NOVA SCOTIA COURT OF APPEAL
Citation: *Nova Scotia v. Johnson*, 2005 NSCA 99

Date: 20050624
Docket: CA 217598
Registry: Halifax

Between:

Her Majesty The Queen in Right of the Province of Nova Scotia

Appellant

v.

George Johnson and Carolyn Johnson

Respondents

Judges:	Roscoe, Oland and Hamilton, JJ.A.
Appeal Heard:	October 13 and 14, 2004, in Halifax, Nova Scotia
Held:	Appeal allowed in part as per reasons for judgment of Oland, J.A.; Roscoe and Hamilton, JJ.A. concurring.
Counsel:	Kirby Grant, for the appellant D.A. Caldwell, Q.C. and Dennis James, for the respondents

INDEX

		Paragraph number:
1.	Introduction	1
2.	The Expropriated Parcels	5
	(A) Parcels A and B	6
	(i) Parcel A	7
	(ii) Parcel B	9
	(B) Parcels C and D	12
	(i) Parcel C	13
	(ii) Parcel D	15
3.	The Board's Decision	17
4.	The Issues	32
5.	The Standard of Review	33
6.	Analysis	
	(A) General	48
	(B) Market Value of the Expropriated Lands	53
	(i) Parcels A and B	60
	(ii) Averaging	96
	(iii) Parcel D	105
	(iv) Summary - Market Value Parcels A, B and D	109
	(C) Injurious Affection	110
	(i) Protection or Buffer Zones	112
	(ii) Parcel D	121
	(D) Access Severance	123

(i) Parcel A 124
(ii) Parcel B 131
(iii) Transportation Costs 137

7. Business Loss or Damages - Parcel C 148
(i) Section 29 154
(ii) Section 3(l)(h)(i)(B) 160

(E) Noise Disturbance 164
(i) The Rule in *Edwards* Case 167
(ii) Double Compensation 176
(iii) Mitigation 177

(F) Personal Damages – Owners' Time and Pension 178
(i) Owners' Time 179
(A) Costs 182
(B) Damages 193
(ii) Pension Loss 207

8. Disposition 209

Reasons for judgment:

1. Introduction

[1] The issues on this appeal concern the expropriation by the Province of Nova Scotia of certain lands for the realignment of a portion of the Trans Canada Highway (Highway 104). The new roadway, known as the Cobequid Pass, is a four lane divided toll highway which now serves as the main highway to New Brunswick.

[2] Among the lands taken in 1995 were two parcels at or near Westchester, Cumberland County owned by George Johnson and another two, at or near Great Village, Colchester County owned by his spouse, Carolyn Johnson. Each of the Johnsons has been in the business of growing and harvesting blueberries for many years.

[3] The Johnsons claimed compensation for the lands expropriated, for business losses, and for injurious affection. In its decision dated December 23, 2003 and reported as 2003NSUARB154, the Nova Scotia Utility Review Board set the total compensation at more than $340,000.

[4] The Province appeals the Board's award. It asks that the compensation be varied to less than $70,000.

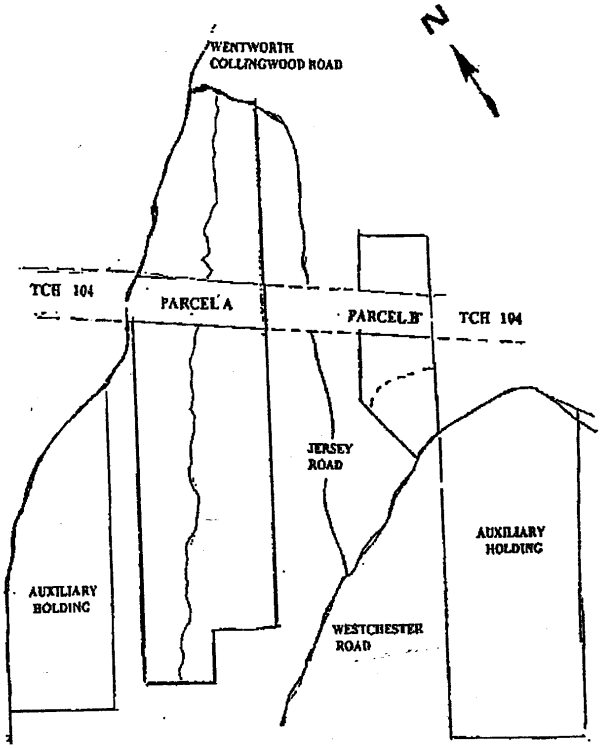
2. The Expropriated Parcels

[5] It is necessary to have an understanding of the parcels expropriated and the lands affected by their taking. The four parcels appear on the two sketch maps which follow. The two owned by George Johnson, parcels A and B, are situated some 15 to 20 kilometres on the Cobequid Pass from the two owned by Carolyn Johnson, parcels C and D. I will here describe each in a summary fashion, leaving fuller details until where helpful in disposing of this appeal.

(A) Parcels A and B

[6] Below is sketch map 1 attached to the Board's decision which sets out these parcels.

LANDS OF GEORGE JOHNSON
SKETCH MAP 1. WESTCHESTER PROPERTIES



(i) Parcel A

[7] As shown on sketch map 1, the land from which parcel A was expropriated enjoys frontage along the Wentworth-Collingwood Road and also along the Jersey Road. It consisted of some 330 acres, roughly bisected by Halliday's Brook. That brook appears on sketch map 1 as a jagged line running north to south through the original parcel.

[8] The expropriation of parcel A (23.04 acres) severed this landholding. The resulting northeast quadrant contains an eight acre blueberry field accessed from the Jersey Road. The remainder of that quadrant and the other three quadrants are mostly wooded. The southeast quadrant, lying to the east of Halliday's Brook and south of parcel A, was alleged to be the largest remaining tract of high quality blueberry land (96 acres) yet to be developed by the Johnsons. In testimony before the Board, it was sometimes referred to as the "crown jewel" of their property.

(ii) Parcel B

[9] The expropriation of parcel B (11.65 acres) also effected a severance of the original lot, which consisted of some 75 acres. The piece to the northeast of that parcel contains about 19 acres of woodland. That to its southwest includes a 25 acre field. The Johnsons planned to build a home on this piece, close to its frontage on the Westchester Road.

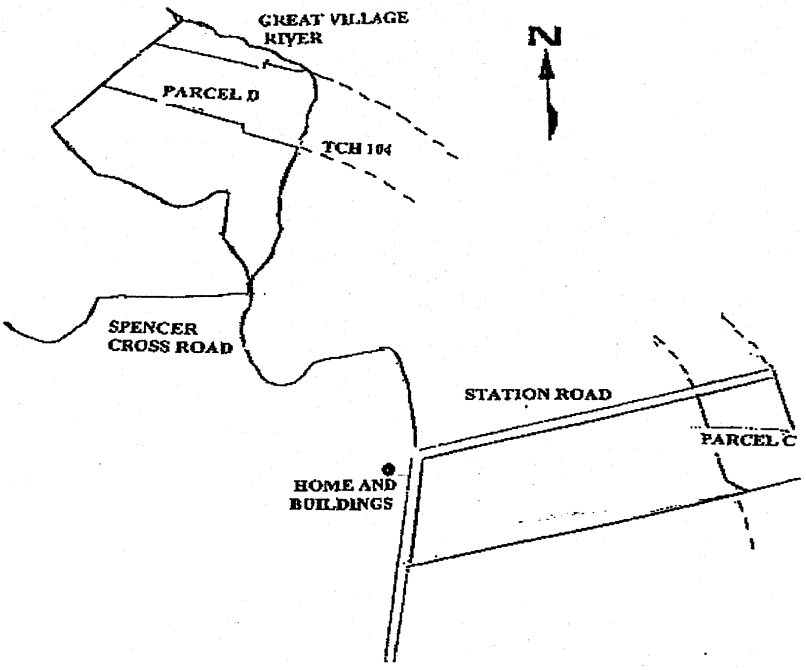
[10] Parcel B is located within a kilometre of parcel A. Mr. Johnson also owns auxiliary holdings which are shown on sketch map 1. That on the Wentworth-Collingwood Road to the southwest of parcel A consists of some 100 acres, approximately 60 of which are in blueberry production. That on the Westchester Road to the southeast of parcel B contains about 175 acres of land mostly in blueberry production.

[11] Parcels A and B were expropriated on November 21, 1995.

(B) Parcels C and D

[12] Below is sketch map 2 attached to the Board's decision which sets out these parcels.

LANDS OF CAROLYN JOHNSON
SKETCH MAP 2 THE HOME PROPERTY.



(i) Parcel C

[13] Unlike parcels A and B, the taking of parcel C (10.64 acres) did not sever but simply divided the land from which it was expropriated. As shown on sketch map 2, parcel C lay at its very eastern end. The remaining lands consist of some 53 acres.

[14] The Johnsons' home property was not expropriated. It is situate on the western side of the Station Road, across from the lands remaining after the expropriation of Parcel C.

(ii) Parcel D

[15] This parcel (13.21 acres) is located about one kilometre northwest of parcel C. Its expropriation severed the original property of some 48 acres. The piece to the north of parcel D, some 4.29 acres, is now landlocked. That to the south includes lands which had been leased for grazing and a four acre blueberry field adjacent to the Great Village River.

[16] Parcels C and D were expropriated on December 18, 1995.

3. The Board's Decision

[17] The Board's hearing of the Johnsons' several claims for compensation commenced on October 9, 2002. Two days before it began, the Board conducted a site visit. The hearing itself took 14 days.

