Ontario Expropriation Association
Annual Case Law Update

October 25, 2013

Guillaume Lavictoire

Introduction

To avoid being remembered as the presenter who overlooked *Antrim*[1] in 2013, I begin by noting that this review excludes the *Antrim* decision. *Antrim* is the subject of a separate presentation forming part of the OEA Fall Conference. The remaining cases within this review are presented below in chronological order. Sub-headings containing a brief summary of the issue(s), accompany each case for ease of reference.

Simone Group Properties Ltd. v. Toronto (City)[2]

Pre-expropriation business losses • environmental contamination • interest on disturbance damages

This was an appeal by the City to the Divisional Court from a decision of the Ontario Municipal Board. The case is worthy of mention because the OMB decision in this matter figured prominently in discussions at the OEA Fall Conference in 2012. The case also deals with the somewhat hot-button issue of the impact of environmental contamination on the determination of market value.

The OMB awarded the owner compensation for market value in the amount of $3,314,812. This award was not reduced to fully account for the presence of environmental contaminants on the lands as the City demanded. The Board also awarded damages for business losses arising from below-market rents received by the owner for a period of approximately seven years. The rents were impacted by the inordinate length of the acquisition proceedings implemented by the City (beginning with discussions in March 1998 and culminating with formal expropriation in October 2005).

The City appealed the following: (1) the award of disturbance damages for business losses that occurred prior to the date of expropriation, and (2) the Board's failure to reduce the compensation for market value on the basis of environmental contamination. The property owner cross-appealed the decision to seek interest on the compensation awarded for business losses.

The City's appeal of the award of pre-expropriation damages centered on two noteworthy arguments. The first was that the owner was not entitled to claim lost profits as part of a disturbance damages claim. The Court viewed this argument as a flawed interpretation of the *Upper Grand*[3] decision as an authority for the proposition that lost profits cannot be claimed as disturbance damages. In reality, as the Court noted, *Upper Grand* established that prospective lost profits are not compensable as disturbance damages. The Court rejected the City's argument because the Claimant was seeking compensation for losses incurred as a result of delays in the expropriation process, not future profits.

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[1] *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*, 2013 SCC 13 (hereinafter referred to as "*Antrim*").

[2] (2013), 108 L.C.R. 12 (Ont. Div. Ct.).

[3] *747926 Ontario Ltd. v. Wellington (County) Board of Education*, (2001), 56 O.R. (3d) 108 (Ont. C.A.) (hereinafter referred to as "*Upper Grand*").

The City also argued that the Board erred in reducing the disturbance damages award because of the owner's failure to mitigate. The City advanced the argument that the Respondents could have avoided business losses by selling their property to the City subsequent to the authorization to expropriate in 2001 by way of a Section 30 Agreement. This voluntary process generally allows an owner to convey title to an authority without prejudice to the determination of compensation by the Board at a later date. Instead, the City argued, the owner decided to exercise its statutory right and challenge the expropriation by requesting a Hearing of Necessity. (Note: this challenge was successful. The Inquiry Officer found the taking not fair, sound and reasonably necessary, as noted by the Divisional Court.)

The Court did not find merit to this argument on the basis that the OMB found there had been some failure to mitigate, and adjusted compensation accordingly. Also, the Court reasoned that the Claimant should not be denied compensation for requesting a Hearing of Necessity, which was its right under the legislation.

In regard to the environmental concerns, it was determined that a number of environmental contaminants were found within the property. The City's expert estimated that the market value of the site should be reduced by $580,000 as a result. The owner's expert determined on the basis of 2009 MOE standards, that the contaminants did not pose any risk to human health. The Board accepted this evidence, however, it did deduct $30,000 for air sampling and bore hole drilling.

The thrust of the City's argument respecting this aspect of the appeal was that the Board should have made a deduction for the environmental contaminants because the land was not pristine. In support of its argument the City relied on *Tridan Developments Ltd. v. Shell Canada Products Ltd*.[4], a 2002 case arising from a civil action. The Court found that this case did not establish a rule that market value of a contaminated property must be reduced because of stigma, and the Board's decision regarding environmental contamination was upheld. The Court stated that the Board made no legal error and was entitled to deference.

