Ontario Expropriation Association
Fall Conference

Annual Case Law Review

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Introduction

Over the past year, Canadian courts and tribunals have provided expropriation practitioners with guidance on a range of timely issues. Decision-makers have considered and commented on pertinent topics such as compensation and valuation methodology, the abandonment processes and offer-back obligations of expropriating authorities, and the ever important issues of statutory interest and costs. Also notable this year are developments in the law on *de facto* expropriations and regulatory takings; and the limits of provincial-federal jurisdiction concerning the expropriation of property designated for a federally regulated project.

A select summary of the cases is presented below in chronological order, based on the date the decision was issued. For reference, sub-headings containing a brief summary of the issues are also provided.

Erbsville Road Development Inc. v. Waterloo Region District School Board[1]

Interest • Compensation

One of the first decisions released following last year's Fall Conference involved an appeal by the Waterloo Region District School Board of Ontario Municipal Board decision[2] awarding the owner statutory interest on compensation accruing from the date the subdivision plan received draft approval designating the property as a future school site.

Section 33(1) of the *Expropriations Act*[3], provides that an owner of expropriated lands is entitled to be paid interest on the portion of the market value of the owner's interest in the land and on the portion of any allowance for injurious affection, at a rate of 6 per cent a year calculated from the date the owner ceases to reside on or make productive use of the lands.

The School Board raised four issues on appeal: (i) whether interest can be awarded for a time period prior to expropriation under the *Act*; (ii) if so, how is the date from which interest commences to be determined; (iii) did the Board member err in finding that interest on the property ought to accrue from the date that the subdivision plan received draft approval; and (iv) whether the Board member erred in refusing to disallow interest to the owner for the period of delay associated with the withdraw of its initial appraisal report.

On the first question regarding whether interest may be awarded prior to the expropriation, the Divisional Court referred to the Court of Appeal's reasoning in *Partition Holdings Ltd. v. Ontario (Ministry of Transportation & Communications)*[4] and its own reasoning in *Vanderbelt v. Ottawa-Carlton (Regional Municipality)*[5], to find that the Board was correct to apply interest to the award prior to the date of the expropriation.[6]

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[1] 2015 ONSC 5216, 2015 CarswellOnt 17394 (Ont SC), Ellies J [Erbsville Road]

[2] *Erbsville Road Development Inc v Waterloo Region District School Board*, 113 LCR 174, 2014 CarswellOnt 2685 (Ont OMB).

[3] RSO 1990, c E26 [the "Act"].

[4] (1986), 56 OR (2d) 738 (Ont CA), leave to appeal to SCC refused (1987), 61 OR (2d) 456 (SCC).

[5] (1980), 19 LCR 193 (Ont Div Ct).

[6] *Erbsville Road*, supra note 1 at para 39.

In regards to the second question as to the correct date from which interest ought to be accrued, the Divisional Court agreed with the Board's reasoning that since the lands were sterilized for further development once designated as a school site, interest should accrue from the date of draft approval on December 24, 1999.[7] It found that the correct test is to determine the earliest date at which the potential for expropriation prevented the use of the land, either because the municipality would not permit further development, or because it would not have been prudent for the owner to spend money for that purpose.[8]

To address the third question, the Divisional Court considered the School Board's argument that the Board member erred in law and fact by failing to consider the specific ways in which the owner continued to make use of the lands.[9] It also considered the owner's arguments, which relied on the reasonableness analysis in *Antrim Truck Centre Ltd. v. Ontario (Ministry of Transportation)*[10], to rebut the authority's position.

The Court was not convinced that the reasoning in *Antrim*[11], as it pertained to the Court of Appeals errors in that case, assisted the owner. It noted that "there is a fundamental difference between a failure to specify all of the potentially relevant factors relating to a legal issue, and a failure to make reference to any of them."[12] Although the Board erred in law by failing to consider the uses to which the owner put the lands after the plan received draft approval, the evidence did not establish that the uses were sufficiently productive to disentitle the owner to an award of interest as of that date.[13]

On the fourth and final issue of delay that was caused when the owner's expert withdrew his initial report, the Divisional Court determined that the wording of section 33(2) of the *Act* is discretionary and allows the Board to decide whether any delay on the part of the owner in determining compensation warrants the application of a lower rate of interest. The Court deferred to the Board's reasons for not granting a lower rate of interest on the grounds that its decision was reasonable.

The Divisional Court succinctly summed up its findings stating that,

> In my view, the board member applied the correct test for the commencement date for interest under s. 33(1). He made no legal error in awarding interest for a period of time preceding the expropriation. His finding that productive use of the land ceased at the time Plan 30T-97017 received draft approval was reasonable. His failure to refer to other uses to which Block 38 was put after the date did not affect the result. His decision to dismiss the School Board's request to deny interest due to delay was also reasonable.[14]

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[7] *Erbsville Road*, supra note 1 at para 55.
[8] Ibid.
[9] Ibid, para 61.
[10] 2013 SCC 13, [2013] 1 SCR 594 (SCC), Cromwell J [*Antrim*]
[11] Ibid.
[12] *Erbsville Road*, supra note 1 at para 66.
[13] Ibid,para 84.
[14] Ibid, para 89.

This decision is significant in that it provides further guidance as to what it means to "make productive use of the lands" and reaffirms the reasoning in earlier cases that interest may be awarded for periods prior to the actual expropriation.

1739061 Ontario Inc. v. Hamilton-Wentworth District School Board [15]

Purpose of Expropriation • Abandonment of Lands • Offer Back Obligations • Costs

This Ontario Court of Appeal decision was the outcome of an appeal of the Superior Court decision discussed in the 2015 Annual Case Law Review.[16] The case considers the offer-back obligations of expropriating authorities and an expropriated owner's right of first refusal under the *Expropriations Act*[17], where lands are found to no longer be required for the purposes for which the property is expropriated. The decision also provides useful guidance on the interpretation of the purposes and objectives of an expropriating authority.