[18] In its decision, the Board reviewed evidence presented in relation to the blueberry industry. Among other things it noted that:

> ¶ 27 Due to soil, climatic and topographical factors, areas of Cumberland and Colchester Counties are among some of the world's best habitat for the wild lowbush blueberry plant. This plant is to be distinguished from the highbush or cultivated blueberry plant which is planted and maintained similar to an orchard, producing a larger, but less desirable, berry product. Unlike its cultivated "highbush" counterpart, the lowbush blueberry is a wild native plant which cannot successfully be transplanted to yield a marketable crop. Instead, farmers must manage and develop existing native stands into producing fields. The wild plants spread primarily through rhizomes, or underground runners, which give rise to new roots and stems. While management practices such as pruning and weed control can increase the spread of the rhizomes (38 cm per year versus less than 10 cm per year), the filling or full coverage of a field is a relatively slow process which can take a number of years to complete.

According to Mr. Johnson, for his area of Cumberland County it typically takes 15 or 16 years to develop wooded lands to the point where the blueberry coverage is sufficient for mechanical harvesting.

[19] The Board also observed that wild blueberries are the most important fruit crop in Nova Scotia in terms of total acreage, export sales and total value to its

economy. This province's average yearly production is about 30 million pounds, over 65% from Cumberland County.

[20] The Johnsons claimed compensation for:

(a) the value of the four expropriated parcels;
(b) damages sustained by reason of the severing of those parcels from their original lots, including
    (i) damage to their remaining lands by the use of road de-icing salt on the highway;
    (ii) loss of access; and
    (iii) additional transportation costs.
(c) business loss arising from the expropriation of parcel C;
(d) disturbance to their existing home and future home properties; and
(e) personal damages, including
    (i) their time and expenses in preparing and presenting their claim, and
    (ii) loss of pension benefits.

I will now set out the nature of their claims and the Board's decision in regard to each in brief compass.

[21] The Johnsons claimed compensation for the expropriation of parcels A, B, C and D. Parcel C had been used as pastureland when taken. They argued that although largely woodland, each of parcels A, B and D had potential for future blueberry development.

[22] The Board found that the Johnsons would have developed parcels A, B and D into blueberry fields, that compensation should be based on such development, and that the highest and best use of those lands were as blueberry producing lands. It accepted the values attributed by Gerald Ryle, an agrologist, to the bare land and to blueberry potential. To those figures the Board added the net roadside values for timber for each of the parcels.

[23] The Johnsons claimed three types of loss from the severance of the original lots by the expropriation of parcels A, B and D. First, they sought compensation for a 100 metre buffer strip along both sides of the Cobequid Pass to protect against the effects of road de-icing salt. The Board accepted their claim and

applied the same finding as to highest and best use, namely blueberry producing lands, and the same method of calculation in valuing the lands within the buffer strip.

[24] The second type of loss claimed as arising from severance was the loss of access to their remaining lands. The Board was satisfied that the expropriation of parcel A prevented Mr. Johnson from accessing his land south of the Cobequid Pass through his lands to its north and that the cost of a river crossing in the southern piece to access the "crown jewel" lands was warranted. It denied access compensation for the woodlot to the north of parcel B but, since the woodlot at the rear of the piece south of parcel B had to be abandoned, the Board awarded compensation for the timber on that woodlot and for the bare land itself.

[25] The expropriation of parcel D resulted in a landlocked lot to its north for which no alternative access was available. The Johnsons were awarded compensation for the full value for that lot.

[26] The final type of loss which the Johnsons said flowed from the severance of their original lots were additional transportation costs occasioned by the necessity of "floating" or transporting farm equipment around the Cobequid Pass. The Board concluded that the Johnsons will need to manoeuver their equipment to their fields on each side of the Cobequid Pass, incurring floating costs and additional operational time, and ordered compensation.

[27] The business loss claimed by the Johnsons related to the alleged loss of alfalfa leafcutter bee production caused by the taking of parcel C. The Board was satisfied that the expropriated parcel C lands could produce the quality forage crop necessary to sustain such bees, that no other lands of that quality were available locally, and that prior to the expropriation the Johnsons' involvement with leafcutter bees was more than speculative. It awarded compensation for the bees which parcel C would have produced over 20 years. It also awarded mitigation costs for the Johnsons' unsuccessful efforts to develop an alternative forage at another of their properties.

[28] According to the Johnsons, the expropriation adversely affected the values of their existing home property on the Station Road and of their proposed new home on the Westchester Road. The Board was satisfied that the traffic noise on the Cobequid Pass materially interfered with their lives and awarded compensation

for remedial measures to their existing home. It also allowed amounts for the reduced values of that home and of their house lot on the Westchester Road, and for the loss of road frontage near parcel A.

[29] Finally, the Johnsons claimed compensation for two types of personal damages:

(a) compliance costs in the form of their time and expenses in preparing and presenting their claim, and
(b) pension and bridging costs.

Satisfied that this expropriation involved a significant commitment of time and expense and that Mr. Johnson had acted reasonably in missing work from his full-time employment, the Board determined that he was entitled to compensation for both claims.

[30] The Board's various compensation awards were set out as a chart in § 293 of its decision. That chart is reproduced below.

George and Carolyn Johnson SUMMARY OF COMPENSATION (As awarded by the Board)		
Parcel A: Wentworth-Collingwood Road		
Loss of value from lost road frontage	$ 8,046	
Loss of expropriated land and protection strip	39,010	
Cost of river crossing (southwest of Parcel A)	47,500	
Discounted additional transportation costs (20 years)	31,178	
Replacement of culvert and access road (northeast of Parcel A)	2,000	
		$ 127,734
Parcel B: Westchester Road		
Loss of value of proposed home site	$10,000	
Loss of expropriated land and protection strip	31,823	
Sterilization of land between highway and field (l4 acres)	19,445	
Encroachment area	335	
Loss of value of land east of highway	0	
		$ 61,604
Parcel C: Station Road		
Loss of home value due to noise	$ 7,000	
Loss of expropriated land	1,064	
Mitigation costs - Scrabble Hill	14,400	
Discounted excess costs for leafcutter bees (20 years)	28,878	
		$ 51,342
Parcel D: Spencer Cross Road		
Loss of estate-type residential lot	$ 0	
Loss of expropriated land	17,812	
Loss of landlocked lot (north)	5,722	
Loss of existing blueberry field (south)	12,000	
Encroachment area	740	
		$ 36,274
Other:		
Costs of remedial measures due to road noise	$46,375	
Loss of pension benefits due to time lost regarding expropriation	21,329	
		$ 67,704
TOTAL		$ 344,658

[31] The $344,658 total does not include costs, interest, the quantum of owners' time and expenses or accelerated income tax on the award, which were to be determined on the motion of either party. The only matters not in dispute in this appeal by the Province are the $8,046 loss of value from lost road frontage and $2,000 for replacement of culvert and access road in regard to parcel A, and the $335 and $740 encroachment areas in regard to parcels B and D respectively.

4. The Issues

[32] It is not surprising then that the Province set out over two dozen grounds in its notice of appeal. The main issues can be summarized as follows:

1. Whether the Board erred at law in determining the market value of the expropriated lands.
2. Whether the Board erred at law in determining a business loss in relation to the expropriation of parcel C and the leafcutter bees.
3. Whether the Board erred at law by awarding compensation for devaluation of remaining lands due to traffic noise.
4. Whether the Board erred at law in allowing claims for access to severed lands.
5. Whether the Board erred at law in awarding claims for owner's time and for pension loss.

Some of these issues pertain to only one expropriated parcel, some to two or more expropriated parcels and some to the remainder or unexpropriated lands. I will deal with the grounds raised on appeal within my consideration of the main issues.

5. Standard of Review

[33] The *Utility and Review Board Act*, S.N.S. 1992, c. 11 which created the Board provides that, as to all matters within its jurisdiction, the Board may hear and determine all questions of law and of fact (s. 22(2)) and that its finding or determination upon a question of fact is binding and conclusive (s. 26). An appeal lies to the Court of Appeal from an order of the Board upon any question as to its jurisdiction or upon any question of law (s. 30(1)).

[34] In *Nova Scotia (Attorney General) v. Williams*, [1996] N.S.J. No. 254, this court reviewed the level of deference to be given to the Board's decisions in expropriation appeals. Freeman, J.A. said at § 18:

> . . . decisions of the Board are protected by a privative clause respecting its findings of fact, and the general rule is that the standard of review is patent unreasonableness. Questions of law or jurisdiction are not so protected; they are subject to a statutory right of appeal, which generally invokes the standard of concurrence or correctness. Questions of mixed fact and law occur with frequency under the Expropriation Act. In the absence of error of law, the Board's findings of mixed fact and law should be entitled to the same deference due to its findings of fact alone, the standard of patent unreasonableness. These general statements are tentative and require closer scrutiny.

[35] After a review of the case law he concluded at § 24:

> Much of the reasoning cited above applies to the Board, and I would adopt a standard of considerable deference even with respect to law and jurisdiction. In particular instances, the Board's jurisdiction depends upon findings of facts, which are protected by a privative clause. Given the nature of the expropriation process, questions of law are closely interrelated with the facts and derive shelter from the protective provision. When there is evidence before the Board, and it has not erred in principle, its findings should not be disturbed unless they are patently unreasonable.