The Respondent's cross-appeal regarding interest on the award for business losses (as disturbance damages) was also dismissed. The Court maintained that the Court of Appeal in the *Upper Grand* decision determined that courts do not have power to award interest on disturbance damages, a proposition which reflects the wording of section 33 of the *Expropriations Act*. The Divisional Court remarked that, "The fact that the *Act* contemplates interest payable on certain types of compensation suggests that the legislature did not contemplate the award of interest on other types of compensation."[5]

[4] (2002), 57 O.R. (3d) 503 (Ont. C.A.).
[5] *Supra* note 2 at para. 50.

Ensteel Industries Ltd. and Ensteel Properties Ltd. v. Calgary (City)[6]
Limits on the Board's authority to make determinations prior to hearing evidence

The decision stemmed from a Notice of Motion filed by the Claimant seeking a preliminary determination that the Alberta Land Compensation Board had the jurisdiction to hear the business loss claims at issue. The City argued that the Board would have difficulty ruling on any specific issues since no evidence had been provided to the Board. The Board identified the issues in the motion as follows:

a) Does the Land Compensation Board have the authority to determine business losses arising from the expropriation of the lands?

b) If so, does the Land Compensation Board have the authority to determine business losses that may have arisen prior to the effective date of the expropriation?

c) If so, can the Land Compensation Board make a determination on its authority to hear the specific business losses claimed prior to hearing evidence and determining the facts of the case?

The Board ruled (and the City acknowledged) that the Board has express jurisdiction to award disturbance damages. Secondly, citing *Dell*[7], the Board also determined that it may consider business losses incurred prior to the date of expropriation. The significant question was whether the Board could make a determination on its authority to hear the specific business losses claimed prior to hearing evidence and determining the facts of the case. The Board found that it did not have such authority, and reasoned as follows at paragraphs 25 and 26:

> The general approach to be taken in interpreting expropriation statutes is that expropriation laws are "remedial", and must be given a "broad and liberal interpretation" consistent with their purpose of giving *"full and fair compensation"* to the owner of the expropriated land. (*Dell*, *supra*, at paragraph 33) The Claimants' business losses must be considered within a complex matrix of facts and statutory provisions; this is not a simple question of interpretation. While the Panel is sympathetic with the desire of the Claimants to have a broad, general ruling, it is unwise for the Board to give answers to broad, general abstract questions.
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> Because of factual disputes or complexity, the response to the specific claims must be left to the hearing. Any such declaration(s) at this preliminary stage would be of limited value. In this case, whether each of the business losses is compensable is intertwined with the facts,

[6] 2013 CarswellAlta 1528 (Alta. L.C.B.).
[7] *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority*, [1997] 1 S.C.R. 32 (hereinafter referred to as "*Dell*").

> therefore it is necessary to have a full hearing to provide a proper foundation for the decision.[8]

Roeland v. Manitoba[9]

Disturbance damages where market value is determined upon the basis of a use other than the existing use

Manitoba expropriated part of a 138-acre parcel of land farmed by Roeland. The taking was for the purpose of constructing a major highway. The expropriated lands comprised an area of 31.05 acres and the expropriation divided the parent parcel into two distinct and separate parcels located on each side of the highway.

The matter proceeded to the Land Value Appraisal Commission ("LVAC") to determine the compensation to be paid to the owner. The LVAC acknowledged evidence that the land had good potential for residential development due to its proximity to two residential developments and the City of Winnipeg. Despite the land's speculative value, the LVAC awarded disturbance damages for increased machinery costs relating to the farming operation on the lands.

Manitoba appealed the LVAC's decision to the Manitoba Court of Appeal. The Court of Appeal dismissed the portion of the appeal relating to the market value of the land taken, but referred the matter back to the LVAC to deal with the award for disturbance damages.

The LVAC upheld its earlier determination that disturbance damages for fixed machinery costs should be awarded. It relied vaguely on the reasoning in *Pike v. Ontario (Minister of Housing)*[10] as a rationale for awarding such damages. *Pike* is an exception to the rule (and to section 28(2) of the Manitoba *Expropriation Act*) dictating that when compensation is based on a property's value for a highest and best use which is different from its existing use, the owner is not also entitled to disturbance damages. In *Pike*, the Court awarded compensation for disturbance damages related to a farming operation despite the highest and best use of the lands being future residential development, and not an agricultural use. The Court did so because the development horizon was well into the future. The rationale was that the owner should be seen as a farmer and an investor with the intention of farming the land prior to the land being ripe for development and sold to realize a significant capital gain.

