeal unanimously upheld the Divisional Court's decision to certify the action. Without going into detail on each of the procedural issues raised and considered on the appeal, it is sufficient to note that although Justice Sharpe did not endorse the approach of the Surveyors in amending its case on appeal, he determined that the nature of the case had not fundamentally changed nor had the changes caused prejudice to the Defendant.[121] The result of the Court's decision is that the matter will proceed as a class action.

Willies Car & Van Wash Ltd. v. Simcoe (County)[122]

Injurious affection ● limitation period ● no land taken

The limitation period for claims of injurious affection and the scope of such claims where no land is taken was also considered by the Ontario Municipal Board in a recent case involving a car and van wash located in Allison, Ontario.

The property at issue was located on the south side of Highway 89 approximately 300 metres east of County Road 10, an access road which served as the principle entrance to the area Honda Automotive Manufacturing Plant ("Honda").[123] The Claimant's business relied on the high volume of traffic going to and from Honda.

In 2007, County Road 10 was re-located approximately one kilometer to the east of its former location.[124] Eventually a portion of the County Road 10 was conveyed to Honda by Simcoe County. As a result, traffic was diverted away from the Claimant's business as employees and visitors to Honda no longer passed by the car wash to access the plant.

The Owner of the car wash claimed damages for injurious affection where no land is taken, alleging that the realignment of County Road 10 had led to a significant decrease in traffic passing by the car wash, which in turn resulted in a decrease in business.[125] The County responded by arguing that the claim was barred by statute because it had not been raised within the mandatory one-year period and that no damage had been suffered as a result of its works.[126]

On the first issue of whether the claim for injurious affection was barred by Section 22 of the Ontario *Expropriations Act*,[127] the Claimant argued that the road closing did not actually take place

[121] Keatley, *supra* note 113, para 29.
[122] 2015 CarswellOnt 7573, 115 LCR 39 ["Willies Car Wash"]
[123] Ibid, para 2.
[124] Ibid.
[125] Ibid, para 5.
[126] Ibid, para 7.
[127] Ibid.

until September 2007 as employees continued to have access to the plant from the closed road allowance.[128] It did not know its losses until April 2009, approximately one month after its accountant produced financial reports following its fiscal year end in February 28, 2009.[129]

Based on the evidence, the Board sided with the County finding that the claim was barred for failing to comply with Section 22(1) of the Ontario *Act*. It found that the actual construction of the realignment of County Road was completed on or around December 2006.[130] Therefore, if the Claimant suffered business losses, it knew or ought to have known of the losses for the fiscal year ending in February 28, 2008.[131]

Based on this information, the Board concluded that the Claimant's claim for injurious affection ought to have been initiated no later than January 2009 to comply with the one-year limitation period.[132] Not thirty months after the road was closed. The Board went on to state that the Claimant was required to act diligently to inform itself of any loss, giving rise to a claim. It further noted that no previous notice of the claim had been given to the Respondent.

Although the Board determined that the claim for injurious affection was outside the one-year limitation period it nevertheless considered the claim. The Board explained that claims for injurious affection where no land is taken, effectively requires the Claimant to show that the interference to the property is both substantial and unreasonable thereby establishing that the public authority's actions are analogous to common law nuisance.[133] The three-step test for injurious affection requires that: 1) the damage result from the action taken under statutory authority (the statutory rule); 2) the action would give rise to liability but for the statutory authority (the actionable rule); and 3) the damage must result from the construction and not the use of the work (the construction and not the use rule).[134]

The Board determined that the first step of the test was easily satisfied as the County's works were undertaken pursuant to its statutory authority. On the second step the Board relied on the the Supreme Court's guidance in the *Antrim*[135] and *St. Pierre v. Ontario (Minister of Transportation & Communications),*[136] noting that for the interference from the statutory works to be considered actionable it must be substantial *and* unreasonable. Based on the evidence before the Board, the tribunal determined that the Claimant did not meet the threshold required by the jurisprudence.[137]

The Board noted that the Claimant had not been able to establish that the losses it alleged had occurred were the result of the construction of the works nor that its losses were the result of the

[128] Willies Car Wash, *supra* note 121, para 10.
[129] Ibid.
[130]Ibid at para 12.
[131] Ibid at para 14.
[132] Ibid at para 15.
[133] Ibid at para 19.
[134] Ibid at para 20.
[135] Antrim, *supra* note 70.
[136] [1987] 1 SCR 906 (SCC).
[137] Willies Car Wash, *supra* note 121, para 29.

re-routing of County Road 10. It determined that the decline in the number of car washes was more likely caused by other factors such as general economic decline resulting in reduced consumer spending.[138] Moreover regular customers would only have to travel a short additional distance to continue to use the facilities.

The Board determined that the Claimant had failed to establish any causal connection between the County's works and the losses alleged by the Claimant. It dismissed the claim on the grounds that the claim related to the use of the works and not the construction of the works, highlighting that sales had continued to increase after the road was closed and the losses alleged occurred many months after the construction of the works were complete. [139]

[138] Willies Car Wash, *supra* note 76, para 34
[139] Ibid at paras 45, 42.