The appeal was brought by a landowner seeking to compel the expropriating authority to offer back a property on the grounds that the lands were no longer needed for the originally stated purpose of constructing and operating a secondary school and related amenities. In 2011, the owner purchased the property from the School Board with the intention of redeveloping the former school site into a seniors centre.[18] The School Board later decided to build a new centrally located school on the recently sold site and expropriated the property back from the owner in 2013.[19]

The design of the new school project evolved over time, and in 2014 it was announced that the School Board would implement a land swap with the City of Hamilton, whereby a majority of the expropriated property would be exchanged for nearby City lands.[20] The plan was that the City would use at least a part of the expropriated site for the development of a recreation facility similar to that previously proposed by the owner.

Upon learning of this plan, the owner brought an application before the Superior Court of Justice. The owner sought a declaration that all or part of the property was unnecessary for the purposes articulated by the School Board in its Notice of Application for Approval to Expropriate Land; an order requiring the School Board to serve a notice under section 41 of the *Act* advising of the owner's option to elect to take the expropriated lands back and seek consequential damages; and an interlocutory injunction preventing the School Board from conveying the property to the City and from demolishing the existing school building until the application was decided.

[15] 2016 ONCA 210, 2016 CarswellOnt 3882 (Ont CA), Lauwers JA [Hamilton].
[16] *1739061 Ontario Inc v Hamilton-Wentworth District School Board*, 2015 ONSC 1442, 114 LCR 207 (Ont SC), Whitaker J [Hamilton #1].
[17] *Act*, supra note 3.
[18] *Hamilton*, supra note 15 at 6.
[19] Ibid, para 25.
[20] Ibid, para 26.

The Superior Court ultimately determined that at least a portion of the expropriated site would be used for the stated purpose of amenities related to the school as defined in the *Education Act*[21], and that the expropriating authority was not obligated to offer the property back to the owner. The application judge found that the owner failed to make its case and dismissed the application, awarding costs and disbursements to the School Board in the amount of $58,815.46.[22]

The owner appealed to the Court of Appeal. The issues on appeal were whether: (i) the appellant's rights under section 41 of the *Act* were engaged on the facts, and if so, what were the consequences; (ii) the School Board was required to offer the property back to the appellant under section 41 despite its resolution not to do so under section 42 of the *Act*; and (iii) the application judge had erred in his award of costs to the School Board.

(i) Issue one: whether the appellant's rights were engaged under s. 41 of the Act

On the first issue, the Court of Appeal found that the School Board's actions had not triggered the offer-back obligation in the legislation. As part of its analysis, the Court considered at length principles of statutory interpretation and how the "purposes" and "objectives" of expropriating authorities are to be determined. It stressed that the purposes and objectives are to be considered in interpreting and applying the legislation that authorizes the expropriation under scrutiny. In this case, the School Board's decision to expropriate the property for a use as a "school site" had to take into account the meaning of that term as described in section 1(1) of the *Education Act*.[23]

Based on the purpose and facts, Justice Lauwers summarized his findings on the issue stating that,

> To sum up, in my view, the School Board did not abandon the property when it authorized the land swap with the City in September and again in November 2014. The motions do not operate as an admission binding on the Board that most of the property was "found to be unnecessary for the purposes of the expropriating authority" by the Board. The swap was not executed by staff, and it appears unlikely that it will be, although the Board has not yet rescinded the approvals. The School Board is set to use the property "for the purposes of the construction and operation of a secondary school and related amenities" consistent with the original notice of application. In short, the School Board did not change its purposes for expropriating the property, and s. 41 of the *Expropriations Act* was not triggered.[24]

(ii) Issue two: whether the School Board was required to offer the property back to the owner

On the second issue, the Court of Appeal addressed the issue of whether the School Board was required to offer the property back to the owner under section 41 despite its resolution not to do so under section 42 of the *Act*. The Court noted that under the latter provision, where the expropriating authority determines that the expropriated land is "no longer required for its purposes" and decides

[21] RSO 1990, c E2.
[22] *Hamilton #1*, supra note 16 at para 17.
[23] *Hamilton*, supra note 15 at para 60.
[24] Ibid, para 80.

to dispose of it, the authority is obliged to give the former owner a right of first refusal to buy the land unless the approving authority dispenses with this right.

The Court reviewed the legislative history of section 42 of the *Act,* namely that its purpose is to discourage the expropriation of more land than is required. However, it declined to rule definitely on the relationship between sections 41 and 42 of the *Act* stating that, "[t]he issue should be explicated in a situation in which it is directly engaged on the facts."[25]

(iii) Issue three: award of costs by the application judge

On the third issue, the Court of Appeal saw no reason to extend the principle of full compensation to cover the costs of collateral civil litigation that expropriated owners may bring to challenge the legality of an expropriation. However, in considering whether the application judge erred in awarding the School Board costs in the amount of $58,815.46 (the amount sought by the owner) instead of $29,574.17 (the amount actually sought by the Board), the Court sided with the owner. It stated that,

> There is no basis in principle for an award of costs exceeding the amount sought by the successful party, and in this case there was no basis for an award of substantial indemnity costs against the unsuccessful appellant…[26]

On this basis, the Court of Appeal set aside the application judge's costs award and adjusted the amount of costs to $14,000.00 all-inclusive for the application and $16,000.00 all-inclusive for the appeal to be paid by the owner to the School Board.[27]

Russell Inns Ltd. v. Manitoba[28]

Valuation Methodology • Injurious Affection

This decision of the Manitoba Court of Appeal concerned an appeal by the Province of a decision of the Land Value Appraisal Commission certifying compensation for injurious affection arising from a partial taking. At issue this case was the valuation approach to be applied when determining injurious affection where there are multiple separate parcels owned by the same landowner.