[36] Since *Williams*, supra the approach to be followed in determining the deference to be accorded the decision of an administrative body has continued to develop. Cromwell, J.A. speaking for this court observed in *Halifax Employers Assn. v. International Longshoremen's Assn., Local 269*, [2004] N.S.J. No. 316 (QL version) at § 45-46 as follows:

> ¶ 45 . . . the Supreme Court of Canada has made it clear in a series of judgments that the standard of review of all administrative decision-makers is to be determined by applying the pragmatic and functional approach: see, for example, **Dr. Q. v. College of Physicians and Surgeons of British Columbia,** [2003] 1 S.C.R. 226. While the "... wisdom of past administrative law jurisprudence need not be wholly discarded, ... the pragmatic and functional approach demands a more nuanced analysis based on consideration of a number of factors. This approach applies whenever a court reviews the decision of an

> administrative body.": **Dr. Q.**, paras. 24 - 25; see also **Voice Construction** at para. 18.
>
> ¶ 46 The central inquiry for the reviewing court is whether the legislature intended to leave the question raised by the statutory provision to the exclusive jurisdiction of the administrative tribunal: see **Pushpanathan v. Canada (Minister of Citizenship and Immigration),** [1998] 1 S.C.R. 1222 at para. 26. Thus, determining the appropriate standard of review is primarily a matter of statutory interpretation. . . .

[37] In *Creager v. Provincial Dental Board of Nova Scotia*, [2005] N.S.J. No. 32 (QL version), Fichaud, J.A. neatly summarized how standards of review from the decisions of the courts differ from those of administrative tribunals and recounted the applicable factors in assessing the appropriate level of curial deference:

> [14] Appeals from decisions of courts on points of law are reviewed for correctness. An error of law which is extractable from a mixed question of fact and law similarly is subject to the correctness standard. Factual matters, including inferences, and mixed questions of fact and law with no extractable error of law are reviewed for palpable and overriding error. *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at paras. 8, 10, 19-25, 31-36. . . .
>
> [15] Judicial review of an administrative tribunal's decision involves different standards of review than those stated by *Housen* for an appeal from a court's decision. Under the pragmatic and functional approach, the court analyses the cumulative effect of four contextual factors: the presence, absence or wording of a privative clause or statutory appeal; the comparative expertise of the tribunal and court on the appealed issue; the purpose of the governing legislation; and the nature of the question, fact, law or mixed. From this, the court selects a standard of review of correctness, reasonableness, or patent unreasonableness. The functional and practical approach applies even when there is a statutory right of appeal: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, at paras. 17, 21-25, 33; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at para. 21. The approach applies even to pure issues of law, for which the standard of review need not be correctness. The existence of the statutory right of appeal and whether the issue is one of law, are merely factors weighed with the others in the process to select the standard of review: *Ryan* at paras. 21, 41, 42; *Dr. Q* at paras. 17, 21-26, 28-30, 33-34.

[38] The purpose of selecting the appropriate standard of review is to ascertain the extent of judicial review that the legislature intended for a particular decision of the administrative tribunal: *Pushpanathan*, supra at § 26 and also see *Voice*

Construction Ltd. v. Construction & General Workers' Union, Local 92, [2004] 1 S.C.R. 609 at § 15 and 18. The exercise of examining the four contextual factors and weighing of contextual elements has been described as a search for "the polar star of legislative intent": *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, 226 D.L.R. (4th) 193 (S.C.C.) (the *Retired Judges Case*) at § 149, per Binnie, J. In this case, not only the *Act* which deals specifically with expropriation but also the *Utility and Review Board Act*, S.N.S. 1992, c. 11 as amended (the "*URB Act*") is to be considered. This is necessary because the *Act* defines the Board as the Nova Scotia Utility and Review Board (s. 3(1)). The composition and other salient features of that board are determined by the *URB Act*.

[39] The first contextual factor that must be considered consists of the presence, absence or wording of any privative clause. The *URB Act* does not contain a full privative clause, that is, one which declares that decisions of the Board are final, binding, conclusive or not subject to appeal. Rather, while it provides that the Board's finding on a question of fact within its jurisdiction is binding and conclusive (s. 26), that legislation expressly provides for appeals from an order of the Board to this court on any question of law or jurisdiction (s. 30(1)). The presence of an appeal provision suggests a more searching standard of review with respect to issues of law and jurisdiction.

[40] The second contextual factor concerns the relative expertise of the Board as compared to that of the reviewing court. Greater deference is required only where the decision-making body is, in some way, more expert than the courts and the question under consideration is one that falls within the scope of that greater expertise: see *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11 at § 50 and *Dr. Q.*, supra at § 28.

[41] According to the *URB Act* (s. 5(1)), Board members are appointed by the Governor in Council. There are no statutorily prescribed expert qualifications, such as specialized knowledge in any field, for membership on the Board. It consists of eight full-time members, each holding office on good behaviour until age 65 (s. 5(3)), and eight or fewer part-time members. Expertise may be recognized where an administrative body is charged with developing policies: see *Deputy Minister of National Revenue v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100 (S.C.C.) at § 28 and 31. Neither the *URB Act* nor the *Act* gives the Board any such role. However, unlike an administrative body appointed on an *ad hoc* basis, a

degree of permanence attaches to Board membership. It is likely then that the Board (or a member who constitutes the Board) would accumulate expertise from repeated examination of the types of materials and evidence presented in expropriation matters and from repeated application of the *Act*.

[42] The third contextual factor that a reviewing court is to take into account is the purpose of the *Act* as a whole and the provision in particular. In *Dr. Q.*, supra at § 31, McLachlin, C.J. for the court stated that greater deference is demanded where a statute's purpose requires an administrative body "to select from a range of remedial choices or administrative responses, is concerned with the protection of the public, engages policy issues, or involves the balancing of multiple sets of interests or considerations." The *Act* states that its intent and purpose is that every person whose land is expropriated shall be compensated for that taking (s. 2). While there is an element of public policy in its determinations, the work of the Board pursuant to that legislation concerns the resolution of disputes between two parties, namely an owner of land whose property is taken and an expropriating authority. Accordingly the statutory purpose of the *Act* does not mitigate in favour of greater deference.

[43] The final contextual factor is the nature of the problem, that is, whether a question of law, fact or mixed fact and law. *Dr. Q.*, supra at § 34 reads:

> When the finding being reviewed is one of pure fact, this factor will militate in favour of showing more deference towards the tribunal's decision. Conversely, an issue of pure law counsels in favour of a more searching review. This is particularly so where the decision will be one of general importance or great precedential value: *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para 23. Finally, with respect to questions of mixed fact and law, this factor will call for more deference if the question is fact-intensive, and less deference if it is law-intensive.

[44] In this regard, Fichaud, J.A. noted at § 19 of *Creager,* supra:

> ¶ 19 Different issues may attract different standards of review. Legal issues at the core of the tribunal's area of expertise, which is incorporated by the statutory purpose, should receive deference. . . . Other legal issues outside the tribunal's core of expertise usually are reviewed on a correctness standard. *Barrie Public Utilities v. Canadian Cable Television Association*, [2003] 1 S.C.R. 476, at paras.

> 12-16, 18; *Voice Construction*, at paras. 19, 21; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 28; *Toronto (City) v. C.U.P.E. Local 79*, [2003] 3 S.C.R. 77 at para. 14; *Alberta Union of Professional Employees v. Lethbridge Community College,* [2004] 1 S.C.R. 727 at paras. 15, 19-20; *Ryan* at paras. 41-42; *Dr. Q.* at paras. 28, 34.

[45] In this case, the Board had to determine entitlement to compensation following the expropriation of land and, if any, the amount of such compensation. In making its determinations and awards, it had to consider *inter alia* various provisions of the *Act* and to apply those provisions to the particular facts of this case. Thus most of its determinations involved questions of mixed law and fact. As Freeman, J.A. pointed out in *Williams*, supra at § 21, the nature of the expropriation process is such that questions of law are closely linked to the Board's findings of fact which are shielded by the privative clause. Accordingly, the specialized Board is to be shown considerable deference with regard to questions of mixed law and fact. When however the Board is faced with questions of law outside its core areas of expertise, much less deference is warranted.

[46] After considering the four contextual factors of the functional and pragmatic approach, in my view the standard of review to be applied to questions of law, such as any entitlement for compensation for owner's time and for pension loss, the standard of review is correctness. For questions of mixed law and fact, such as matters related to compensation for market value and injurious affection, the standard is patent unreasonableness. For findings of fact, the standard is patent unreasonableness.

[47] In *Ryan v. Law Society of New Brunswick*, [2003] 1 S.C.R. 247, Iacobucci, J. recounted the characteristics of a patently unreasonable decision as follows:

> [52] The standard of reasonableness *simpliciter* is also very different from the more deferential standard of patent unreasonableness. In *Southam, supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" *(Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at pp. 963-64, *per* Cory, J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3. S.C.R. 84 at para 9 - 12, *per* Gonthier, J.).

> A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

6. Analysis

(A) General

[48] At this point it would be helpful to review some matters and principles relevant to this appeal. I begin by pointing out that when parcels A, B, C and D were expropriated late in 1995, the applicable legislation consisted of the *Expropriation Act* R.S.N.S. 1989, c. 156 as amended by 1992 S.N.S. c. 11 s. 36 (the *Act*). According to its s. 2, "It is the intent and purpose of this *Act* that every person whose land is expropriated shall be compensated for such expropriation."

