Ontario Expropriation Association Annual Case Law Update

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Introduction

The past year has provided the expropriation law community with an array of interesting cases. A select summary of these cases is presented below in chronological order. Sub-headings containing a brief summary of the issue(s) accompany each case for ease of reference.

Visser, Re[1]

Injurious affection where no land taken

This decision was the outcome of a supplementary hearing held in relation to a decision summarized in last year's Case Law Update also entitled *Visser, Re.*[2]

The Claimants had been awarded compensation for injurious affection where no land was taken as a result of the impact of highway construction works on the Claimants' health and enjoyment of their property. However, prior to the Nova Scotia Utility and Review Board rendering this decision, one of the Claimants, Mr. Visser, passed away. The Board awarded compensation to Mrs. Visser and reserved its decision with respect to Mr. Visser's entitlements pending a supplementary hearing.

The question before the Board was now whether the death of Mr. Visser relieved the Crown of its obligation to compensate the owner for injurious affection where no land was taken.

The Board ruled in favour of the Claimants and concluded that the Crown's obligation to compensate Mr. Visser was not extinguished upon Mr. Visser's death.

The Board noted that the Nova Scotia *Expropriation Act*[3] alters the common law rule that no action in tort survives a plaintiff's death. The Board determined that to decide otherwise would render section 31(2) of the *Act* meaningless. That section (which is mirrored in the Ontario *Expropriations Act*[4] in section 22(2)), allows an owner under disability to commence a claim for compensation within one year after his or her death. The Board also found that the *Act* prevails over the *Survival of Actions Act*[5], which was tabled by the authority as a mechanism to limit Mr. Visser's entitlements.

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[1] (2013) 111 LCR 69 (NSUARB).
[2] 2013 NSUARB 180, 111 LCR 1.
[3] RSNS 1989, c 156.
[4] RSO 1990, c E 26.
[5] RSNS 1989, c 453.

Goodtrack v. Waverley No. 44 (Rural Municipality)[6]
Costs where expropriation invalid

This case involved an appeal concerning costs for a matter in which the appellant, Mr. Goodtrack, succeeded in obtaining an order in the Court of Queen's Bench quashing a municipal bylaw expropriating a portion of his farm land. The decision is noteworthy due to the Court's consideration of solicitor-client costs in instances where the landowner establishes an unlawful taking.

The failed expropriation arose due to a dispute over the use of trails on land owned by Mr. Goodtrack. The Rural Municipality of Waverley considered the trails to be public land. After unsuccessful attempts to purchase the land from Mr. Goodtrack, the Municipality passed a bylaw expropriating the land under section 3(1) of the Saskatchewan *Municipal Expropriation Act*.[7]

The bylaw was required by section 3(2) of the *Act* to "state the purpose" for which the land was required. Applying a strict interpretation of the subsection, the Chambers judge found that the Municipality had failed to provide a purpose and deemed the bylaw invalid and the expropriation unlawful.

Mr. Goodtrack requested unassessed solicitor and client costs in the amount of $64,498.92. Instead, the Chambers judge awarded a fixed sum of $3,000.00 for the cost of the application to quash the bylaw payable by the Municipality. Relying on *Siemens v. Bawolin*[8] and *Wilson v. SGI*[9], the Chambers judge found that, "…an award of solicitor-client costs is limited to rare and exceptional circumstances where the conduct of the party against whom, costs are sought is scandalous, outrageous or reprehensible."[10] Mr. Goodtrack appealed the decision.

The Court of Appeal allowed the appeal. It determined that the judgment in *Siemens* provides for solicitor-client costs in "exceptional circumstances" and not only in strict cases of outrageous conduct. The Court also found that the Saskatchewan Court of Appeal's reasoning in the *Siemens* and *Canada (Attorney General) v. Saskatchewan Water Corp.*[11] cases provided an equitable basis upon which to allow the costs stating that:

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[6] 2013 SKCA 137, 112 LCR 1 [*Goodtrack*].
[7] RSS 1978, c M-27.
[8] 2002 SKCA 84, 46 ETR (2d) 254 [*Siemens*].
[9] 2012 SKCA 106, [2013] 5 WWR 286.
[10] *Goodtrack*, *supra* note 6 at para 11.
[11] [1991] SJ No 403, [1992] 4 WWR 712.