The landowner owned two adjacent parcels referred to as Lots 1 and 2. The Province expropriated part of Lot 2 in order to make certain improvements.[29] The landowner continued to own Lot 1 and the remainder of Lot 2. Although the lands were contiguous, each lot was registered as having a separate title at the Manitoba Land Titles Office.

The parties agreed to the value of the expropriated lands but disagreed as to the landowner's claim for injurious affection. The matter proceeded before the Commission where the tribunal was asked

[25] *Hamilton*, supra note 15 at para 87.
[26] Ibid, para 97.
[27] Ibid, para 99.
[28] 2016 MBCA 43, 2016 CarswellMan 148 (MB CA), Phuetzner JA [Russell Inns].
[29] Ibid, para 3.

to determine whether the "remaining land" was comprised of the remainder of Lot 2 or included both the remainder of Lot 2 *as well as* the neighbouring Lot 1.[30] The parties agreed that the remainder of lot 2 in itself had little if any market value.

At the hearing, the Province argued that the "larger parcel theory" should be applied to determine the injurious affection to the owner's remaining lands. Under this theory, the remainder of Lot 2 and the whole of Lot 1 would be viewed as one parcel. Based on this approach there was no reduction in the market value of the remaining land as a result of the expropriation. The Commission decided in favour of the landowner finding that the Province's larger parcel theory was not a common valuation approach in Canada.[31]

On appeal, the Province argued that the Court should re-weigh the evidence presented to the Commission and choose the valuation methodology adopted by the authority's appraiser. The Court of Appeal applied a standard of reasonableness and deferred to the Commission's reasoning finding that the tribunal had adequately explained why it did not adopt the larger parcel theory. It went on to state that,

> [m]ethodology is a question of fact, and decisions as to methodology are directly within the expertise of the Commission. This Court will not intervene in decisions of methodology unless there has been a clear error in principle.[32]

Accordingly, the appeal was dismissed. This decision reinforces the point that courts are often inclined to defer to specialized tribunals on questions of land valuation methodology.

Down v. Ontario (Transportation)[33]

Compensation • Injurious Affection

This Ontario Municipal Board decision similarly concerned compensation for a partial taking of land, including the amount for injurious affection to the remaining property.

In 2011, the Ministry expropriated 20.962 acres of a 72.373 acre farm located in northeast Oshawa for the construction of Highway 407 East.[34] The expropriated lands included the principle residence of one of the owners as well as related structural improvements.

The subject property was located outside of the urban expansion area. However, the lands were designated as "whitebelt", meaning that the lands were not restricted from future urban development under Ontario's *Greenbelt Plan*.

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[30] *Russell Inns*, supra note 28 at para 6.
[31] Ibid, para 8.
[32] Ibid, para 12.
[33] 117 LCR 268, 2016 CarswellOnt 7864 (Ont OMB) [Down].
[34] Ibid, paras 7 and 15.

Pursuant to section 25 of the *Expropriations Act*[35], the Ministry offered, and the owners accepted, an offer of $358,000.00 without prejudice to the their right to seek further compensation.[36] The Ministry's offer was based on appraisal evidence that relied upon comparable sales that included improvements. No additional compensation was offered to reflect the fact that the partial taking included all of the improvements on the property, including the home of one of the owners.

The owners subsequently advanced a claim in the total amount of $2,753,998.00 inlcuding:

- $677,575.00 - market value of the fee simple interest in the expropriated lands;
- $395,000.00 - market value of the improvements;
- $1,212,000.00 - injurious affection to the remaining lands;
- $425,000.00 - equivalent reinstatement less any amount awarded for the improvements;
- $19,750.00 - inconvenience allowance;
- $4,673.00 - disturbance damages for moving costs;
- $20,000 - disturbance damages for lost farm rental income; plus reasonable costs and interest in accordance with the *Act.*[37]

(i) Highest and Best Use of Lands – Before and After

The Ministry's position was that the highest and best use of the property *before and after* the taking was a continuation of its existing agricultural use. The owners argued that *before* the taking, the subject lands would have been brought into the Urban Area Boundary for the City of Oshawa and designated as 'Living Areas' in the Durham Region Official Plan, and therefore should be valued based on the future residential development potential. Following the expropriation, the owners argued that the highest and best use of the property would be for 'Future Employment Areas.'

The Board agreed with the evidence of the owners' appraisers as to the highest and best use of the lands. Accordingly, the Board valued the majority of the lands at $35,000.00 per acre, which reflected the designation of the lands as "whitebelt" and therefore likely to form part of the future urban development area.[38] For the modest non-developable portions of the lands designated as conservation and "greenbelt" lands, the Board found that a value of $7,500.00.00 per acre was appropriate.[39]

(ii) Improvements

The improvements on the expropriated lands included a two-storey house, garage, shed, drive shed, bank barn with lean-to and covered feed area. The Ministry's position was that no compensation should be payable for the improvements on the basis that when agricultural properties are acquired to expand cash crop farm operations, the improvements are often considered a liability to maintain and therefore had a nominal contributory value.

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[35] *Act*, supra note 3.
[36] *Down*, supra note 33 at para 14.
[37] Ibid, para 17.
[38] Ibid, para 118.
[39] Ibid, para 120.