The LVAC noted that eight years had already passed since the date of expropriation indicating that the speculative value of the Roeland lands was well into the future. Despite its conclusion, the LVAC reduced compensation so that the disturbance award was based on the value of the property as agricultural land rather than as future residential land.

[8] *Supra* note 6 at paras. 25-26.
[9] 2013 MBCA 37.
[10] (1979), 20 L.C.R. 116 (Ont. Div. Ct.) (hereinafter referred to as "*Pike*").

Manitoba appealed this decision to the Court of Appeal on the basis that it contravened s. 28(2) of the *Expropriation Act*. Roeland cross-appealed the reduction of the disturbance allowance.

Manitoba argued that the LVAC had failed to correctly interpret s. 28(2) of the *Act*. As the Court put it:

> Manitoba argues that the expropriated land, although farmland, was valued on the basis of its speculative value as residential development land and that to award additional fixed machinery costs would, in effect, amount to a double recovery, which is contrary to the provisions of the *Act.*"[11]

For ease of reference, section 28 (2) of the Manitoba *Expropriation Act* reads as follows:

> **No disturbance considered in certain cases**
> 28(2) Where the market value of the land is determined upon the basis of a use of the land other than the existing use, the due compensation for the land shall not include compensation for any damages attributable to disturbance that would have been sustained by the owner in putting the land to that other use.

Manitoba also argued that by simply adopting the exception in *Pike*, the LVAC failed to provide a meaningful analysis of section 28(2) of the *Expropriation Act*. It also argued that there was no factual foundation for its finding that the lands' development potential was well into the future.

Roeland for his part, essentially put forward his arguments from the hearing before the LVAC. He submitted that the case is similar to *Pike* and that the LVAC was correct in awarding disturbance damages. In relying on *Pike*, he argued, the LVAC provided analysis and interpretation of section 28 of the *Act*.

The Manitoba Court of Appeal noted that *Pike* did create the exception that when expropriated land is not ripe for development damages for disturbance are compensable. The Court quoted the following relevant passages from the *Pike* decision to describe the exception in detail:

> This is a case in which the land is a long way from being ripe for development. It should be anticipated that the hypothetical purchaser of the farm in the open market contemplated by s. 14(1) of the Expropriations Act would continue to farm it, or cause it to be farmed, for 20 years or more. In these circumstances, it cannot be said, in my view that a market value derived from an examination of sales of

[11] *Surpa* note 9 at para. 9.

other properties having a similar potential and a similar present use is based upon a use other than the existing use, simply because such value is much greater than that of lands being used for farming that have less or no potential for future development. The concluding words of s. 13(2), therefore, have no application in the present case, and the Board, in my judgment, erred in holding that the appellant was not entitled to damages attributable to disturbance.

It does not follow from this interpretation that the exclusion of damages for disturbance contained in the concluding words of s. 13(2) would be inapplicable in the case of lands that were ripe for development, but in which development could not occur forthwith because of the delays normally encountered by developers. In such a case, the owner would be entitled to the full value of the lands for development. The owner could have realized that value in a private sale, however, only if he had been prepared to give up possession, and it is a value premised upon his being prepared to give up possession. Such a value would clearly be based upon a use other than the existing use.

Cases may arise in which it is difficult to determine whether the expropriated lands were ripe for development at the date of expropriation, or whether their highest and best use involved a holding for future development. In the former case, the concluding words of s. 13(2) would apply; in the latter, they would not. The determination of cases involving such difficulty must be left to other Courts on other days, but the test may be whether the interim or caretaker use of such lands and the improvements incidental thereto, would have added materially to the market value of the lands on the open market. If not, it would probably be clear that the lands were ripe for development, that their market value is based on a use other than existing use, and that the concluding words of s. 13(2) exclude an award of damages for disturbance in such case.[12]

[emphasis added]

The Manitoba Court of Appeal expressed doubts regarding the soundness of the *Pike* decision, but that aside, found that the circumstances of this case did not justify applying the *Pike* exception on the basis of the lack of evidence presented to the Court. The Parties' appraisers both valued the Roeland lands as farmland with a speculative aspect but there was no evidence suggesting that the time element required to trigger the *Pike* exception was present. The only reference to time had been the LVAC's reference to eight years having passed from the date of expropriation, which was a factor deduced from hindsight and not evidence.