> [t]here is … a substantial body of literature suggesting, as a matter of fairness, that persons whose private land has been taken from them by means not of agreement but of compulsory expropriation should generally be able to recover their reasonable legal and other costs, responsibly incurred, in responding to the expropriation. This is not to say that compensation on expropriation necessarily includes recovery of such costs, for the scope of compensation is customarily a matter of statute. It is only to say that the courts, in exercise of their discretionary power to award costs as between the parties to litigation, may properly have regard for considerations of this nature in the exercise of that discretion. [12] [Emphasis added]

The Court concluded that since Mr. Goodtrack's land was taken from him through no fault of his own and pursuant to a process in which he had no input, equity required that solicitor-client costs should be awarded. The award of fixed costs was vacated and the matter remitted to the Chambers judge to assess the reasonable solicitor-client costs in favour of Mr. Goodtrack.

Higgins v. Nova Scotia (Attorney General)[13]
Scale and quantum of costs • Party and party costs

This decision of the Nova Scotia Court of Appeal serves as an update on the *Higgins*[14] decision discussed at the 2013 OEA Fall Conference concerning procedural fairness relating to an authority's application to expropriate. At issue in this subsequent decision was whether the landowner, Mr. Higgins, should have to pay party and party costs to a mining company, D.D.V. Gold Limited (DDV), and to the Attorney General of Nova Scotia (AG), for his unsuccessful appeal challenging the validity of the expropriation.

The initial appeal concerned a vesting order granted by the Nova Scotia Minister of Natural Resources pursuant to section 70 of the *Mineral Resources Act*,[15] transferring the land owned by Mr. Higgins to DDV for the development of an open pit mine. Mr. Higgins appealed the Minister's order to the Supreme Court of Nova Scotia where the judge found that the vesting order was validly granted, dismissed the appeal and sought written submissions from the parties on costs.

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[12] *Goodtrack*, *supra* note 6 at para 26.
[13] 2013 NSCA 155, 1071 APR 316 [*Higgins*].
[14] 2013 NSCA 106, 1059 APR 190.
[15] SNS 1990, c 18.

Mr. Higgins appealed the merits of the case to the Court of Appeal. During the period when the Court of Appeal was hearing the merits of the case, the Superior Court ruled on costs finding that:

> In the present case the Appellant is not asserting a claim for compensation. The Appellant is asserting that the Minister either had no authority or improperly exercised his authority in making a decision to expropriate the Appellant's lands. This challenge to the exercise of Ministerial authority is distinct from the issue of appropriate compensation. In fact, if the Appellant had succeeded there would be no further discussion on the issue of compensation. The Appellant would simply have the issue of costs determined and that would be the end of the matter.
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> The issue on power or the exercise of the power to expropriate is distinct from the issue of compensation. There is a process that will allow for a proper determination as to the amount the Appellant should receive as compensation for his lands. That is separate and apart from the process wherein the Appellant challenges the expropriation itself. While the Appellant may be entitled to all costs reasonably incurred for determining the appropriate amount of compensation, that does not rule out the possibility of the Appellant being held liable for costs pursuant to the Civil Procedure Rules for challenging the expropriation itself. The Appellant and others should be mindful of the fact that a baseless challenge of the process is not made without risk. To rule otherwise would ignore the wording in the applicable legislation and encourage ill-conceived challenges to the process. Applicants should not be lead to expect they will be awarded a cost amount, and have their costs paid for in cases where there are not proper grounds to challenge an expropriation.[16] [Emphasis added]

On this basis the Superior Court awarded costs in accordance with the *Civil Procedure Rules*. It ordered Mr. Higgins to pay costs of $6,000.00 plus disbursements of $10,136.07 to DDV and $2,000.00 inclusive of disbursements to the AG. Mr. Higgins appealed this decision.

The Court of Appeal considered Mr. Higgins' costs appeal and the costs to be paid in connection with the merit appeal in a separate decision. The Court of Appeal dismissed Mr. Higgins costs appeal and submissions regarding costs for the merits appeal. The Court relied on an earlier case of the Manitoba Court of Appeal, *Fouillard v. Ellice (Municipality)*,[17] for the proposition that:

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[16] *Higgins v Nova Scotia (Attorney General)*, 2013 NSSC 186, 109 LCR 199, at paras 15-16.
[17] 2007 MBCA 108, leave to appeal to SCC dismissed [2007] SCCA No 555.

> [t]here is a clear distinction between compensation proceedings where there is a statutory scheme providing for payment of costs to the land owner, and court proceedings to challenge the validity of the expropriation itself.[18]

On this basis, the Court determined that the cost provisions of the *Expropriation Act*[19] were not applicable to Mr. Higgins' appeals. Mr. Higgins was ordered to pay costs to DDV and the AG in the amount of $500.00 inclusive of disbursements in relation to the costs appeal and in the amount of $1,000.00 inclusive of disbursements in relation to the merits appeal, payable at the time he received compensation for the expropriated land.