In contrast, the owners submitted that the improvements had value in broadening the scope of potential purchasers of the lands beyond just developers and in order to be made whole the owners were entitled to additional compensation to replace the improvements. The Board again agreed with the Down family, finding that the improvements had value.[40]

The Board accepted the owners' valuation approach, which estimated value of the residential improvements based on a separate notional one-acre parcel in order to determine the cost of an equivalent rural residential property. It accepted the owners' appraisal evidence finding that a comparable residence in the area would have a replacement value of $395,000.00, in addition to the market value of the vacant lands.[41]

(iii) Injurious Affection

Based on the above-noted finding regarding the highest and best use of the lands before and after the taking, the Board determined that the remaining lands had been injuriously affected as there was a difference in value between the long term residential lands and speculative employment lands. The appraisal evidence before the tribunal indicated that there was minimal demand for employment land in north Oshawa combined with the limited servicing options. These factors along with the proximity to the highway and setback requirements would have a negative impact.

As a consequence, the value of the employment land ($18,750.00), as compared to residential value ($35,000.00), would be substantially lower.[42] The resulting difference in value was a loss of $16,250.00 per developable acre of the remaining land, totalling $743,148.00.

(iv) Loss of Rental Income

On the issue of lost rental income, the Board determined that the loss of income earned from renting out the approximately 17 acres of hydro corridor lands owned by Ontario Hydro adjacent to the owner's farm lands was not compensable.[43] There was no written evidence presented indicating that the owner was authorized to sublet the Ontario Hydro lands to a third party.[44]

(v) Compensation, Interest and Costs

Overall the Board awarded compensation in the amount of $1,842,094.00, plus interest and costs.[45] This award resulted in additional compensation in the amount of $1,484,094.00, which was paid over and above the Ministry's section 25 offer of $358,000.00. On the matter of interest, the parties agreed that interest on the market value and injurious affection was to be applied as of May 15, 2012 to the issuance date of the Board's decision on May 12, 2016. Costs were awarded to the owners.

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[40] *Down*, supra note 33 at paras 132 and 142.
[41] Ibid, para 133.
[42] Ibid, para 139.
[43] Ibid, para 103
[44] Ibid, paras 101 and 102.
[45] Ibid, para 142.

Shergar Development Inc. v. Windsor (City)[46]
Valuation Methodology • Compensation • Interest

This recent Ontario Municipal Board decision concerned the valuation of the lands, interest accrued, and costs incurred in a long-standing matter involving former rail corridor lands located along the Detroit River in Windsor.

In 1998, the City of Windsor expropriated lands on the south shore of the Detroit River and the north side of Riverside Drive West, located approximately one kilometre west of the downtown area, between the Ambassador Bridge and the Detroit-Windsor Tunnel.[47] The expropriated lands were owned by Shergar Development Inc. and mortgaged by Canadian Pacific Railway, which later withdrew as a party to the proceedings.

Pursuant to section 25 of the *Expropriations Act*[48], the City offered the owner $500,000.00 in compensation for the lands.[49] The claim eventually advanced by Shergar was for $5,000,000.00.[50]

(i) Valuation Analysis

In determining the value of the lands and compensation to be paid, the Board undertook a lengthy and detailed analysis regarding the comparable sales utilized by the parties' appraisers. In assessing the valuation evidence, the Board noted that there are a number of cases that have upheld the principle of the subject property being the best comparable. Quoting from the case, *Aldo Recreational Park Ltd. et al. v. Metropolitan Toronto & Region Conservation Authority*[51], citing other case law on the subject[52], the Board noted that,

> Where a shrewd, successful, experienced man like…[the claimant]…before purchasing, carefully considers the matter and reaches a conclusion as to the value of the property, and finally parts with his money in exchange for it, much weight must be given to his action.[53]

Applying this reasoning and the proposition that the price paid by the owner may be a good starting point in determining market value, the Board noted that when Shergar purchased the property it thought that it was getting two sites (the subject lands and the railcut lands) that were joined together. Shergar only later found out that the properties were not connected and that the railcut lands were land locked and virtually worthless. In this context, the tribunal determined that the owner had overpaid for the properties and accepted the City's estimate of $710,000.00 for the lands.[54]

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[46] 2016 CarswellOnt 8507 (Ont OMB) [Shergar].
[47] Ibid, para 15.
[48] *Act*, supra note 3
[49] *Shergar,* supra note 46 at para 17.
[50] Ibid, para 20.
[51] (1973) 5 LCR 321 (Ont LCB).
[52] *Re Reaume and Detroiut-Windsor Subway Co* (1930), OWN 370 at 371.
[53] *Shergar*, supra note 46 at para 46.
[54] Ibid, para 48.

(ii) Interest

The City argued that the interest clock should begin running as of July 5, 2013 to the hearing date. It further argued that Shergar should receive a net amount after the mortgage costs were paid, and that statutory interest on the net amount should be from July 5, 2013 to the date of the decision.[55] Shergar responded by arguing that the interest should be paid on the full amount of the award, and the time should be as set out in the legislation.[56]

Ultimately, the Board rejected the City's arguments and found Shergar entitled to the statutory rate of interest from the date of possession on August 17, 1998 to the end of December 2007, and from July 5, 2013 to the date of issuance of the decision.[57] The Board also ruled that Shergar was entitled to a reduced amount of 3 per cent interest for the period of January 1, 2008 to July 4, 2013.[58]

The tribunal concluded by awarding costs to Shergar and noted that the total claim based on the above would be reduced by the amount owing to CPR based upon the portion of the lands that it held on the mortgage.[59]

Mask v. Admaston/Bromley (Township)[60]

Re-Categorization of Compensation • Injurious Affection

This Ontario Municipal Board decision concerned whether the authority, the Township of Admaston/Bromley, had in fact compensated the landowners for injurious affection.