[12] *Ibid.* at para. 25.

The Court's concluding remarks at paragraph 33 were a direct challenge to the rationale underpinning the *Pike* decision, and read as follows:

> if land is valued in a manner other than its present use and that value is higher than that of the present use, there can be no disturbance award. The land in this case was farmland and it was valued as speculative farmland. That to me is an "other" use and, as it was assessed and compensated at a higher value, there should be no disturbance award.[13]

1353837 Ontario Inc. v. Stratford (City)[14]
OMB jurisdiction to determine ownership of land • Interim costs

This case arose from a motion by the City to strike the Claimant's Notice of Arbitration and Statement of Claim on the basis that the claims contained therein were outside of the jurisdiction of the Board.

The Claimant brought a cross-motion for payment of interim costs and the preservation of expropriated buildings and improvements.

By way of background, the City expropriated the Claimant's lands, referred to as the undisputed lands, on June 15, 2009. On June 16, 2009, the Claimant, the City and another owner (Ryan) entered into a Quit Claim Agreement concerning the ownership interest of adjacent lands, referred to as the disputed lands. The Agreement stated that the City would compensate the Claimant and Ryan pursuant to the *Expropriations Act* for whatever rights, title and/or interests that the Claimant or Ryan could prove that they held in the disputed lands. The agreement also provided that the parties agreed that any ownership dispute between the City and either or both of the Claimant and Ryan would be determined by way of a court trial.

In 2010, the Claimant commenced court proceedings pursuant to section 39 of the *Expropriations Act* relating to possession of the undisputed lands. Within those proceedings, the City, the Claimant and Ryan executed Minutes of Settlement providing for an amended offer of compensation by the City, as well as other relief, which the claimant accepted without prejudice.

In 2012, the Claimant issued a Statement of Claim seeking compensation arising from the expropriation of the undisputed and the disputed lands. Although the disputed lands had not been expropriated, they had a shared common history with the undisputed lands. The Board noted that the Statement of Claim specifically requested a determination of the Claimant's interest in the disputed lands, prompting the central substantial question in this matter: did the Board have jurisdiction to make a determination of the Claimant's interest in the disputed lands?

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[13] *Ibid.* at para 33.
[14] (2013) 109 L.C.R. 207 (O.M.B.).

The City's Motion

The City took issue with a number of aspects of the Notice of Arbitration and Statement of Claim; however, its primary concern was that the Board did not have jurisdiction pursuant to section 29 of the *Expropriations Act* to determine ownership of land. It further argued that even if there was jurisdiction to grant such relief, the Board should not act on the jurisdiction because of the potential for inconsistent outcomes between proceedings before the Board and the court proceedings prescribed in the Quit Claim Agreement. The City also stated that since the determination of title to the disputed lands was a central issue, as plead by the Claimant, it could not be viewed as "necessary or incidental", as might be authorized under the *Expropriations Act*.

The Claimant's response was that the Board had jurisdiction to determine the nature of the Claimant's ownership interest, and that such jurisdiction "arises from the definitions of land and owner under the *Expropriations Act* and the broad powers in the OMB to determine all questions of law and fact 'necessary and incidental' to the exercise of its powers contained in the Act."[15] The Claimant also argued that the Minutes of Settlement and Quit Claim Agreement constituted Section 30 Agreements.

The Board sided with the City, largely dismissing the case law cited by the Claimant. The Board held that the Claimant should not be allowed to go back on the Quit Claim Agreement, which specified that ownership interests would be determined by a court. Further, it noted that the *Expropriations Act* gives the Board limited jurisdiction, grating certain limited powers to the Board and other powers to the courts. Noting that certain case law grants the Board jurisdiction to make legal determinations with respect to matters such as ownership and easements when exercising its planning jurisdiction, the Board held that the distinguishing element of this case was that the issue of the determination of the Claimants interest in the disputed lands was not a "necessary and incidental" matter, but a central issue, which meant the Board did not have jurisdiction.