Moore v. Getahun[20]
Expert reports • Evidence

The case involved the liability of a doctor in a personal injury matter. The issue arose in the case as to the purpose of Rule 53.03 of the *Rules of Civil Procedure*[21] in ensuring the integrity of the expert witness and whether it is appropriate for counsel to review a draft report of an expert and provide input to shape the report.

The Defence called a medical expert to testify with respect to reports made in support of their case. During his evidence the Plaintiff's counsel reviewed the expert's file and found notes regarding a one-and-a-half hour telephone call that took place between Defence counsel and the expert. During the telephone conversation, Defence counsel suggested changes to the final report. The expert confirmed that he was happy with his draft report but that the lawyers had made "suggestions" and he had made "the corrections over the phone."[22]

The Plaintiff submitted that the phone meeting was improper and that it was inappropriate for the Defence counsel to make suggestions to shape the expert's report. In response, the Defendant submitted that experts are entitled to prepare draft reports and share those draft reports with counsel for comment and discussion.

In strongly worded reasons, Madam Justice Wilson criticized the current practice of lawyers reviewing and commenting on draft expert reports prepared for use in litigation matters stating that:

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[18] *Higgins*, *supra* note 13 at para 11.
[19] RSNS 1989, c 156.
[20] 2014 ONSC 237, [2014] OJ No 135 [*Moore*].
[21] RRO 1990, Reg 194.
[22] *Moore*, *supra* note 20 at para 47.

> …the purpose of Rule 53.03 is to ensure the expert witness' independence and integrity. The expert's primary duty is to assist the court. In light of this change in the role of the expert witness, I conclude that counsel's prior practice of reviewing draft reports should stop. Discussions or meetings between counsel and an expert to review and shape a draft report are no longer acceptable.
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> If after submitting the final expert report, counsel believes that there is need for clarification or amplification, any input whatsoever from counsel should be in writing and should be disclosed to opposing counsel.
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> I do not accept the suggestion in the 2002 Nova Scotia decision, Flinn v. McFarland, 2002 NSSC 272, 211 N.S.R. (2d) 201 (N.S. S.C. [In Chambers]), that discussions with counsel of a draft report go to merely weight. The practice of discussing draft reports with counsel is improper and undermines both the purpose of Rule 53.03 as well as the expert's credibility and neutrality.
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> [...]
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> The practice formerly may have been for counsel to meet with experts to review and shape expert reports and opinions. However, I conclude that the changes in Rule 53.03 preclude such a meeting to avoid perceptions of bias or actual bias. Such a practice puts counsel in a position of conflict as a potential witness, and undermines the independence of the expert.
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> [...]
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> The purpose of Rule 53.03 of the Rules of Civil Procedure is to ensure that independence and integrity of the expert witness. The expert's primary duty is to the court. In light of this change in the role of the expert witness under the new rule. I conclude that counsel's practice of reviewing draft reports should stop. There should be full disclosure in writing of any changes to an expert's final report as a result of counsel's corrections suggestions, or clarifications, to ensure transparency in the process and to ensure that the expert witness is neutral. [23] [Emphasis added]

Madam Justice Wilson considered at length the expert's testimony on the nature of the changes to the report. She relied on this reasoning to discount portions of the expert's

[23] *Ibid* at paras 50-52, 298, 520.

evidence concluding that the meeting with the Defence counsel and subsequent edits to the draft report involved "…more than simply superficial, cosmetic changes."[24] In particular, she focused on the length of the conversation and the fact that as a result some content helpful to the Plaintiff was deleted or modified in the draft report as a consequence. On this basis, the judge determined that the expert's opinion was shaped by the Defence counsel's suggestions.

The Defendant lost at trial and has appealed to the Ontario Court of Appeal. A number of interested parties have also expressed an intention to seek leave to intervene in the pending appeal.

Egg Lake Farms Ltd. v. Alberta (Minister of Environment and Sustainable Resource Development)[25]

Procedure • Appeal of Inquiry Officer's decision

In this decision, the Alberta Court of Queen's Bench was tasked with determining compensation in an action brought by a Statement of Claim under section 28(3) of the Alberta *Expropriation Act*,[26] after a portion of the Plaintiff's farm was expropriated. The Plaintiff, Egg Lake Farms, later amended the Statement of Claim to request additional compensation for the expropriated land and damages for tort claims. The Defendant applied to strike portions of the amended Statement of Claim that claimed the expropriation was void or voidable under the *Act*, and requested that the compensation and tort claims be severed into two separate matters and heard independently.

In 2009, the Defendant initiated the process to expropriate a portion of the Plaintiff's farm located near Egg Lake, a lake that was regularly subject to flooding. In 2004, a weir was constructed to address the flooding of the lake, with the knowledge and approval of Egg Lake Farms. The elevation of the weir was later raised without the notice or consent of Egg Lake Farms, causing the water level to remain higher for a longer period during the summer growing and pasturing season.