The subject property abutted a landfill site that was converted to a waste transfer facility in 2004. In order to address the risk of migrating contamination, the Ontario Ministry of the Environment instructed the Township to create a Contaminant Attenuation Zone ("CAZ") around the facility. It was eventually determined that the CAZ should include neighbouring lands owned by the Masks. In 2013, the Township expropriated a parcel of approximately 6.8 acres from the landowners, which consisted of a wooded area and hayfield used by the owners for their cow-calf farming operation.[61]

The Township served the owners with an offer of compensation for the lands in the amount of $41,711.00, pursuant to section 25 of the *Expropriations Act*.[62] The offer was twice what the Township's appraisers had found the farmland to be worth.[63] The lands were valued as a building

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[55] *Shergar*, supra note 46 at para 50.
[56] Ibid, para 51.
[57] Ibid, para 56.
[58] Ibid.
[59] Ibid, paras 58 and 59.
[60] 2016 CanLII 33687 (Ont OMB) [Mask].
[61] Ibid, paras 7, 10 and 13.
[62] Ibid, para 14.
[63] Ibid, para 15.

lot, even though it was impossible to build or develop the lands due to the required separation from the waste facility.

According to the Township, Council had intentionally decided to serve the inflated value, even though it was aware that the lands were not a building lot, because it wished to make a form of "all-in" offer and secure a quick comprehensive settlement. The owners accepted the Township's section 25 offer of $41,711.00 on a without prejudice basis, indicating that the amounts for injurious affection and costs were still to be negotiated.[64] Subsequent negotiations were unsuccessful.

The owners eventually filed a Statement of Claim indicating that although the market value of the land had been paid, injurious affection for the loss of hay crops had not. The loss of hay over a 10 to 20 year period was initially claimed to be in the range of $28,000.00 (at the hearing the owners' Certified Crop Advisor estimated the loss over a 10 year period to be $14,745.55).[65]

Both parties agreed that the amount paid for the lands was inflated. In the proceedings, the owners made no effort to rebut the Township's arguments that the amount of compensation ($41,711.00) paid was twice the market price for farmland. The Masks instead relied on procedural arguments that the Township had admitted that the payment was for land only and that nothing had been paid for injurious affection.[66]

In the pleadings filed by the Township, the authority did not dispute the owners' right to claim injurious affection, but maintained that the Masks had already been compensated for the crop losses by virtue of the overpayment for the market value of the expropriated lands.[67]

In considering the issue, the Board began by reiterating the three principles underlying expropriation law. Namely, that (i) the *Expropriations Act* is meant to place an owner in the same position as he/she would have been in but for the expropriation; (ii) the valuation of land is based on objective standards; and (iii) the pivotal factor in determining the value of lands is the subject property's highest and best use.[68]

Applying these principles the Board concluded that the owners had been adequately compensated for any resulting injurious affection and that the Township had placed the owners in the same position as they would have been in, but for the expropriation. On an objective standard, there was no rationale to support the valuation of the lands as a building lot and the landowners had been paid some $20,000.00 more than what the lands highest and best use would normally provide.[69] Applying the principles set out in a case called *Smith v. Chatham*[70], the Board found that it was not procedurally barred from interpreting the Township's purpose of the additional payment amount of $20,000.00 and re-categorized this amount as a payment for injurious affection.

[64] *Mask*, supra note 60 at para 16.
[65] Ibid, paras 2 and 25.
[66] Ibid, para 20.
[67] Ibid, para 36.
[68] Ibid, paras 46 to 49.
[69] Ibid, para 55.
[70] 1985 CarswellOnt 2153, 33 LCR 165 (Ont OMB) at 166.

Accordingly, the Board dismissed the claim for injurious affection. In its concluding remarks, the Board noted that from a legal and substantive perspective in maintaining the intent and purpose of the *Act*, it found no fatal flaw in the Township's actions.[71] However, the tribunal cautioned authorities against utilizing an "all-in" approach and similar shortcuts stating that, "[t]he current litigation is ample testimony to the risks that can result, in terms of messaging. From a policy perspective, transparency is usually preferable."[72]

PEV International Research & Development Inc., Re[73]

Business Losses • Special Economic Interest

This case concerns a long-standing matter that received much attention from the Nova Scotia Utility and Review Board over an eight-year period. At issue in this particular matter was the compensation that should be awarded for an owner's special economic interest in the lands.

In 2006, the Municipality of the District of Guysborough expropriated lands from James Irving Warner, the fee simple owner of a property. After a lengthy hearing in 2008, the Board awarded compensation to Warner in the amount of $1,340,000.00 for the rural shore lands located on the Atlantic Ocean.[74] In 2009, a separate claim for compensation was advanced for an interest in the same lands held by PEV International Research & Development, which initially claimed compensation in excess of $47,000,000.00 related to a planned natural gas development.[75] PEV later withdrew its claims for business loss and disturbance damages thereby reducing the amount claimed.

PEV had proposed the development of a project on the site, which would include the importation of natural gas, which would be stored in floating storage and regasification units berthed off the property. Pipelines from the site would then carry the re-gasified natural gas to various points. The company had undertaken research, communicated with various persons regarding a source of natural gas, and had entered into certain agreements with Warner prior to the expropriation.