[49] Any entitlement to compensation for expropriation must be contained within the provisions of the *Act*. Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada* (2nd Ed., 1992) states at p. 35:

> It has never been suggested that there was a common law right to compensation. On the contrary, as Lord Parmoor stated in *Sisters of Charity of Rockingham v. R.* "Compensation claims are statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of the land taken, or for damage, on the ground that his land is 'injuriously affected', unless he can establish a statutory right."

[50] As a consequence, an owner of an interest of land which has been taken must demonstrate that the legislation which authorizes the expropriation provides for the particular type of compensation claimed.

[51] Expropriation legislation is to be given a broad and liberal interpretation, consistent with its purposes. The governing principles were set out in *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority*, [1997] 1 S.C.R. 32, 142 D.L.R. (4th) 206 at § 20-21 and 23 (S.C.R.) as follows:

> 20 The expropriation of property is one of the ultimate exercises of governmental authority. To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the power of an expropriating authority should be strictly

> construed in favour of those whose rights have been affected. This principle has been stressed by eminent writers and emphasized in decisions of this Court. . . .
>
> 21 Further, since the *Expropriations Act* is a remedial statute, it must be given a broad and liberal interpretation consistent with its purpose. Substance, not form, is the governing factor. . . . In *Laidlaw v. Municipality of Metropolitan Toronto*, [1978] 2 S.C.R. 736, at p. 748, it was observed that "[a] remedial statute should not be interpreted, in the event of an ambiguity, to deprive one of common law rights unless that is the plain provision of the statute".
>
> 23 It follows that the *Expropriation Act* should be read in a broad and purposive manner in order to comply with the aim of the Act to fully compensate a land owner whose property had been taken.

[52] With that background I now turn to the grounds of appeal pertaining to the Board's compensation awards.

(B) Market Value of the Expropriated Lands

[53] For the reasons which follow, I am of the view that the Board's decision to award compensation for the lands expropriated from the Johnsons was patently unreasonable.

[54] Section 24 of the *Act* stipulated that where land is expropriated, the statutory authority shall pay the owner compensation as determined in accordance with the *Act*. After establishing that the land value is that at the time the expropriation documents are deposited at the registry of deeds (s. 25(2)), the *Act* continued:

> **Aggregate of items to be compensated**
>
> 26 The due compensation payable to the owner for lands expropriated shall be the aggregate of
>
> > (a) the market value of the land or a family home for a family home determined as hereinafter set forth;
> >
> > (b) the reasonable costs, expenses and losses arising out of or incidental to the owner's disturbance determined as hereinafter set forth;

> (c) damages for injurious affection as hereinafter set forth; and
>
> (d) the value to the owner of any special economic advantage to him arising out of or incidental to his actual occupation of the land, to the extent that no other provision is made therefor in due compensation. (Emphasis added)

[55] The Johnsons did not claim, nor did the Board award, any compensation on the basis of special economic advantage pursuant to s. 26(d). Throughout, the Board purported to derive the market value of the land expropriated.

[56] The *Act* specifies how market value is to be determined:

> **Land value to be market value**
>
> 27 (2) Subject to this Section, the value of land expropriated is the market value thereof, that is to say, the amount that would have been paid for the land if, at the time of its taking, it had been sold in the open market by a willing seller to a willing buyer. (Emphasis added)

[57] The Province had a real estate appraiser establish the market value of parcels A, B, C and D and of the remaining lands of the Johnsons affected by their expropriation. The *Act* provides that the statutory authority is to pay the cost of one appraisal incurred by the compensation claimant (s. 35). However it does not make the preparation or submission of a competing appraisal mandatory. The Johnsons provided valuation information to the Board through sources other than a formal appraisal.

[58] Thus the Board was faced with two methodologies, which it described as a conventional and an unconventional approach to valuation.

[59] The conventional approach consists of the valuation of the lands expropriated as of the date of expropriation by a real estate appraiser. For the Province, Ernest C. Smith, an accredited appraiser, prepared a report dated May 23, 1996 concerning parcels C and D and the second report dated June 13, 1996 concerning parcels A and B. His reports utilized the direct comparison method, described in *The Appraisal of Real Estate*, Canadian ed., (Chicago, Ill.: Appraisal Institute; Winnipeg, Man.: Appraisal Institute of Canada, 1992) at p. 292-293 as follows:

> . . . Direct comparison is the most common technique for valuing land and it is the preferred method when comparable sales are available. To apply this method, sales and other data for similar parcels of land are analyzed, compared, and adjusted to provide a value indication for the land being appraised. In the comparison process, the similarity or dissimilarity of the parcels is considered.
>
> The appraiser gathers data on actual sales and ground leases as well as listings, offers, and renewal options; identifies the similarities and the differences in the data; ranks the data according to the relevance; adjusts the prices of the comparables to account for the dissimilar characteristics of the land being appraised; and forms a conclusion as to the most reasonable and probable market value of the subject land.
>
> Elements of comparison include property rights, legal encumbrances, financing terms, conditions of sale (motivation), market conditions (sale date), location, physical characteristics, available utilities, zoning, and highest and best use. The most variable elements of comparison are the physical characteristics of the site, which include its size and shape, frontage, topography, location, and view. . . . It is usually wise to correlate the results of two or more units of comparison in arriving at a land value estimate, e.g., dollar per hectare and per lot or dollars per unit and per square metre.

(i) Parcels A and B

[60] To illustrate the competing methodologies before the Board, for simplicity I will focus initially on the record in regard to parcels A and B. Mr. Smith's appraisal of those parcels included an area/neighbourhood description. The area in which parcels A and B are located was portrayed as "highly rural, characterized by small farming operations, major woodland holdings and operating blueberry fields in various spotted locations". His report spoke of blueberry field operations as a major land use with various fields disbursed throughout the general and immediate area.

[61] It also assessed the physical makeup of the original properties from which the parcels were taken. Sector 1 which contained parcel A was described as predominantly mixed species woodland with a small field (approximately 14 acres) which contained a blueberry growth section (some seven acres) abutting the Jersey Road. Sector 2 which contained parcel B was described as consisting of some five acres of pasture, approximately 16 acres blueberry field, and 51 acres or so of woodland.

[62] The direct comparison method of property valuation requires the gathering of sales data on similar properties, analysis of similarities and dissimilarities, and an estimation of value thereafter.

[63] In his report concerning parcels A and B, Mr. Smith detailed the data of 17 sales during the period from September 1991 to June 1995. Among other things he set out the date of the transaction, the location of the property, the parties, a description of the lands sold in terms of its size, improvements and use, and road frontages. All 17 properties were in the area of Cumberland and Colchester Counties surrounding parcels A and B and their locations in relation to those parcels were pinpointed on a land sales map.

[64] After considering relevant factors identified in his report, Mr. Smith finalized an acreage rate for Sector 1 which contains parcel A of $350 an acre and one for Sector 2 which contains parcel B of $750 an acre.

[65] The Board rejected the appraiser's approach and his estimates of value. It preferred the unconventional approach and the values put forward on behalf of the Johnsons. In its view, compensation for parcels A and B should be calculated by adding the values for each of three components, namely the bare land ($100/acre), its blueberry potential ($900/acre) and its timber ($557/acre), for a total of $1,557/acre.

[66] This alternative methodology and valuation had been proposed by Gerald Ryle, an agrologist. His preliminary assessment dated January 2002 as amended read in part:

> **Potential Blueberry Land**:
>
> . . . the government appraisal reports did not take into account any additional market value which might accrue from the potential to develop the land for blueberries and this too was appraised by a specialist, Mr. Jack Sibley, who visited each parcel of land and then provided his estimate of the proportion of the land which could be developed for blueberries. This proportion was than (sic) multiplied by a conservative figure of $900 per acre to give an assessment of the loss of value entailed. It is emphasized that blueberry potential is not a substitute value but is **incremental** to the woodland value. (Emphasis added)

[67] Jack Sibley, to whom Mr. Ryle referred, had been a provincial agriculture department employee responsible for liaison between lowbush blueberry research and production and subsequently a private consultant in wild blueberry production. He had assessed, in percentage terms, the blueberry potential of parcels A, B, C and D. His report was accepted into evidence without Mr. Sibley having to testify.

[68] In his testimony, Mr. Ryle acknowledged that the appraisals conducted by Mr. Smith for the Province included the value of the wood on the land. However, he described blueberry potential as "an incremental value" and "a further component of market value". He agreed that it would be fair to say that he had identified a higher use for the land than the appraiser had, one which should be recognized and compensated.

[69] Mr. Ryle valued blueberry potential at $900/acre. He testified that an appraiser hired by the government to value a property nearby had identified that value. He also stated that he had had several discussions with Mr. Sibley and that it was generally agreed that $900 seemed to be "about the right figure."

[70] The Board's analysis in selecting the applicable methodology and values is captured in the following extracts from its decision:

> ¶ 149 To the extent that Mr. Smith, the Respondent's appraiser, questioned the blueberry potential of the lands in question, the Board attaches little weight to such evidence. While he maintained in his testimony that he could identify blueberry potential in lands, he conceded on cross-examination that he did not examine the expropriated parcels and adjacent lands to determine their blueberry potential at the time of his appraisal, nor was he aware that the Johnsons were major blueberry growers. Further, he was not prepared to acknowledge on cross-examination by Mr. Caldwell that the subject area of Westchester Mountain was considered to be one of the most productive areas in the world for wild blueberries, an assertion which was readily accepted by Dr. Eaton, a blueberry research expert who also testified for the Respondent.
>
> ¶ 150 The Board prefers the evidence of Mr. Sibley and Mr. Johnson respecting the blueberry potential of the lands. They both have extensive experience in recognizing such lands, and of their development. The Board accepts Mr. Sibley's opinion respecting the distribution of the potential blueberry lands, in the areas described by him in his report.