Regarding the assertion that a Section 30 agreement was in place, the Board held that there was not a Section 30 Agreement because the City had not consented to one, noting that the consent of the parties is the operative element of such an Agreement.

The Claimant's Cross-Motion

The owner claimed interim costs. The City had already paid $150,000 for interim costs as part of the above-noted Minutes of Settlement. In support of the costs claimed, the Claimant provided evidence showing costs had exceeded the initial $150,000 paid by the City. The Claimant relied on section 32 of the *Expropriations Act* in tandem with *Dell*, which in the Claimant's view gave the Board the power to "take the bold step of ordering the costs in this case."[16]

[15] *Ibid.* at para. 19.
[16] *Ibid.* at para. 59.

The Board declined to order interim costs, favouring costs cases post-dating *Dell*, such as *Bernard Homes*[17] and *Paciorka*[18], which determined that interim costs were not recoverable under the *Expropriations Act*. In any event, it was not clear whether the costs being claimed were compensable under the *Act*, or merely costs incurred as part of the ownership and occupation of the property.

The Claimant also sought an order preventing the City from clearing the buildings on the undisputed lands. The Claimant relied on planning case law that the Board considered to be off point. In response, the Board pointed to the Minutes of Settlement between the parties which specified that the City was free to deal with the undisputed lands and all buildings and structures as it chose and in its discretion. Even in the absence of such an Agreement, the Board noted that it would not grant the relief sought by virtue of section 35 of the *Expropriations Act*, which empowers expropriated owners only to make claims upon compensation, and not upon land.

The Claimant also argued that demolition would have an adverse environmental impact on the undisputed lands. The Board noted that the Minutes of Settlement adequately addressed such concerns to allow the Claimant to minimize costs arising from contamination. The Board concluded on this point by stating that it was not appropriate to constrain the City's activities on the undisputed land because the prejudice to the City was clear, while the advantages to the Claimant were uncertain.

The Board granted the City's motion and struck out the Notice of Arbitration and Statement of Claim and granted the Claimant 45 days to serve and file amended pleadings which would exclude reference to the disputed lands, along with other portions of the document deemed inappropriate. The Claimant's cross-appeal was dismissed.

Marsdin v. Hamilton (City)[19]

The Claimants (Mark Marsdin, Margaret Marsdin, Joao Milagaia and Maria Milagaia) instituted separate actions before the Ontario Municipal Board for a determination of compensation respecting their properties. The City brought a motion to dismiss each Notice of Arbitration and Statement of Claim on the grounds that the OMB did not have jurisdiction because the Claimants' properties had not been expropriated. The matters were joined for the motion.

The key facts, which were generally agreed upon by the parties, are summarized as follows:

- City Council approved an area containing the Claimants' properties for construction of a new stadium for the Pan Am Games and gave staff approval

[17] *Bernard Homes Ltd. v. York Catholic District School Board,* 2004 CarswellOnt 3008 (Ont. Div. Ct.).
[18] *Windsor (City) v. Paciorka Leaseholds Ltd.*, [2012] O.J. No. 4259 (Ont. C.A.).

[19] 2013 CarswellOnt 10709 (O.M.B.).

to expropriate the lands if a negotiated purchase of the properties could not be achieved.

- The City made offers of full and final compensation for the lands, which were refused by the Claimants.
- The City served the Claimants each with a Notice of Application for Approval to Expropriate Land.
- Following service of the Notice of Application, the Claimants were advised that the City would not be proceeding with the expropriation because other sites for the stadium were under consideration.
- Despite the change in location, the Claimants were advised that the City was willing to purchase their properties for the previously offered price. The Claimants did not accept the offers.
- The Application for Approval to Expropriate Land was never forwarded to the approving authority and the expropriation was never approved. As a result, the City never held a proprietary interest in the properties.
- Once it had been confirmed that the lands would not be taken by the City, the Claimants counsel provided the City with a bill of costs setting out the legal costs associated with the determination of compensation payable under the *Expropriations Act* relating to the negotiations between the Claimants and the City regarding the possible expropriation of their lands. The City did not pay these costs.
- The Claimants served and filed separate Notices of Arbitration and Statements of Claim seeking consequential damages (in the form of legal costs) arising from the City's abandonment of the expropriation pursuant to section 41 of the *Expropriations Act*; and in the alternative, costs in accordance with section 32 of the *Act*.