Egg Lake Farms submitted that the increased lake level had also increased the harm to their farming operation caused by the expropriation. Amongst their submissions, Egg Lake Farms alleged that the Defendant had produced an inaccurate map and had misled them respecting the effect of the weir on their remaining farmlands. The Plaintiff also

[24] *Ibid* at para 293.
[25] 2014 ABQB 42, [2014] AWLD 1964 [*Egg Lake Farms*].
[26] RSA 2000, c E-13.

sought an interim injunction to halt further expropriation proceedings, and, in the alternative a declaration that the expropriation was voidable.

In addressing these arguments, the Honourable Madam Justice D.C. Read noted that the procedure set out in the *Act* gives a party whose land has been expropriated the option of having compensation fixed by either the Land Compensation Board or by the Court of Queen's Bench. She went on to explain that a party who objects to an expropriation does not have a similar option to have its objection heard by a judge instead of an Inquiry Officer. This is because under section 37 of the *Act*, there is no appeal from the decision of an Inquiry Officer respecting whether the expropriation should proceed.

The Court found that judicial review of an Inquiry Officer's decision is available. But the Court went on to note that assuming that one could argue that the expropriation is void or voidable is a form of judicial review, the claim still had to be brought within six months of the impugned act or decision. It determined that the governing legislation did not otherwise give the Court of Queen's Bench the authority to order the Crown to alter the terms of an expropriation or declare it voidable. Therefore, the Court found that the portion of the amended Statement of Claim seeking a declaration that the expropriation was void or voidable, had to be struck from the claim.

On the issue of the tort claims, the Court noted that claims for negligent misstatement or other tort claims are only recoverable in expropriation compensation matters to the extent that they are causally connected to the expropriation. Surveying the facts of the case, the Court determined that the tort claims were not causally connected with the expropriation. The alleged misstatement was made before the construction of the weir and before the expropriation was commenced.

At the same time, the Court found that there was an overlap of the factual circumstances and context of the compensation claim and the torts due to the fact that they involved the same parties and the same lands. The disputes were factually inter- related insofar as the water level of the lake was an important consideration in determining the compensation payable for the expropriated lands. Likewise, the course of negotiations on the compensation claim was relevant to the torts claim and the alleged misconduct in the torts claim could be relevant to the compensation claim.

Ultimately the Court found that while the legal basis and supporting evidence of the two claims were different, two separate trials were likely to be longer and more expensive than one consolidated trial. Madam Justice D.C. Read noted that:

> Having considered all of these factors, I am not convinced this is one of those exceptional cases where severance offers any real chance of saving time and expense. Nor am I convinced that there is sufficient prejudice to the Defendant on the costs issue to justify it. While it is true, the process of hiving off steps taken in the torts claim from the compensation claim will demand care and take time, it is far from impossible. Most firms now have time keeping systems in place which will provide the necessary record keeping and counsel on this matter are both able and experienced and can ensure the process does not become unwieldy.[27]

On this basis, the Court ordered that the compensation and tort claims be heard together.

Thoreson v. Alberta (Minister of Infrastructure)[28]

Procedure for assessing compensation • Particular items of costs • Legal fees

In this case the Appellants appealed a trial judge's award of costs under section 39(1) of the Alberta *Expropriation Act.*[29] The cost award at issue arose from a second trial held to determine the market value of an expropriated parcel of land.

The Alberta Ministry of Infrastructure expropriated two parcels of land owned by the Appellants in 2004. Two trials took place on the issue of compensation for the expropriated lands. Thoreson sought costs for the second trial in the sum of $850,571.00. The claim for costs was supported by a 159-page affidavit sworn by one of the Appellants. The affidavit did not speak to the reasonableness of the costs and very few of the costs claimed related to the first trial and/or appeal from the first trial judgment.

In his written reasons, the trial judge referred to *Nissen v. Calgary (City)*[30] as the leading case on expropriation costs. The trial judge ultimately reduced the costs and awarded $267,261.68, finding that the costs claim was excessive and that duplication of work had taken place:

> [t]he costs claimed in this matter are excessive because of the huge amount of time spent on various matters during the course of preparing for and attending at the second trial. The number of times

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[27] *Egg Lake Farms*, *supra* note 25 at para 47.
[28] 2014 ABCA 31, [2014] AWLD 1648 [*Thoreson*].
[29] RSA 2000, c E-13.
[30] [1984] AWLD 42, 28 LCR 321 at 322 [*Nissen*].