The agreement between the company and Warner provided the company with exclusive development rights, the exclusive right to pipeline corridors and tolls on the owner's land; a right of first refusal, a share of lease revenues and a share of sale proceeds. For the loss of these rights, PEV sought compensation in the amount of $8,986,000.00, plus interest and costs from the Municipality.[76]

The Board was not persuaded that PEV should be compensated for the entire amount, finding that,

> …there is no evidence of any value of PEV's development rights, or toll revenue, nor did PEV bring any special economic advantage to the lands. PEV did nothing

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[71] *Mask*, supra note 60 at para 73.
[72] Ibid, para 72.
[73] 2016 NSUARB 88, 2016 CarswellNS 450 (NS UARB) [PEV]
[74] *Warner v Guysborough (Municipality)*, 2009 NSUARB 130, 98 L.C.R. 135 (NS UARB) at para 536.
[75] *PEV*, supra note 73 at para 3.
[76] Ibid.

> to enhance the value of the Warner property or its attributes for LNG development.[77]

However, the Board did find that PEV's right of first refusal had value.[78] This value was supported by amounts paid under option agreements before the effective date of the expropriation and in reasonable contemplation thereafter, as well as payments received from other companies for a valve and pipeline agreement. Accordingly, the Board found that PEV was entitled to be paid $149,500.00 plus interest and costs, pursuant to the Nova Scotia *Expropriation Act*.[79]

Rogers Communications Inc. c. Châteauguay (Ville)[80]

Validity of Expropriation • Constitutionality

This Supreme Court of Canada case concerned whether a municipality may intervene in the siting of cell phone antennae and/or radiocommunication infrastructure within its borders, including the circumstances in which a local government may exercise its powers of expropriation.

In 2007, Rogers Communications Inc. decided to construct a new radio communication antenna system in the City of Châteauguay.[81] The company identified an optimal "search area" with a few possible sites for the antennae that could provide adequate coverage to fill gaps in its wireless telephone network. Rogers eventually entered into a lease with the owner of a property in a residential neighbourhood, referred to as 411 Boulevard Saint-Francis.

In order to install the antennae, Rogers was required to obtain approval for the specific site from the Minister of Industry. As part of the approval process the company had to comply with Industry Canada's *CPC-2-0-03-Radiocommunications and Broadcasting Antenna Systems Circular*,[82] requiring consultation with the public and the land-use authority, in this case the City.

In March 2008, Rogers initiated the required consultation process and notified the City of its intent to erect an antennae on the Saint-Francis site.[83] The City opposed the installation of the antennae on the site as it is located in a residential neighbourhood. It argued that the project would contravene the municipality's zoning by-law and would be visually disagreeable. Concerns were also expressed that the tower would have an adverse impact on the health and safety of people living in the surrounding area.[84]

The City and Rogers worked together to explore alternatives to the site, including the possibility of constructing the proposed antenna system on another property located in an industrial area.[85]

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[77] *PEV*, supra note 73 at para 310.
[78] Ibid, para 311.
[79] RSNS 1989, c 156; ibid at para 312.
[80] 2016 SCC 23, 117 LCR 215 (SCC), Wagner and Côté JJ [Rogers].
[81] Ibid, para 7.
[82] Ibid, para 9.
[83] Ibid, para 10.
[84] Ibid, para 11.
[85] Ibid.

When the owner of the industrial site refused to sell the property to Rogers, the City commenced expropriation proceedings to acquire the industrial zoned property on the company's behalf.[86]

However, after complications and delays with the expropriation of the industrial site, the company obtained permission from the Minister to proceed with constructing the antennae on the residential property.[87] To prevent the antennae project from proceeding on this site, the municipal council adopted a resolution, which authorized the service of a notice of establishment of a "reserve" under the Quebec *Cities and Towns Act*[88] and the *Expropriation Act*[89], prohibiting construction at the residential property for two years.[90]

Rogers filed a motion contesting the notice and intervened in the expropriation proceeding between the City and the owner of the industrial site. The company argued that the municipality had acted in bad faith, the reserve was unconstitutional and did not apply by reason of the doctrine of interjurisdictional immunity, which prevents actions taken by one level of government from impairing a "core" undertaking of another level of government.

At trial, the Superior Court found that the City had acted in bad faith and annulled the notice of reserve.[91] The lower court's decision was rejected by the Court of Appeal, which found that the purpose of the notice of a reserve was to ensure the well-being of residents and the harmonious development of the municipality's territory; and therefore the notice did not encroach on the federal rules[92]. Rogers sought, and was granted, leave to appeal to the Supreme Court.

The Supreme Court considered whether the City's notice of reserve was *ultra vires*, inapplicable and/or inoperable by virtue of the doctrines of interjurisdictional immunity and federal paramountcy, as well as principles of municipal law.

i) Notice of Reserve Unconstitutional

Writing for the majority, Justices Wagner and Côté found that the notice of reserve was unconstitutional as its essential purpose or "pith and substance" was to control the siting of radiocommunications infrastructure, a power that fell squarely within federal jurisdiction.[93] As evidence, the Court highlighted that the notice had not been served until *after* the Minister approved the installation of the antennae on the Saint-Francis site, Rogers had refused to wait for the expropriation proceedings for the industrial property, and it was announced that the company would be proceeding with the project as planned.[94] Accordingly, the municipality's goal was to block the installation of the antennae not to ensure the health and safety of area residents.[95]

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[86] *Rogers*, supra note 80 at para 18.
[87] Ibid, para 20.
[88] RLRQ, c C-19.
[89] RLRQ, c E-24.
[90] *Rogers*, supra note 80, para 22.
[91] *White c* Châteauguay *(Ville)* (2013), 11 LCR 81, 2013 CarswellQue 8577, Perrault JCS (CS Que).
[92] *White c* Châteauguay *(Ville)* 2014 QCCA 1121, 2014 CarswellQue 5123 at para 92 (CA Que).
[93] *Rogers*, supra note 80 at para 40.
[94] Ibid, para 43.
[95] Ibid, para 44.