¶ 151 In the Board's opinion, however, the critical question is whether the Johnsons can reasonably have been expected to develop the blueberry potential of their lands. If there exists no reasonable expectation that they would have developed the lands into blueberry production, then this part of their claim must fail.

. . .

¶ 156 . . . the Board concludes that the Johnsons would have developed their lands into blueberry production, and will continue to do so in the future. The Board finds that the Johnsons' compensation should be based on development of the lands into blueberry fields, to the extent that such potential was recognized by Mr. Sibley in his report. Implicit in this finding is that the highest and best use of the subject lands are as blueberry producing lands. The Board considers "highest and best use" as a key determinant of value.

¶ 157 Turning to valuation, the respective parties presented two different approaches to valuation. Mr. Ryle adopted an unconventional approach, assigning a value to different components of the land (i.e., bare land, timber, and blueberry). Adding the component parts together, this resulted in a total value. Mr. Smith used a conventional Direct Comparison approach in determining value. In the Board's view, however, Mr. Smith's approach was flawed by his failure to recognize the lands' highest and best use as blueberry producing lands, with the result that his comparables (which attached only minor weight to this attribute) failed to recognize the true character of the expropriated parcels and the adjacent lands. Thus, the Board assigns little weight to the valuation conducted by Mr. Smith. The Board observed other flaws in Mr. Smith's methodology, including the assignment of an "average" value which he abstracted from his range of comparable sales, a methodology rejected by the Courts, see **Henderson v. Minister of Tourism** (1981), 23 L.C.R. 30 (N.B. Property Compensation Bd); **Tekmin v. The Queen** (1995), 59 L.C.R. 31 (Fed. C.A.); and **Ives v. Province of Manitoba**, [1970] S.C.R. 465.

¶ 158 While Mr. Ryle applied an unconventional approach, the Board concludes, on the balance of probabilities, that his valuation is to be preferred over that of Mr. Smith and Mr. Taylor. In effect, his identification of "premium" or "component" values is implicitly recognized in the more traditional valuation methods. Thus, to the extent that lands with blueberry potential attract a higher value than forest lands, the difference is simply attributable to the value or "premium" a buyer is willing to pay for the blueberry potential. Actual blueberry producing capacity would attract an even higher "premium."

> ¶ 159 . . . Thus, the Board adopts the net roadside values assigned by Ms. Haylock ($557 per acre for the timber component in the vicinity of Parcel A and $1,289 per acre for the timber component in the vicinity of Parcel B).
>
> ¶ 160 The Board accepts the values attributed by Mr. Ryle to the bare land ($100 per acre) and blueberry potential ($900 per acre). He described the latter amount as conservative, but was satisfied with this figure following conversations with Mr. Sibley and others. Given the development costs of blueberry land which Mr. Ryle set at a minimum of $3,000 per acre, and the price of fully developed blueberry land ($3,500 to $4,000 per acre - see paragraph 167), the Board is satisfied, on the balance of probabilities, that $900 per acre represents a reasonable incremental value for lands possessing blueberry potential.
>
> . . .
>
> ¶ 167 . . . The Board awards compensation to the Johnsons in the amount of $3,000 per acre for the existing blueberry field, as valued by Mr. Ryle. The Board views this amount as reasonable in light of Mr. Johnson's unchallenged testimony that producing blueberry lands can attract prices of $3,500 to $4,000 per acre. (Emphasis added)

[71] With respect, the Board's decision is obviously defective. It both misapprehends the definition of market value as defined in s. 27(2) of the *Act* and does not accord with the evidence.

[72] I must deal with a preliminary point before proceeding further. According to the Province, the Board committed an error of law by accepting Mr. Ryle's component approach which it claimed was based upon the concept of value to the owner rather than market value as set out in the *Act*. With respect, I cannot agree.

[73] That compensation based upon the value of constituent elements, which in the aggregate amount to a value to the owner, is not how compensation is to be determined is well-established: *Bank of Nova Scotia et al. v. The Province of Nova Scotia et al.* (1978), 22 N.S.R. (2d) 568 at p. 592; *Nova Scotia (Attorney General) v. L.E. Powell Property Ltd.*, [1995] N.S.J. No. 343 at p. 9. However while the approach put forward by Mr. Ryle included constituent or component elements, the evidence simply does not support the contention that his assessment relied on the concept of "value to the owner."

[74] As I indicated earlier, nothing in the *Act* confined the Board to a consideration of real estate appraisals only, nor to appraisals using the direct comparison approach only, in determining the market value of expropriated land. Thus it is open to the Board to accept evidence or methodologies that, in the particular circumstances of the case then before it, are reliable or appropriate towards establishing market value, provided they are directed to the definition of that term and provided they have not been found to be incorrect, as has the value to the owner approach. A component value approach in determining the market value of land is not, in and of itself, a flawed assessment.

[75] Having disposed of that preliminary matter, I will now commence my reasons for finding that the Board's determination of market value was patently unreasonable. The critical question was not that identified by the Board, namely whether the Johnsons were likely to develop their present woodlands into blueberry producing lands. The task before the Board concerned the determination of market value in accordance with the criteria set out in s. 27(2) of the *Act*. Consequently the question the Board should have asked itself was what amount would have been paid for the land if, at the time of its taking, it had been sold in the open market by a willing seller to a willing buyer. The focus should have been placed upon the fictional willing seller and willing buyer and the evidence as to land value to those persons. The relevant time was the time of expropriation and not some time in the future.

[76] I turn then to an examination of the bases upon which the Board accepted Mr. Ryle's assessment and valuation and it rejected Mr. Smith's appraisal and valuation. This involves a consideration of the evidence as to land value on the open market.

[77] Before the Board Mr. Ryle was the sole proponent for including an incremental value of blueberry potential in valuing the land. His opinion that land which has potential to be blueberry producing land carries a premium of $900 an acre higher than what it would be otherwise stood on two bases.

[78] The first was an appraisal to which he referred to in his evidence and upon which he relied. That appraisal, which according to Mr. Ryle had determined a premium in that amount for a property nearby, was not given in evidence. Nor was the property identified. Nor were any specifics about that property provided.

Nor was the real estate appraiser, who prepared that appraisal, called to give evidence as to the market value of lands having blueberry potential.

[79] The second basis for Mr. Ryle's opinion was Jack Sibley, with whom Mr. Ryle claimed to have discussed the value of blueberry potential. However, no opinion whatsoever as to such value, if any, is found in Mr. Sibley's report which was confined to the proportion of certain lands which might be developed into blueberry production. Like the appraiser upon whom Mr. Ryle apparently relied, Mr. Sibley did not testify.

[80] Mr. Ryle acknowledged that he is neither a qualified real estate appraiser nor a blueberry specialist. He did not conduct any market sales investigations. Contrary to § 150 of the Board's decision, he testified that he was not able to identify potential land for blueberry development. He had not been involved in blueberries until this case and one other. Mr. Ryle's opinion then is neither based upon his personal knowledge of the facts or upon facts proved before the Board.

[81] For the reasons which follow, I am of the view that the Board's failure to recognize that Mr. Ryle's opinion that land with blueberry potential carried a premium did not rest on a solid footing and its rejection of clear evidence to the contrary led to a patently unreasonable determination as to market value.

[82] I begin with D.M. Paciocco & L. Stuesser, *The Law of Evidence, 3rd* ed. (Toronto: Irwin Law, 2002) which states (ch. 6-7):

> Often experts . . . will have relied on information that would not have been admissible if presented in court. The most common example is hearsay evidence - expert witness often form their opinions based, at least in part, on out-of-court interviews that would not satisfy any of the exceptions to the hearsay rule. Since it is essential for the trier of fact to know the basis for an expert opinion so that the opinion can be evaluated, it is permissible for expert witnesses to relate any inadmissible information that they have relied on.
>
> The inadmissible information that the trier of fact learns about in this way is to be used solely to enable the trier of fact to evaluate the opinion, but not as proof of facts [*R. v. Abbey* (1982), 29 C.R. (3d) 193 (S.C.C.).]

[83] *Abbey* and *R. v. Lavallee*, [1990] 1 S.C.R. 852 were criminal cases concerning the use of psychiatric evidence based, in part, upon what an accused who did not testify at trial had told the expert. At § 66 of *Lavallee*, Wilson, J. writing for the majority distilled the *ratio* in *Abbey* into four propositions, namely:

> 1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence.
>
> 2. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.
>
> 3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.
>
> 4. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

[84] In his decision concurring in the result, Sopinka, J. noted that *Abbey* contained an inherent contradiction, namely, how an expert opinion based on unproven hearsay could be admissible yet entitled to no weight. At § 82, he stated that its resolution lay in:

> . . . the practical distinction between evidence that an expert obtains and acts upon within the scope of his or her expertise (as in *City of St. John*), and evidence that an expert obtains from a party to the litigation touching a matter directly in issue (as in *Abbey*).