> the file has changed hands and the number of people involved in the file has resulted in duplication of work.[31]

The Appellants appealed the decision, arguing that the trial judge erred by restrictively interpreting the concept of reasonableness under section 39(1) of the *Act* and had misapprehended evidence by failing to balance the appropriate factors.

The Court of Appeal dismissed the appeal. In doing so it reaffirmed the importance of *Nissen* as the leading case on expropriation costs and the determination of reasonable costs under section 39(1) of the *Act*. Likewise, it confirmed the lower court's application of the relevant legal principles and the judge's finding that he was entitled to reduce claims which were "duplicative, excessive, unnecessary, undocumented or, in the case of expert costs, if the evidence was of little assistance."[32]

Ghazarian v. York (Regional Municipality)[33]
Procedure • Consolidation of claims

This was a motion brought by the expropriating authority to consolidate the property owners' claim with the claim of the tenant respecting the partial expropriation of a commercial property. In the alternative to consolidation, the authority moved for the owners' and the tenant's claims to be heard one after the other by the same Board member or panel of the Ontario Municipal Board (OMB). In the further alternative, the authority moved that the claim of the property owner be held in abeyance until the tenant is prepared to have its matter heard.

The property owners were the registered owners of the subject property located along Davis Drive in Newmarket. The tenant, of which the owners are the principals, operated a Goodyear Tire franchise from the property.

The authority argued that a number of factors supported the consolidation of the parties' claims including: (i) the non-arm's length relationship between the owners and the tenant; (ii) the identical facts, evidence, expert evidence and witnesses to be relied upon within each claim; and (iii) the fact the parties were represented by the same counsel. A failure to consolidate, it was argued, would result in the Board hearing the same case twice and lead to a duplication of resource expenditures and risking inconsistencies in the separate findings.

[31] *Thoreson*, *supra* note 28 at para 8.
[32] *Ibid* at para 14.
[33] 112 LCR 215 (OMB) [*Ghazarian*].

The landowners opposed the motion primarily because the tenant's damages could take years to crystalize given the authority's delays in advancing construction. They argued that consolidation would result in a significant delay of the determination of fair compensation, denying the owners the ability to carry out the required modifications to their property to mitigate the impacts of the expropriation. The owners also contended that there would be no overlap between claims since the tenant had agreed to abide by the factual findings arising from the owners' case; and had undertaken not to advance claims for leasehold advantage, leasehold interest in the property, or for improvements to the property (claims which would risk overlapping with the owners' claims).

The Board loosely considered the criteria for consolidation set out in the *Rules of Civil Procedure*[34], the OMB's *Rules of Practice and Procedure*[35] and the case law, and remarked that consolidation is a discretionary remedy. In applying its discretion, the Board ruled in favour of the Claimants and dismissed the motion to consolidate the claims. The Board gave the following reasons for its decision:

- The degree of overlap between claims was not significant, with the background being the only similar aspect. The two claims would involve distinct legal entities as well as distinct claims supported by different evidence and experts.

- There would be no risk of inconsistency between findings, particularly since the tenant undertook to be bound by the facts established in the owners' case, and undertook not to advance claims overlapping with the owners' claims.

- The owners are ready to advance their claims, and the tenant may not be ready for years. The delay caused by consolidation would cause prejudice to the owner.

- The incomplete road works and the impact of the expropriation on the tenant should not supersede the owners' right to claim compensation.

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[34] RRO 1990, Reg 194.

[35] Ontario Municipal Board, "Rules of Practice and Procedure", issued August 11, 2008, amended November 2, 2009 and September 3, 2013, OMB:online <https://www.omb.gov.on.ca/stellent/groups/public/@abcs/@www/@omb/documents/webasset/ec059424.pdf>.

Although the case does not establish a firm test for the consolidation of expropriation-related claims, it provides useful examples of the types of factors a Board member will consider when determining whether owner and tenant claims should be consolidated.[36]

Atco Lumber Ltd. v. Kootenay Boundary (Regional District)[37]
Inquiry procedure ● Challenging the validity of an expropriation

The *Atco Lumber* decision resulted from an expropriated owner's application to the British Columbia Supreme Court. The proceeding was comprised of two distinct applications. The first was for a judicial review of the Minister's decision to deny the appointment of an Inquiry Officer, and the second was to challenge the validity of the expropriation itself.

The Regional District of Kootenay Boundary issued and served a notice of expropriation advising of its intention to expropriate two permanent rights of way over Atco's lands: one over a portion of the lands where the District had previously installed a water line; and the other over an existing private road. In response, Atco requested that the Minister of Justice appoint an Inquiry Officer in accordance with the British Columbia *Expropriation Act*.[38] The Minister requested submissions from Atco and the District on whether the expropriation was for the "construction, extension, or alteration of a linear development".[39] If it was found to be so under the *Act*, the Minister would be barred from appointing an Inquiry Officer.