In support of its motion, the City argued that section 41 of the *Expropriations Act*, relating to the abandonment of an expropriation, did not apply because there was no expropriation in this instance. The City interpreted section 41 of the *Act* to mean that in order for damages to flow from abandonment, there must be an expropriation in fact and an abandonment in fact. According to counsel for the City:

> Contemplated or intended expropriations are not caught by s. 41. If the legislature, in its construction of the Expropriations Act, intended to capture intended or considered expropriations, clear and express language providing for compensation in such cases would have been employed. Any additional jurisdiction or powers of the Board would have been explicitly stated in clear language.[20]

The City further argued that consequential damages under section 41 may only be awarded where the landowner takes back the expropriated lands. In this case, the lands never vested in the authority, and it was therefore impossible for the owners to take back their interest, since it was never taken from them.

[20] *Ibid.* at para. 18.

The City underlined that *Dell* espoused that expropriated owners are to be made whole only when land is taken. The City cited paragraph 33 from *Dell* in support of this proposition, which reads as follows:

> The whole purpose of the Expropriations Act is to provide full and fair compensation to the person whose land is expropriated. It is the taking of the land which triggers and gives rise to the right to compensation. An owner whose land is caught up in a zoning or planning process but not expropriated must simply accept in the public interest any loss that accrues from delay. There is neither a statutory requirement nor a policy reason for employing a similar approach to compensation for losses accruing from delay when land is expropriated and for losses accruing from delay in the planning approval process when land is not taken.[21]

The City made the same argument with respect to the Claimants' section 32 arguments, stating that a Claimant is only entitled to costs under section 32 if there is an expropriation of land or a claim for injurious affection that has been determined by the Board. Again, the City argued that there was no expropriation in this instance, and as a result a costs award was unwarranted.

The Claimants contended that section 41 of the *Act* did apply since the technical requirements under section 41 had been met: there had been an expropriation, the expropriation was found unnecessary prior to the payment of compensation, the expropriated owners were served or entitled to be served with a Notice of Expropriation and the owners elected to keep the property.

The Claimants argued there had been an expropriation, relying on *Dell* as an authority for the position that expropriation is a process and not merely a matter of title vesting in the authority at a particular point in time. The Claimants cited the following passage from *Dell* in support of this assertion:

> the approach to damages flowing from expropriation should not be a temporal one; rather it should be based upon causation. It is not uncommon that damages which occurred before the expropriation can in fact be caused by that very expropriation.[22]

The Claimants added that the City had confirmed the abandonment in correspondence, writing that the City would not be proceeding with "this expropriation." As for the requirement that they be served with a Notice of Expropriation or be entitled to be served with a Notice of Expropriation, the Claimants stated that they would have been entitled to receive such a Notice but for the abandonment of the expropriation (since the expropriating authority had already served them with a Notice of Application). Finally, the Claimants stated that it was clear that they had opted to keep their lands.

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[21] *Ibid.* at para. 25.
[22] *Ibid.* at para. 36.

Regarding the claim for costs under section 32 of the *Expropriations Act*, the Claimants argued that the Board has the jurisdiction to determine an owner's entitlement to costs "upon an expropriation", relying on the above-noted rationale that expropriation is a process, rather than a specific point in time. In support of this position, the Claimants cited case law where pre-expropriation damages had been awarded.

In the alternative to their arguments pursuant to sections 41 and 32 of the *Act*, the Claimants argued that the doctrine of jurisdiction by necessary implication required the Board to make a determination of pre-expropriation costs. That doctrine arose from *Bell Canada v. Canadian radio-Television & Telecommunications Commission*[23], a case emanating from the Supreme Court of Canada. In that case, Bell was arguing that the CRTC did not have the authority to order Bell to pay a one-time credit to its customers pursuant to the CRTC's enabling statutes. The Court found that the statutes implied such authority, stating as follows:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes. I have found that, within the statutory scheme established by the Railway Act and the National Transportation Act, the power to make interim orders necessarily implies the power to revisit the period during which interim rates were in force. The fact that this power is provided explicitly in other statutes cannot modify this conclusion based as it is on the interpretation of these two statutes as a whole.[24]

The Claimants in this case further argued that section 38 of the *Ontario Municipal Board Act* gives the Board wide ranging powers, which empower it to make the costs award sought in the action.