He continued at § 83 and 84:

> In the former instance, an expert arrives at an opinion on the basis of forms of enquiry and practice that are accepted means of decision within that expertise. A physician, for example, daily determines questions of immense importance on the basis of the observations of colleagues, often in the form of second-or third-hand hearsay. For a court to accord no weight to, or to exclude, this sort of professional judgment, arrived at in accordance with sound medical practices, would be to ignore the strong circumstantial guarantees of trustworthiness that surround it, and would be, in my view, contrary to the approach this Court has taken to the

> analysis of hearsay evidence in general, exemplified in *Ares v. Venner*, [1970] S.C.R. 608.
>
> Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will, consistent with *Abbey*, have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point. But it must be recognized that it will only be very rarely that an expert's opinion is entirely based upon such information, with no independent proof of any of it. Where an expert's opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight. (Emphasis added)

[85] *Saint John (City) v. Irving Oil*, [1966] S.C.R. 581 to which Sopinka, J. referred involved an expropriation by the city. Its appraiser valued the property based upon calculations made from his unrecorded interviews with 47 persons who had been parties to sales of land in the area. His opinion was held to be admissible. Ritchie, J. for the court noted at § 38 that if each of the appraiser's informants had to testify, valuation proceedings would take on "an endless character" and that what was at issue was the value of the appraiser's opinion, not the facts of each comparable transaction.

[86] *Ferguson v. Ranger Oil Ltd.*, [1997] 3 W.W.R. 487, 47 Alta. L.R. (3d) 346 (C.A.) also involved real property and expert evidence. There the appeal involved compensation for general disturbance and adverse effect arising from right-of-entry orders for well sites and access roads. Leases upon which the owners' expert had relied for his opinion were not put into evidence nor were the relevant land owners called as witnesses. Hunt, J.A. for the court held that the opinion was admissible. She also suggested at § 15 that another way of viewing Sopinka, J.'s explanation in *Lavallee* regarding the admissibility of expert testimony based partly upon hearsay, was to consider whether the underlying hearsay would itself be admissible under the normal hearsay rules, where the tests to be applied are whether the evidence is reasonably necessary and reliable.

[87] Mr. Ryle, the expert put forward by the Johnsons, is a professional agrologist. His chief occupation was described as teaching or demonstrating the science or art of agriculture or as advising or conducting related scientific experiments and research. His training included the principles and practices of

agricultural economics. In the course of his professional duties, he had valued the economic impact of expropriation on agricultural operations. Mr. Ryle was qualified before the Board as an expert "in all aspects of agricultural operations, including the economic impacts of expropriation on all aspects of agricultural operations, including blueberry operations, woodland operations, and other typical agricultural operations".

[88] In view of the nature of his expertise and the hearsay evidence on which his opinion was founded, I am of the view that the Board's acceptance of Mr. Ryle's evidence that land with blueberry potential attracted a premium of $900/acre was seriously flawed. Nothing in his qualifications indicated that it was within his competence as an agrologist to value property. Even if I were to assume that agrologists can do so, it is not obvious from the record what forms of inquiry and evidence are generally accepted and acknowledged as reliable by them in establishing property valuations.

[89] Moreover Mr. Ryle's opinion relied on facts not proved in evidence before the Board. For example, he relied on an appraisal of other lands for which no particulars were provided other than that their location was "nearby." The precise location in relation to parcels A or B, its acreage, the nature and quality of the lands, the extent of blueberry development (if any), etc. were all unknown. In such circumstances the reliability of that appraisal for the purposes of determining the valuation of the parcels expropriated from the Johnsons is, at best, marginal. The information lacks the hallmarks of trustworthiness.

[90] According to these authorities then, Mr. Ryle could testify as to second-hand or hearsay information, such as the appraisal of the nearby property and any conversation with Mr. Sibley, upon which he relied upon to form his own opinion. However, his evidence was admissible merely to show the basis of his opinion and not for the truth of any facts contained therein. Thus Mr. Ryle's opinion could not establish that appraisal or Mr. Sibley had assigned an incremental value of $900 per acre for lands with blueberry potential.

[91] Even assuming, without deciding, that there was some admissible evidence to establish the foundation for Mr. Ryle's opinion, I would remain of the view that it was not reasonable for the Board to accept his opinion on the market value of land with blueberry potential or blueberry producing land. It was beyond his

competence as an agrologist to testify as to market values of agricultural lands. Furthermore, not only was the evidence supporting the claim that the market was paying a premium for lands with blueberry potential restricted to that of Mr. Ryle, but the Board had clear evidence of what would have been paid for the land if sold by a willing seller to a willing buyer on the expropriation date. That evidence was contained in the detailed reports prepared and presented by Mr. Smith, the real estate appraiser.

[92] Of the 17 sales in Cumberland and Colchester counties surrounding parcels A and B which he used as comparables, three contained wholly blueberry producing land. Another three contained approximately half blueberry producing lands and half woodland and two appear to be mostly woodland with a good percentage of blueberry producing land. Of eight sales which were of woodlands, three were in the Westchester Mountain area, the immediate vicinity of parcels A and B. It is to be remembered that when expropriated, parcels A and B were largely woodland, not blueberry producing lands nor land under development for blueberries.

[93] The general considerations and conclusions in the Smith report for Sector 1 which contained parcel A and Sector 2 which contains parcel B read as follows:

> **ORIGINAL PROPERTY LAND VALUATION**
>
> **General Considerations and Conclusions:**
>
> Due to the separate land sector holdings, the relevant considerations on a per sector basis will be stated to follow.
>
> Sector 1:
>
> As previously stated, this land sector primarily consists of low to moderate quality woodlands with only a minor blueberry plus cleared field component. The status of the blueberry field as indicated by the owners is of a young field not yet matured in production. The site does have two substantial frontage sections on the Wentworth - Collingwood Road being a favorable influence. Additionally, this sector constitutes a large holding (250+- acres) which tends to affect an overall achievable average selling price per acre.

In respect to these and other relevant factors and conditions influencing achievable value, weighted consideration must be given to sales #3, #4, #9 and #12 which conclude a maximum average acreage rate from $325 to $375 with the mid point of $350/acre average finalized.

Projection:

Area = 250.0+- acres

Therefore:

250.0+- acres @ $350/acre average (maximum) = $87,500

Sector 2:

This is a superior tract of land over Sector 1, for varying factors that would affect an overall achievable selling price per acre. This land has favorable conditions of a larger blueberry field component, superior forestry stands, etc. As in the instance of Sector 1, the blueberry fields are young and not yet matured to full production levels. None the less, the blueberry field is larger and prepared to be primarily machineable harvested.

Additionally, this sector is of an overall smaller size which tends to affect a higher average acreage rate than larger sized parcels if all other factors are held constant.

These foregoing conditions warranted weighted consideration to be given to sales #1, #4, #8, #11, #12, #13 and #14.

General Conditions and Conclusions:

Sector 2:

The remaining sales hold lesser degrees of comparability for valuation of this sector as an overall singular entity. Respective of this data and the influencing physical conditions of this sector, a supportable average acreage rate range from $700 to $800 has been finalized with the mid point of $750/acre selected.

Projection:

Area = 72.0+- acres

Therefore:

72.0+- acres @ $750/acre average = $54,000

Final Estimates of Value:

Sector 1:

EIGHTY SEVEN THOUSAND FIVE HUNDRED DOLLARS
$87,500

Sector 2:

FIFTY FOUR THOUSAND DOLLARS $54,000

[94] When the acreage rates were applied to the acreage of each of parcel A (23.04 acres) and parcel B (11.65 acres), the estimated value for the former was $8,100 and for the latter $8,700.

[95] The Board largely dismissed the appraiser's direct comparison approach because, in its view, Mr. Smith had failed to recognize the lands' highest and best use as blueberry producing lands and did not determine the blueberry potential of the expropriated parcels. But the sales data compiled by Mr. Smith did not demonstrate that any incremental value for blueberry potential existed. Even those comparables which were for lands already in blueberry production had acreage prices about the same as or below that suggested by Mr. Ryle for lands with only blueberry potential. There was no evidence before the Board on market value other than the information of the recent sales of numerous similar properties in the vicinity of parcels A and B, adjusted for differences, contained in the Smith report.

(ii) Averaging

[96] It is evident that the principal reason it rejected Mr. Smith's market value opinion related to the alleged blueberry potential of the lands. However, the Board gave an additional reason. Although it referred to "other flaws" in his methodology, it identified only one: "the assignment of an average value, which

[Mr. Smith] abstracted from his range of comparable sales." According to the Board, this methodology had been rejected by the courts. Its decision cited *Henderson et al. v. The Minister of Tourism* (1981), 23 L.C.R. 30 (N.B. Property Compensation Board), *Tekmin v. The Queen et al.* (1995), 59 L.C.R. 31 (Fed. C.A.) and *Ives v. Manitoba*, [1970] S.C.R. 465.

[97] This issue is a question of law which attracts a standard of review of correctness. In my view the methodology followed by Mr. Smith was not similar to that impugned in those decisions and was not wrong in principle.

[98] It is clear that simply taking a mathematical average of all the evidence as to value is incorrect. As was stated in *Grand Trunk Railway Company v. Coupal* (1898), 28 S.C.R. 531 at p. 537:

> . . . [the] method of computation would seem to approximate nearer to legal principles, but even that method was clearly vicious, because it was attended by a process of averages, giving to the evidence of each witness on each side the same value, adding up the amounts respectively sworn to by them all and arriving at the amount by dividing the total by the number of the witnesses. I cannot conceive how any award come to by any such process can be supported.

This principle was also applied in *Fairman v. The City of Montreal* (1901) 31 S.C.R. 210 at p. 218.