Following a review of the parties' submissions, the Minister determined that no inquiry would be held since the expropriation was deemed to be for a linear development

[36] A similar dispute arose in a matter heard by the Manitoba Land Value Appraisal Commission in *3339859 Manitoba Ltd v Winnipeg (City),* 111 LCR 163. In that case the City of Winnipeg sought a ruling to have the claims of the owner (Masonic Memorial Temple Ltd.) and the tenant (3339859 Manitoba Ltd./Roy L. Switzer) heard either at the same time or one after the other. The matter had arisen out of a partial expropriation, and in the authority's view each party was seeking compensation for lost parking and the authority was at risk of paying twice for the same claim. The Commission decided that the matters should be heard separately, but within a reasonable time frame. The basis for the decision was similar to that provided in the *Ghazarian* decision noted above. It was held that consolidation would unduly delay the advancement of the owner's claims, and the injurious affection claim advanced by the tenant did not appear to conflict with the owner's claims.
[37] 2014 BCSC 524, [2014] BCWLD 2769 [*Atco Lumber*].
[38] RSBC 1996, c 125.
[39] *Ibid* at s 10.

within the meaning of section 10 of the *Act*. The Minister provided the parties with limited reasons in support of its decision.

The Court's Finding Respecting the Minister's Decision

Atco conceded that the water line right of way expropriated by the authority fell under the definition of a linear development, and sought to abandon its review of the Minister's decision respecting this taking. However, Atco did seek a review of the Minister's decision regarding the access road taking. Atco submitted that the:

> …[c]ourt ought to apply a standard of correctness in reviewing the Minister's decision, and find it incorrect. Alternatively, …[it should find] that the decision was unreasonable in that it was not one of the possible, acceptable outcomes based on application of the law to the facts.[40]

The landowner argued that a private road/access road right of way is not a highway under the legislation, nor is it a water main. Even if it were deemed linear, it was not for the extension of a prior linear work.

The Minister asked the Court that the decision of the Minister be found reasonable and left in force. The District echoed the Minister's standard of review argument and added that so long as the expropriation related in some way to a linear development, it should fall under the linear development exception of the *Act*.

The Court determined that the Minister's decision was to be reviewed on the deferential standard of reasonableness. Although the Court would have preferred more detailed written reasons from the Minister, the Court was able to discern the "why" of the Minister's decision, a determinant factor in reviewing the reasonableness of a decision. Accordingly, the Minister's decision was deemed defensible in respect of the facts and the law and the first of Atco's applications was dismissed.

The Court's Finding Respecting the Validity of the Expropriation

Atco challenged the validity of the district's expropriation on three grounds: 1) its impermissible combining of two distinct expropriations; 2) the expropriated right of way interests imposed impermissible positive and personal covenants on Atco; and 3) the right of way was vague and overly broad.

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[40] *Atco Lumber*, *supra* note 37 at para 35.

Regarding Atco's first ground for challenging the validity of the expropriation, the court rejected Atco's position, stating that "[t]here is no authority in the *EA* [*Expropriation Act*] or in the case law supporting Atco's position that an expropriation combining two takings of the same type of interest on the same area of land is invalid."[41]

However, the Court agreed with Atco's argument that the expropriated right of way contained impermissible positive and personal covenants, noting that an easement cannot impose a positive obligation on the servient tenement, and that a statutory right of way must be negative in nature.

The types of covenants imposed by the right of way included Atco's covenant to remove the gate at the entrance of the private roadway, Atco's covenant to indemnify the District against actions arising out of Atco's conduct and Atco's covenant to execute further documents to the District's benefit. In addition, there was no obligation on the part of the District to repair or maintain any portion of the right of way, imposing upon Atco all of the maintenance duties. The Court ruled that "[s]uch covenants are impermissible. They are incapable of forming an interest in land and, therefore, the Regional District has exceeded its power in expropriating them."[42] The expropriation was set aside on the basis of Atco's second argument. Therefore, the Court did not review Atco's third ground for contesting the expropriation.

Erbsville Road Development Inc. v. Waterloo Region District School Board[43]
Appraisal methodology

The decision was the result of an arbitration related to an expropriation by the Waterloo Region District School Board of land within a residential and commercial subdivision for the construction of a school. Although the decision is heavily fact-driven, it is notable for its particular attention to the appraisal evidence put forward by the Claimant.