Echoing the City's arguments, the Board allowed the motion and dismissed the claims, primarily on the grounds that there had been no expropriation. Section 41 of the *Act*, the Board reasoned, does not contemplate compensation for intended or contemplated expropriations.

The Board also noted that the cases cited in support of pre-expropriation costs were distinguishable from the present case in that lands were actually taken in those cases.

The Board applied the same reasoning to the Claimants' argument under section 32 of the *Act*. The Board understood section 32 to mean that compensation is not payable if

[23] [1989] 1 S.C.R. 1722 (hereinafter referred to as "*Bell Canada*").
[24] *Ibid*, at para. 51.

there is no expropriation. The Board provided further reasoning for its interpretation of sections 32 and 41 as follows:

> The use of the words "upon an expropriation" is intentional and ought to be read in their grammatical ordinary meanings. This phrase "upon an expropriation" is used in both s 32 and s 41. This cannot apply to the process of expropriation to attract an award of consequential damages, since the wording in s. 41 is specific to a taking. There can be no retention of an interest in land, or transfer back of land if the interest or title is not transferred in the first place. This Board recognizes how this provision places the claimant in a difficult position when faced with the prospect of expropriation. The Board, however, must be mindful of its authority and the Board was reminded during the course of the hearing of the Motion of the care with which the Act must be read and applied.
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> The overall purpose of the Act revolves around expropriations that are executed and determining the compensation thereof. The object of the Act is to ensure landowners are compensated fairly when their lands are expropriated.[25]

In response to the Claimant's third argument based on implied jurisdiction, the Board took the same position: in order for the Board's discretionary powers to apply, there must be a taking of land. Citing the *Bell Canada* case relied upon by the Claimants, the Board stated that, "Awarding costs where there has been no expropriation would be contrary to the Supreme Court of Canada's statement in ***Bell Canada*** that '... courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making...'"[26]

The Board's decision is perhaps best summarized by its comments at paragraph 79 of the decision, which reads as follows:

> In the absence of a formal registered expropriation, an expropriating authority should not be bound to compensate for damages or costs in a case where there is a potential for an expropriation. Furthermore, in the absence of a taking of land, negotiations for the purchase of the lands does not, and should not, attract a claim for costs, merely because the potential buyer has the power, if fully exercised, to expropriate.[27]

[25] *Supra* note 19 at para. 75-76.
[26] *Ibid.* at para 68.
[27] *Ibid.* at para. 79.

Visser, Re[28]
Injurious affection where no land taken

This decision of the Nova Scotia Utility and Review Board is distinguished by the fact that it is the first case to apply the test for determining injurious affection where no land is taken since the Supreme Court of Canada issued its decision in the *Antrim* matter.

As the result of highway construction activities very near to their home, the Vissers were claiming injurious affection in the form of physical damage to their home and lands, as well as business losses, loss of enjoyment of the property and other special damages.

Prior to the Board releasing its judgment, the Supreme Court's judgment in *Antrim* was released. The parties were invited to make further written submissions in light of *Antrim*. Each party did so.

The Board reviewed the principles arising from *Antrim* in detail. As in *Antrim*, private nuisance was the tort alleged under the "actionable" component of the test. The Board noted accurately that, "For private nuisance to succeed, the defendant's activities must interfere with the claimant's use or enjoyment of the land, which interferences must be both: (1) substantial and (2) unreasonable."[29]

It was clear that the Vissers were claiming compensation as the result of the construction of the highway and not its use. The "construction and not the use" dichotomy, which was ignored in *Antrim*, was not analyzed in detail by the Board. It is also interesting to note that the Crown entered into an agreement with the Vissers prior to construction to entitle the Vissers to advance claims available to them under the *Expropriation Act*.

Upon an extensive review of the evidence, it was clear to the Board that the construction caused damage to the owners' property, health and business and impacted the owners' use and enjoyment of the land. The Board did not engage in a complex review of the "substantial" and "unreasonable" components of the tort at issue; rather, the Board simply concluded that the Province's activities "constituted private nuisance within the test of being both substantial and unreasonable, that is, after considering all of the circumstance of this case, the Board finds the interference should not be borne by the Vissers without compensation."[30]

[28] 2013 CarswellNS 659 (N.S.U.A.R.B.).
[29] *Ibid.* at para. 43.
[30] *Ibid.* at para. 218.