[99] In *Tekmin*, supra the expropriated lot was situated in a region particularly rich in sand and gravel and the owner had acquired it with a view to exploiting that resource. The Minister offered $65,000 assuming its most profitable use was as a gravel quarry. The owner claimed $1,300,000 based on passive exploitation or alternatively $2,300,000 based on active exploitation of the aggregate. The trial judge awarded $76,000. In allowing the appeal, the Federal Court of Appeal addressed the approach adopted by the appraiser and applied by the judge of determining the average value of the sale prices by dividing the sales selected into subgroups. It stated at p. 35-36:

> . . . I believe that this mathematical exercise was unjustified, particularly since the effect was to substantially reduce the overall result, given that the last of the four subgroups (whose influence on the calculation is magnified since it is considered

> four times) was, for no sound reason, comprised of two sales that were inexplicably much lower than all the others. This blind approach certainly does not comply with what the Supreme Court said in *Ives v. Province of Manitoba*, [1970] S.C.R. 465 (S.C.C.)

[100] The issue in *Ives*, supra was whether, where the arbitrator had used an improper method of averaging sales to determine the value of land taken for a provincial park, his decision should stand. There three appraisers had given estimates of $51,000, $48,000 and $9,000 for the land value and the damage caused to remaining land by way of severance. The arbitrator made his valuation by selecting five of 38 sales presented by one appraiser and the six presented by the other two, adding them, dividing by 11, and thus deriving an average value of $216.50 per acre for a total award of some $20,500. The Court of Appeal considered the $9,000 estimate the most realistic but allowed $12,320 since the province was agreeable.

[101] In allowing the appeal Hall, J. writing for the majority of the Supreme Court stated at p. 470:

> . . . While a mathematical averaging of sales is not a proper method of arriving at the value to the owner, evidence of such sales is relevant and it was proper for the arbitrator to take such evidence into consideration . . . This value [of the land being taken] may be the market value but it may be more in cases where, for some reason, the land has a special adaptability for the purpose of the new use. That this land had such a special adaptability is quite clear . . .

The majority was of the view that the arbitrator was the proper person to weigh the evidence and it was clear that he did not accept the lowest valuation. Since his conclusion was reasonably correct in spite of his adoption of the wrong method in arriving at his valuation, it was allowed to stand.

[102] In *Henderson*, supra the Province of New Brunswick expropriated Heron Island in the Baie des Chaleurs. The Minister offered less than $350,000; the owners claimed $1,429,000. The evidence before the New Brunswick Property Compensation Board included valuation reports by four appraisers who, although they agreed as to the approach to be taken and the highest and best use and used the same comparables, gave estimates of $1,429,000, $1,000,000, $308,000 and

$332,000. The Board awarded $1,000,000. In analyzing one of the appraisals, it commented at p. 45:

> . . . An arithmetic average, *i.e.*, the sum total of a set of values divided by the number of items in the set, may be used as the most probable value only where there is no reason for thinking one estimate is better than another. Such is not the case in the appraisal under review.

While the Board's award was upheld ((1983), 43 N.B.R. (2d) 360) it was not necessary for the Court of Appeal to address this statement.

[103] What the appraiser did in the matter before us was to calculate an average per acre price for each land sale presented as an appropriate comparable to the Johnson lands. Mr. Smith then considered various relevant factors and conditions in selecting those which were the most comparable, finalized a supportable range for the average acreage rate for those sales, and determined his estimate within that range. His methodology was not based upon an averaging of all the evidence nor did it involve the use of subgroups which allowed for uneven weighing. Moreover it did not divide the total of original sales figures by the number of sales. Rather, his approach was selective, considered, and far removed from any "blind approach" in reaching an estimate for market value.

[104] In summary, I am of the opinion that in determining compensation for the expropriation of parcels A and B, the Board decision which relied upon Mr. Ryles' component approach, included a value for blueberry potential, and disregarded evidence was patently unreasonable. Moreover, the Board was incorrect in its criticism of Mr. Smith's methodology based on its understanding of averaging.

(iii) Parcel D

[105] The Board's valuation of lands with blueberry potential was derived in part from the valuation it gave to fully productive blueberry lands. In my respectful opinion, in setting compensation for the taking of parcel D, the Board's determination as to the valuation of such lands was patently unreasonable.

[106] Mr. Ryle testified that it was not unusual for blueberry lands to change hands at $3,000 to $4,000 per acre and that Jack Sibley had given him the figure of

$3,000 per acre. Mr. Johnson testified that the normal price for developed blueberry land seemed to be around $3,500 to $4,000. Neither Mr. Ryle nor Mr. Johnson produced any sales information or verification in support of his evidence. It is also to be noted that as an owner, Mr. Johnson was an interested party in the expropriation proceedings.

[107] After finding that the expropriation foreclosed expansion of an existing four acre blueberry field in parcel D, the Board awarded compensation of $3,000 per acre for the existing blueberry field. It stated that this amount was reasonable "in light of Mr. Johnson's unchallenged testimony that producing blueberry lands can attract prices of $3,500 to $4,000 per acre." (Emphasis added)

[108] The Board's statement is not accurate. Mr. Johnson's testimony in that regard had been challenged. Contrary evidence appeared in the Smith appraisal reports. The sales data in the report for parcel D showed acreage values for agricultural land that was largely cleared or which included blueberry land and blueberry potential land as ranging from $400 to about $1,200. Even the Smith appraisal for parcels A and B with its sales data for lands situate in the Westchester Mountain area which, according to Mr. Ryle's evidence is arguably the best in Nova Scotia and perhaps in North America for blueberries, showed prices for lands already in blueberry production which did not exceed $1,700 per acre.

(iv) Summary - Market Value of Parcels A, B and D

[109] In summary, the Board's determination of compensation for the expropriation of parcels A, B and D is patently unreasonable.

(C) Injurious Affection

[110] The Johnsons made several claims which fall under the head of compensation known as injurious affection. That term is defined in part in the *Act* as follows:

> 3 (h) "injurious affection" means

> (i) where a statutory authority acquires part of the land of an owner,
>
> > (A) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and
> >
> > (B) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute,
>
> . . .
>
> and for the purposes of subclause (i), part of the land of an owner shall be deemed to have been acquired where the owner from whom land is acquired retains land contiguous to that acquired or retains land of which the use is enhanced by unified ownership with that acquired.

[111] The compensation the Johnsons sought included:

(a) under s. 3(h)(i)(A), the reduction in market value to their remaining lands adjacent to parcels A and B arising from the need to establish buffer zones adjacent to the Cobequid Pass to protect blueberry lands to be developed from potential salt damage; and
(b) under s. 3(h)(k)(B), business damage resulting from access difficulties and increased transportation costs arising from the severance of their original lots by the expropriation of parcels A and B.

I will deal with each in turn.

(i) Protection or Buffer Zones

[112] The Board was satisfied that an allowance should be made for a 100 metre buffer, measured from the centre line of each carriageway of the Cobequid Pass, to protect against the effect of de-icing salt. Having decided that had it not been for the expropriation, the lands within this buffer zone would have been developed for

their blueberry potential, the Board adopted a methodology similar to that applied to the expropriated parcels themselves for valuation.

[113] In my view, the Board was not patently unreasonable in establishing the width of the buffer zone and thereby the lands for which the Johnsons were entitled to compensation. However, as determined earlier, the Board erred in the methodology it used to establish market value.

[114] The Province submits that the Board erred in law in awarding compensation for devaluation (a) where there was no evidence of actual damage, and (b) where the evidence of the only expert on the issue of potential damage from use of de-icing salt and adequate remedial measures was not accepted. Its arguments focus upon the Board's rejection of the opinion of the Province's evidence of its expert, Dr. Leonard Eaton, an agrologist who, since 1974, has conducted research on the lowbush or wild blueberry and who has written on the effects of de-icing salt on wild blueberries. He was qualified as an expert in and a researcher of wild blueberries, particularly with respect to that plant's nutrition, pollination and environmental issues, including salt damage.

[115] While there was no evidence of actual damage before the Board, Dr. Eaton acknowledged that de-icing salt causes damage to roadside vegetation. There was no evidence to the contrary. Consequently this ground of appeal reduces to the Board's determination of the adequate remedial measure, namely the width and location of the buffer zone.

[116] The Johnsons claimed that a protection buffer of 100 metres measured from the centre line of each carriageway was necessary. Dr. Eaton considered this width excessive. He recommended a 50 metre buffer measured from the edge of the road bed to the northeast of parcels A and B, and none at all on the southwestern side of the Cobequid Pass.

[117] The Board considered the factors which can affect the extent of the damage which de-icing salt might cause. It stated:

> ¶ 196 With respect to the application of these factors to the lands in question, the Board places greater weight on the evidence of Mr. Ryle and Mr. Johnson than that of Dr. Eaton. While Dr. Eaton has carried out extensive research on this topic,

> the Board finds that his knowledge of the subject lands was rather limited, likely attributable to his late retainer by the Respondent. He was unable to prepare any scientific analysis of the potential impact deicing salt may have in the area or to examine all the lands. While Mr. Ryle and Mr. Johnson, likewise, did not conduct any scientific analysis, they both demonstrated a keen awareness of the subject lands, and provided convincing evidence explaining how the various factors would interact with the surrounding lands in this location (e.g., amount of salt usage, amount and size of traffic, wind, and land elevation in comparison to the highway). In particular, the Board observes that the levels of salt applied to the Cobequid Pass far exceeds the levels noted in other studies where the amount of salt was measured (e.g., more than twice that applied in the Folly Mountain study, and more than triple if considering that applied near the highway interchange). Further, an Environment Assessment of the Cobequid Pass construction was prepared by the firm Nolan, Davis & Associates (N.S.) Limited for DOT. The Environmental Assessment Report (Exhibit J-16) noted, as did testimony at the hearing, that prevailing winds in this area are westerly and northwesterly in the winter months. This increases the likelihood of salt drifting onto potential blueberry lands in the area, rather than along the highway as asserted by Dr. Eaton. (Emphasis added)

[118] The Province maintains that the Board's acceptance that Mr. Ryle and Mr. Johnson are better positioned by virtue of their knowledge of the properties, or additionally in Mr. Ryle's case, by his reading of studies and articles, is patently unreasonable since they did not have Dr. Eaton's qualifications nor the expertise as to what precautionary measures are adequate. I am unable to agree.