The Claimant's appraiser used the subdivision development technique as the methodology in arriving at his opinion of the market value of the land. This technique is a methodology within the income approach that is designed to determine the value of developable land. The process involves using market comparables to estimate sales

[41] *Ibid* at para 97.
[42] *Ibid* at para 117.
[43] 2014 CarswellOnt 5685 (OMB).

revenue, followed by a complex multi-step procedure of deducting the costs associated with arriving at and completing the sale of the land.

The Ontario Municipal Board rejected the use of the subdivision development technique in this case, preferring instead the direct comparison approach applied by the authority's appraiser. Although it acknowledged that the subdivision development concept was acceptable, the Board invoked past jurisprudence in warning that the technique is prone to error and should only be used in rare cases. Specifically, the Board noted that:

> It is clear from the appraisal principles and jurisprudence that the Direct Comparison Approach is the preferred methodology for appraising development land and that the Subdivision Development Technique should only be applied as an alternative when there is insufficient comparable data upon which to base an estimate using the Direct Comparison Approach. The Board and the courts have found the Subdivision Development Technique prone to error and unreliable.
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> Although the Subdivision Development Technique uses market comparables for the purpose of estimating sales revenue, this is only an initial step that is followed by a complex multi-step procedure of analysing and deducting the costs associated with arriving at and completing the sale of the finished product. The appraiser is normally required to consult with [the] planner, architects and engineers during this process in order to ascertain and evaluate the steps for subdividing the land. The process is dependent on estimates and assumptions, and courts have found it prone to error and to be avoided where possible.[44]

After having conducted its own review of the comparable sales evidence, the Board rejected the owner's claim and awarded the owner compensation for market value slightly in excess of what had been opined by the authority's appraiser.

Vincorp Financial Ltd. v. Oxford (County)[45]
Valid public purpose • Powers of a municipal corporation

The case involved an action brought by a landowner and mortgage holder of lands expropriated by the County of Oxford for the purpose of selling it to Toyota Motor Manufacturing North America Inc. (Toyota).

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[44] *Ibid* at paras 85-86.
[45] 2014 ONSC 2580, 239 ACWS (3d) 661 [*Vincorp*].

In 2004, the County commenced the process of acquiring 28 properties for a new automotive manufacturing plant. Toyota required a site of at least 1,000 acres in size. The County negotiated the purchase of all of the required parcels except one. As a consequence, the County expropriated the last required parcel, on which the Plaintiffs owned and operated a shopping mall (referred to as the "Mall Lands").

The Court was tasked with determining two issues. The first was whether the County could lawfully expropriate the lands in order to transfer them to Toyota for the purposes of developing the new manufacturing plant. The second was whether the expropriation and later sale of the lands by the County to Toyota conferred a "bonus" on the manufacturer contrary to the provisions of section 106 of the *Municipal Act.*[46]
On both issues the Court decided in favour of the County.

On the first issue, the Court noted that a municipality has the authority to purchase land and or expropriate land under the Ontario *Expropriations Act*.[47] Most importantly, it determined that there is no dispute that municipalities have the authority to expropriate lands and in turn sell the land to a private party so long as the expropriation is in pursuit of the public interest.

In examining the facts, the Court found that the County had expropriated the Mall Lands for a valid public purpose. It focused on the fact that municipalities have broad authority under section 11 of the *Municipal Act* to deal with the "economic, social and environmental well-being of that municipality" and can pass bylaws respecting matters within its "spheres of jurisdiction", including "economic development services." [48]

Relying on an earlier decision of the Court of Appeal in *Smuck v. St. Thomas (City),*[49] the Court found that the public purpose that the County sought to achieve in expropriating the lands fulfilled the objective of its bylaw, which was to promote economic development and industrial land in the City of Woodstock. This public purpose was also substantiated by various other documents, such as the County's request to the Minister of Municipal Affairs to place the lands under a Minister's Zoning Order; request to waive the hearing of necessity; and application to amend the Official Plan.

On the second issue, as to whether the expropriation and later sale of the lands by the County conferred a "bonus" contrary to section 106 of the *Municipal Act*, the Court

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[46] SO 2001, c 25.
[47] RSO 1990, c E26.
[48] *Vincorp*, *supra* note 45 at para 90.
[49] (1982) 136 DLR (3d) 191n, 35 OR (2d) 160.

relied on the reasoning in *Friends of Lansdowne Inc. v. Ottawa (City),*[50] to find that the provision prohibits only an "obvious" or an "obviously undue advantage."[51] The Court determined that although Toyota had paid less than fair market value for the Mall Lands, it did not amount to the giving of an obvious or undue advantage.