Higgins v. Nova Scotia (Attorney General)[31]
Procedural fairness relating to an authority's application to expropriate

DDV mines applied to the Minister of Natural Resources for a vesting order pursuant to the *Mineral Resources Act* to acquire fee simple ownership of Higgins' lands for an open pit gold mine. DDV had been trying to purchase Higgins' 7-acre parcel for some time, but he refused to sell.

Notice of the DDV's application was made public, and many people wrote the Minister in support the mine's application and in opposition to it. The Minster specifically notified Higgins of the application by DDV and invited him to make written and oral submissions to express his opposition to the vesting order. Higgins did not want to sell his lands and he believed the mine could proceed without his lands. The Minister allowed DDV to make submissions and provide documentation in addition to its initial application. DDV was not given Mr. Higgins' submissions nor was Higgins provided with DDV's submissions.

The Minister granted the vesting order. Higgins appealed the decision to the Nova Scotia Supreme Court. Higgins alleged that the Minister applied an unfair process and was biased due to the mining project's political and economic implications. The Supreme Court dismissed the appeal on the grounds that the *Mineral Resources Act* did not prescribe any specific process for dealing with an application for a vesting order and that the duty of fairness owed to Higgins was met through the dialogue between the Minister and Higgins. As for bias, the Court had found nothing in the record to suggest the Minister was biased, and commented that the *Act* allowed for the Minister's decision to have political motivations, given that the project would impact all residents of the Province.

Higgins appealed the decision to the Nova Scotia Court of Appeal.

The Court succinctly summarized Higgins' argument as follows, at paragraph 10:

> The basis of Mr. Higgins' appeal is that the judge erred (1) in determining that the procedure followed by the Minister in granting the vesting order was fair and (2) by improperly considering inappropriate factors in reaching his decision, i.e., the effect the proposed gold mine would have on the local economy and the mining industry in the Province.[32]

The Court identified that the issues before it related to procedural fairness, that the standard of review was correctness and that its exercise was to determine whether the Supreme Court judge correctly applied the principles of procedural fairness to the

[31] 2013 NSCA 106.

[32] *Ibid.* at para. 10.

process followed by the Minister in granting the vesting order. The Court of Appeal reviewed the matter in light of the factors set out in the *Baker*[33] decision.

The Court found that the judge correctly applied the principles of procedural fairness in reviewing the Minister's decision, and provided a summary of its rationale as follows:

> Considering (1) the policy decision the Minister was required to make under the MRA, to choose the best course of action, from the standpoint of the public interest, in order to achieve the objectives of the MRA, (2) the purpose of the MRA to encourage, promote and facilitate mineral exploration, development and production for the economic advantage of the Province, (3) the MRA leaves the process to be followed up to the Minister, (4) the importance of the decision to Mr. Higgins, DDV and the people of Nova Scotia, (5) the legitimate expectations of Mr. Higgins in the process that would be followed by the Minister and (6) the process the Minister followed, we are satisfied the judge was correct in finding the Minister acted fairly and was not required to provide Mr. Higgins with more procedural protections than he did. We dismiss this ground of appeal.[34]

The Court also dismissed Higgins' second ground of appeal: that the judge erred in considering inappropriate factors such as the effect of the mine on the province's economy. The Court supported this aspect of its decision with the following remarks:

> The judge's reference to the many jobs that would be created by the mine, the positive economic impact it would have on the economy, the revenue the Province would earn through royalties and taxes and the effect the Minister's decision would have on the mining industry in Nova Scotia, are not an indication that he considered inappropriate factors. Rather, these are relevant considerations under the first and second Baker factors, the nature of the decision being made, a policy one, and the MRA's statutory scheme to encourage, promote and facilitate mineral exploration, development and production for the economic advantage of the Province. Thus the judge was correct to consider them.[35]

Higgins' appeal was dismissed.

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[33] *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817.
[34] *Ibid.* at para. 18.

[35] *Ibid.* at para. 20.