At the same time, the Court clarified that the exercise of a municipality's power to expropriate is not in and of itself unconstitutional in the context of radiocommunications infrastructure projects, stating that,

> It is true that a spectrum licence holder has no powers of expropriation. When it cannot find an owner interested in leasing or selling property to it, it must, in principle, either rely on the municipality's co-operation to expropriate the land it seeks to use or have recourse to the Minister's power of expropriation. Our conclusion that the notice of a reserve is ultra vires does not mean that when a municipality supports a spectrum licence holder in the process for the installation of an antenna system, it is exercising a federal power. When a municipality supports a spectrum licence holder by expropriating property, the pith and substance of the measures it takes is not the choice of the location of an antenna system, as that location has already been approved by the Minister pursuant to his or her power under s. 5(1)(f) of the *Radiocommunication Act*. In such a case, the municipality's actions relate to the development of its territory, and there is no question from the perspective of the division of powers that it is entitled to do so.[96]
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> This being said, a municipal measure is not intra vires simply because it has a positive effect on the exercise of the federal power over radiocommunication, just as it is not necessarily ultra vires because it has a negative effect on the exercise of that power. The distinction we are making is instead based on the premise that when a municipality aids a spectrum licence holder by expropriating property for the licence holder's benefit, its purpose in doing so is not to choose the location of the antenna system. On the other hand, when the purpose of a municipal measure is to prevent or block the spectrum licence holder from, or to delay it in, constructing its antenna system at the location approved by the Minister pursuant to federal legislation, the municipality is, for the purposes of the pith and substance analysis, exercising the federal power to choose the location of the antenna system.[97]

The Court made clear that while expropriation on behalf of a telecommunications company may be acceptable from a constitutional standpoint, it may not be permitted from a statutory standpoint. Many expropriation statutes, such as the Quebec statutes at issue in this case, specify that the expropriation must be for a public purpose. Therefore, from a practical perspective it may be difficult for a municipality to expropriate land on behalf of a spectrum licence holder to carry out its federal mandate, while at the same time fulfilling its local powers, duties and/or functions.

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[96] *Rogers*, supra note 80 at para 54.
[97] Ibid, para 55.

ii) Siting for Radiocommunication Infrastructure a Core Federal Power

The Court went on to clarify the doctrine of interjurisdictional immunity. It found that, "… the siting of radiocommunication antenna systems is at the core of the federal power over radiocommunication."[98] As a consequence of the notice of reserve,

> …Rogers was unable to meet its obligation to serve the geographic area in question as required by its spectrum licence. In this sense, the notice of a reserve compromised the orderly development and efficient operation of radiocommunication and impaired the core of the federal power over radiocommunication in Canada.[99]

Overall, the decision is unlikely to have a significant impact on municipalities' day-to-day interactions with spectrum license holders. However, the underlying principle that choosing an appropriate location for radiocommunication infrastructure is a core part of the federal power is worth noting, particularly where there is a dispute regarding the location of such a project.

Lynch v. St. John's (City)[100]

Constructive Expropriation • Regulatory Taking

This decision of the Newfoundland and Labrador Court of Appeal involves an appeal of a case discussed in the 2015 Annual Case Law Review.[101] The appeal was brought by a group of related landowners, which had initially brought an application for a declaration that their property had been constructively expropriated by the City of St. John's.

The owners applied to develop a 10-lot residential subdivision and had requested rezoning of the property. The City denied the development and rezoning application on the grounds that the lands were part of the Broad Cove River Watershed and provided an important source of water for the City. The owners were informed that the 7.4 acre site must be kept in a "natural state".[102] The owners brought an action for a declaration that the land had been *de facto* expropriated. At trial, the judge concluded that the regulation of the property by the City did not amount to a *de facto* expropriation and therefore the owners were not entitled to compensation.[103] The owners appealed.

On appeal, the owners again submitted that the actions of the City, in ensuring that the municipality acquired the benefit of the property as a source of unpolluted water, rendered the lands totally unusable and valueless, and had in effect resulted in the lands being taken from them. The City maintained that there had been no expropriation or taking from the owners, but merely a lawful regulation of the use of the property to protect the public interest and no compensation need be

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[98] *Rogers*, supra note 80 at para 66.
[99] Ibid, para 71.
[100] 2016 NLCA 35, 2016 CarswellNfld 277, Barry JA (NL CA) [Lynch].
[101] 2015 NLTD(G) 2, 1118 APR 309 (NL TD), Burrage J. [Lynch #1]
[102] *Lynch*, supra note 100 at para 23.
[103] *Lynch #1,* supra note 101 at para 91.

paid. The municipality further submitted that, if the lands had been expropriated, it had resulted from the actions of the Provincial Legislature and not the City.

In considering the parties' arguments, the Court of Appeal undertook a comprehensive analysis of the body of law on regulatory takings and the requirements for a *de facto* expropriation. The Court noted that cases on constructive expropriations set a high bar and establish that land use regulation is rarely found to constitute a compensable expropriation in Canada.

The Court noted that the determination as to whether compensation is payable for a *de facto* expropriation depends on whether the government action went beyond drastically limiting the use or reducing the value of the owner's property. The restriction on the use must become so stringent and all-encompassing that it has the effect of depriving the owner of his or her interest in the land, although leaves paper title undisturbed.

To determine whether the facts of the case met the threshold for a *de facto* expropriation giving rise to compensation, the Court applied the two-step test set out by the Supreme Court in the *Canadian Pacific Railway v. Vancouver (City)*[104] and considered whether: (i) there was an acquisition of the property by the City; and (ii) all reasonable uses of the property were removed. In addition, the court considered whether there was authority to compensate for an expropriation.