Applying a contextual approach, the Court determined that it was necessary to look at the net benefits that the development of the plant as a whole brought to the County, including but not limited to the increased tax assessment which far outweighed any differential between the fair market value of the Mall Lands with or without the Toyota plant. The Court outright rejected the Plaintiffs' flood-gate argument that there would be nothing to stop municipalities in the future from expropriating land so long as the use of the land would employ more people or generate higher tax revenue. In concluding, the Court reiterated the importance of economic development as a valid public purpose, highlighting that the Toyota development presented the County with "a unique and significant economic opportunity" and that "[a] municipality must have the tools at its disposal to pursue opportunities like the Toyota plant."[52]

20688685 Ontario Inc. v. Durham (Regional Municipality)[53]
Availability of disturbance damages • Examinations for discovery

This decision resulted from concurrent motions brought by both the Claimants and the expropriating authority.

The Claimants' motion sought to amend its Notice of Arbitration and Statement of Claim. The proposed amendment would add "compensation for damages which are the natural and reasonable consequence of the expropriation," as well as disturbance damages "... to account for any difference in value between the funds that would have been paid by Mr. Aggarwal and the market value of the Subject Properties" to the Notice of Arbitration and Statement of Claim.[54]

The Claimants argued that the amendment sought was appropriate, particularly in light of the regime arising from the Supreme Court's landmark decision in *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*,[55] which prescribes a broad

[50] 2011 ONSC 4402, 107 OR (3d) 104.
[51] *Vincorp*, *supra* note 45 at para 129.
[52] *Ibid* at paras 135-136.
[53] 2014 CarswellOnt 7817 (OMB) [*20688685 Ontario Inc*].
[54] The Claimants' claim was largely based on a written pre-expropriation agreement to purchase the expropriated properties by Sagar Aggarwal, which did not close.
[55] [1997] 1 SCR 32.

interpretation of the Ontario *Expropriations Act*,[56] so as to make owners whole economically.

The authority opposed the motion primarily on the basis that it was untenable at law and that there was no cause of action for allowing the relief claimed in the amendment. The authority relied on case law where a developer's unrealized profit (*747926 Ontario Ltd. v. Wellington (County) Board of Education*[57] referred to as "*Upper Grand*") and the potential profit from an offer to purchase (*Activa Holdings Inc. v. Waterloo Region District School Board* [58]) were rejected as disturbance damages.

In arriving at its decision respecting the Claimants' motion, the Board noted that these rejected disturbance damages claims were based upon full evidence being examined through a hearing where the merits of each case were fully considered. In a motion hearing, the Board held that it did not have the benefit of full evidence and could not make its determinations based on the merits.

Because this was a motion and the Board did not have the benefit of full evidence, the Board concluded that it could not determine whether the disturbance damages claimed in the amendment would fall within the exclusions prescribed in the cases cited by the authority. Accordingly, the Board granted the amendment, stating that "the proposed disturbance damages must be considered through the provision of evidence at a full hearing in order to make an appropriate determination on this matter."[59]

The authority's motion requested: 1) an order compelling the Claimants to provide answers to undertakings given during discoveries; and 2) an order compelling the discovery of two individuals who were not parties to the action: the above-noted Mr. Aggarwal, and Mr. Ash, the Claimants' previous solicitor.

With respect to the first part of the authority's motion, the Board accepted the Claimants' submissions that it had provided the information available in response to the questions asked at discovery. In considering the second part of the authority's motion, the Board relied on section 31.10 of the *Rules of Civil Procedure*[60] and acknowledged that this Rule establishes a high threshold for the examination of non-parties. Rule 31.10 (2) sets out that a court may grant leave for the examination of a non-party if it is satisfied that:

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[56] RSO 1990, c E26.
[57] (2001), 56 OR (3d) 108, 108 ACWS (3d) 655.
[58] [2012] OMBD No 212, 106 LCR 262.
[59] *20688685 Ontario Inc*, *supra* note 53 at para 27.
[60] RRO 1990, Reg 194.

a. the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person the party seeks to examine;
b. it would be unfair to require the moving party to proceed to trial without having the opportunity of examining the person; and
c. the examination will not,
    (i) unduly delay commencement of the trial of the action,
    (ii) entail unreasonable expense for other parties, or
    (iii) result in unfairness to the person the moving party seeks to examine. [61]

Applying the test, the Board concluded that the authority had failed to satisfy the above-noted criteria since Mr. Aggarwal and Mr. Ash were not uncooperative, and were willing to testify at a hearing. The Board was also concerned that an examination of these third parties would unnecessarily delay proceedings. Additionally, Mr. Ash's contribution would be limited by his duty of confidentiality as past counsel to the Claimants. For these reasons, the authority's motion was dismissed.

[61] *Ibid* r 31.10(2).