In considering the first question, the Court found that the City had acquired a beneficial interest in the property as a consequence of purporting to take away the owners' right to appropriate the groundwater on their land. Having found that there had been an acquisition, the Court considered the second requirement as to whether all reasonable uses of the property had been removed. In answering this second question, the Court noted that,

> ...the property rights [initially] flowing from a Crown grant, with virtually unrestricted rights to build and to appropriate and use groundwater, transformed to merely a right to keep the land unused in its natural state results in virtually all of the aggregated incidents of ownership being taken away. All of the reasonable uses of the property were taken away and a compulsory taking, a *de facto* or constructive expropriation, resulted.[105]

Finding that the steps of the test had been satisfied and a *de facto* expropriation had taken place, the Court considered whether the City had the authority to provide compensation for the expropriation. It clarified that,

> If such acquisition and removal is found, the question then becomes whether there is a statutory provision which, reasonably interpreted, expressly authorizes the taking without compensation. If no such legislative provision is put forth, the Court must order that compensation be paid by the adoption of an expropriation procedure, *mutatis mutandis*.[106]

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[104] 2006 SCC 5 at para 30, 2006 CarswellBC 404 (SCC), McLachlin CJC.
[105] *Lynch*, supra note 100 at para 63.
[106] Ibid, para 65.

In this case, the Court found that the provisions of sections 101 and 105 of the *City of St. John's Act*[107] could be applied to allow for compensation. Specifically, section 105, which referenced the council as having power to expropriate private property, "where necessary, for preventing the pollution of the waters"[108] could be applied. The evidence established that the restrictions on building and other activity on the owners' property were imposed to prevent pollution of the waters of Little Pond, from which water is pumped on an intermittent basis to supplement the Windsor Lake water supply.[109]

Given that it was the City Manager that had exercised discretion under section 104 of the *City Act*[110] to refuse approval of the development along with the fact that the lands were being used to benefit the City's water supply, the Court reasoned that the City should pay compensation.[111]

Based on these reasons, the Court of Appeal concluded that the trial judge erred in concluding that the property had not been constructively expropriated. It found that the owners were entitled to compensation from the City as a result of the actions undertaken pursuant to subsections 101 and 105 of the *City Act*[112], which lead to the prohibition on development of their land. The Court declared that the owners had a right, pursuant to sections 18 and 19 of the Newfoundland and Labrador *Expropriation Act*[113], to file a claim for compensation with the City as though a notice of expropriation had been served as of February 1, 2013. Failing an agreement as to the amount of compensation to be paid by the City, the owners had a right to proceed to have the compensation determined by the Board of Commissioners of Public Utilities.

Willies Car & Van Wash Limited v. The Corporation of the County of Simcoe[114]

Injurious Affection • No Land Taken • Costs

This recent decision of the Divisional Court of Ontario considered and upheld a costs award by the Ontario Municipal Board against an owner under the *Expropriation Act*[115], which was initially discussed in the 2015 Annual Case Law Review.[116]

The appellant was the owner of a car wash located on the south side of Highway 89 near County Road 10, which served as an access road and the principle entrance to the Honda Automotive Manufacturing Plant in Alliston.[117] The owner's business relied on the high volume of traffic going

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[107] RSN 1990, c C-17 [*City Act*].
[108] *Lynch*, supra note 100 at para 66.
[109] Ibid, para 66.
[110] *City Act*, supra note 107.
[111] *Lynch*, supra note 100 at para 68.
[112] *City Act*, supra note 107.
[113] RSN 1990, c E-19.
[114] 2016 ONSC 5786 (Ont Div Crt), Molloy, Horkins, Howard JJ [Willies Car Wash].
[115] *Act*, supra note 3
[116], 115 LCR 39, 2015 CarswellOnt 7573 (Ont OMB) [Willies Car Wash #1]
[117] *Willies Car Wash*, supra note 114 at para 5.

to and from Honda. In 2007, County Road 10 was re-located approximately one kilometre to the east of its former location and traffic was diverted away from the owner's car wash.

The owner of the car wash alleged 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. The owner commenced proceedings and claimed compensation before the Ontario Municipal Board for injurious affection where no land was taken.

The Board ultimately found that the owner had failed to establish any causal connection between the County's works and the alleged losses.[118] It dismissed the claim on the grounds that it 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.

Costs were awarded to the authority, the County of Simcoe, in the amount of $86,943.20.[119] The owner appealed the costs award to the Divisional Court.

On appeal, the owner's position was that the costs award was excessive and unfair, and the Board had placed too much reliance on an offer to settle from the County prior to arbitration. The owner also specifically argued that the award would have a "chilling effect" by "raising the prospect of jeopardizing the principle of facilitating access to justice."[120]

The Divisional Court rejected the owner's arguments. The Court noted that the risks associated with the claim were clearly outlined by the County prior to the arbitration proceedings.[121] Nevertheless, the owner advanced the matter to a hearing where it failed to prove injurious affection, and where it was determined that such a claim was statute barred in any event.

The Court concluded that while the costs awarded were high, they did not "fall outside the boundary of what is reasonable".[122] The Court also remarked that evidence of the car wash's own costs could have been helpful in the determination of the costs award. The owner's failure to provide any detailed evidence of its counsel's fees and disbursements also weighed against the costs appeal.[123] Accordingly, the case remains as a precedent for costs awards in favour of an expropriating authority, where a landowner ignores the risks of its own claims.

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[118] *Willies Car Wash #1*, supra note 116.
[119] Ibid.
[120] *Willies Car Wash*, supra note 114 at para 25.
[121] Ibid, para 28.
[122] Ibid, para 30.
[123] Ibid, para 29.