[119] The Board clearly set out why it preferred the evidence of Mr. Johnson and Mr. Ryle over the opinion evidence of the expert. It noted Dr. Eaton's lack of familiarity with the lands and that, since he had been engaged merely to critique Mr. Ryle's report, he had not done a salt study of the Johnsons' property. The Board also observed that in expressing his view on the need for the protection buffer and its width, Mr. Ryle had relied on several articles including some co-authored by the Province's expert. Dr. Eaton himself acknowledged that those studies were relevant to the issues of salt damage on property adjacent to high speed highways such as the Cobequid Pass.

[120] Accordingly, I am not persuaded that the Board's determination as to the appropriate extent of the buffer zone was patently unreasonable. However, for the reasons set out earlier, its method for valuing those lands was in error.

(ii) Parcel D

[121] The effect of de-icing salt was a factor in the compensation awarded for a portion of the lands remaining after the expropriation of parcel D. The Board found that an existing four acre blueberry field within the remaining lands south of parcel D had lost its value. According to Mr. Johnson, a blueberry field should be at least eight acres before it is economically feasible to harvest but the building of the Cobequid Pass and the application of salt on that highway had made expansion of this field impossible. The Board awarded $3,000 per acre for the existing blueberry field, as valued by Mr. Ryle.

[122] There was no evidence that the use of de-icing salt or any other activity had damaged those lands. Rather, the evidence showed that ever since the expropriation of parcel D Mr. Johnson has continued to harvest that blueberry field. The Board's finding that the value of this parcel was lost was patently unreasonable. Based on the evidence before it, no compensation should have been awarded.

(D) Access Severance

[123] The Johnsons' claim which pertains to access difficulties arising from the severance of their property relates mainly to parcels A and B. I will deal with each parcel separately.

(i) Parcel A

[124] The original lot from which parcel A was expropriated had frontage on the Wentworth-Collingwood Road along a portion of its western boundary and on the Jersey Road along a portion of its northern boundary. The northern portion of that lot includes an eight acre blueberry field which was accessed from the Jersey Road.

[125] Prior to the expropriation of parcel A, the Johnsons could access the remainder lands southwest of the Cobequid Pass (including the so-called "crown jewel" lands) through or from the remainder piece to the north of that highway. The expropriation makes this impossible. The Board awarded the Johnsons the amount of unchallenged costs estimates for the construction of a crossing over

Halliday's Brook to access the "crown jewel" lands. I have not been satisfied that in doing so, it erred such that this court should interfere.

[126] Since his purchase of the original lot in 1983, Mr. Johnson had used a woods road to access its southern portion. This road comes up northerly from the Westchester Road across lands owned by a third party known to Mr. Johnson as a Mr. Brown. After reaching the southern boundary of the Johnson property, the woods road ran roughly parallel to and east of Halliday's Brook which bisects the original lot. Since it ended at a point south of expropriated parcel A, that road was not severed when that parcel was taken.

[127] In deciding to award compensation for the loss of access, the Board pointed out that where Mr. Johnson does not have title to nor any easement or right-of-way across the lands belonging to Mr. Brown, his use of this woods road depended on its owner's goodwill which could change without notice or recourse. In its view, it was reasonable and appropriate to compensate the Johnsons for having to access the "crown jewel" lands by way of the Wentworth-Collingwood Road and across Halliday's Brook.

[128] The Province says that Mr. Johnson had not shown why he could not access the southern portion of the original property as previously, or alternatively had not shown any effort to secure any legal right or agreement to continue using the woods road. According to the Province, in the absence of evidence that the Johnsons had attempted to mitigate by securing a legal agreement with the adjoining landowner and where the expropriation did not interfere with the woods road itself, the Board erred in allowing the claim for loss of access to the remainder lands to the southwest of parcel A.

[129] I am unable to accept the Province's argument. The Board had to determine whether the loss of access and the cost of constructing the Halliday's Brook Crossing arose directly as a result of the expropriation. It found that it did and there was evidence in support of its finding. None of its factual findings such as access to their lands south of the Cobequid Pass from that to its north having been prevented by the construction and use of that highway and the Johnsons having no title or legal interest in the woods road was challenged by the Province. Once the Johnsons had made out a *prima facie* case, the burden of proof in regard to

mitigation was not carried by them but by the expropriating authority: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146 at p. 163-164.

[130] I have not been satisfied that the Board was patently unreasonable when it made the award it did for access in relation to parcel A.

(ii) Parcel B

[131] The Johnsons claimed compensation for severance of access both to the 19 acre woodlot north of Parcel B and the 14 acre woodlot south of parcel B. They asserted that they would have accessed these lands by way of woods roads leading from the Jersey Road. There was no evidence that Mr. Johnson had any legal right to do so.

[132] In the interests of consistency with the disposition of the parcel A access issue and of fairness, the Board considered that the Johnsons do not have any right to use woods roads leading from the Jersey Road. It denied any claim for compensation pertaining to access related to the 19 acre woodlot to the north of parcel B, noting that the Department of Transport had built an access road from the Jersey Road to this parcel as well as to other owners' properties on that side of the highway.

[133] As to access to the 14 acre woodlot south of that parcel which lay between the buffer from de-icing salt along the Cobequid Pass and an existing blueberry field, the Board stated:

> ¶ 215 Turning to the lands south of Parcel B, the Johnsons assert that they would have accessed these lands from the north, via the Jersey Road and the woods road described above. The only remaining option (possibly the only option that existed prior to the expropriation, given the Board's findings above) is to access the lands from the Westchester Road through the existing blueberry field.

It rejected a road through the existing blueberry field suggested by Mr. Johnson's engineer which would mean a loss in production. The Board found that it would not be appropriate to clear cut the woodlot which is on a steep grade for various reasons, including the stability of the slope. It then continued:

> ¶ 217 . . . Clearly, in the Board's opinion, had the Cobequid Pass not been constructed in its present location, the development of blueberry fields within Parcel B and the deicing salt protection buffer could have contributed to the cost of constructing the road.
>
> ¶ 218 Having considered the evidence, the Board concludes that it is not economically feasible to construct an access road down through the blueberry field. Thus, in effect, the woodlot must be abandoned. The Board finds that the Claimants should be compensated for the lost opportunity to harvest the isolated woodlot comprising 14 acres. It awards compensation in the amount of $19,446 (14 acres x $1,289/acre for the timber, plus 14 acres x $100/acre for the bare land).

[134] I agree with the Province that once the Board found that the only access was from the Westchester Road, it should not have proceeded further as it did and that no compensation should have been awarded. The land from which parcel B was expropriated had never had a road through it. The taking of that parcel did not sever any existing access. Quite simply, the expropriation of parcel B did not alter the access to the 14 acre woodlot in any way. Both before and after its expropriation, the Johnsons would have had to build a road to reach that land.

[135] Thus it was not necessary for the Board to consider the economic feasibility of constructing an access road through the existing blueberry field. Even had this been appropriate, in doing so the Board failed to take into account several important factors. It stated that the construction of the Cobequid Pass impacted negatively on the cost of road construction in that the lands within parcel B and the protection zone were no longer available to contribute to that cost. However, the Johnsons were awarded compensation for those lands and thus received funds which could be applied against the building of an access road. Moreover, while the Board made no award in relation to the lot north of parcel B, a new road built by the Province provided access where none had existed prior to the expropriation. It might be said that in that way the Johnsons derived some financial benefit in regard to that lot. In addition, the Board erred in the compensation it did award for the abandonment of the 14 acre woodlot by including an amount for the bare land in addition to one for timber. Since they still own that land, even if they lost the value of the timber which could no longer be harvested, the Johnsons could not have lost the value of the land itself.

[136] In summary, the Board's decision to award the cost of constructing a new access road through the blueberry field to reach the l4 acre woodlot was patently unreasonable. The Johnsons had not suffered any personal or business damages resulting from the construction or use, or both, of the Cobequid Pass in relation to that woodlot.

(iii) Transportation Costs

[137] Understanding the Johnson's claim for compensation for additional transportation costs calls for an examination of sketch map 1which shows parcels A and B. Their claim involves the Jersey Road which runs between the original lots from which those parcels were taken. As shown on sketch map 1, the Jersey Road extends northwards from the Westchester Road to join the Wentworth-Collingwood Road. Although not shown, the Westchester Road continues southwesterly and connects to the Wentworth-Collingwood Road.

[138] The Jersey Road was a public, gravel road which carried less traffic than secondary roads such as the Westchester and the Wentworth-Collingwood Roads. Before the expropriation of parcel A, the Johnsons had used it to access the existing blueberry field in their remaining lands to the northeast of that parcel. It was also their preferred route between their blueberry fields on the lots from which parcels A and B were expropriated.

[139] The expropriation for the Cobequid Pass severed the Jersey Road. The Johnsons' blueberry processing plant is located off the Wentworth-Collingwood Road in the remaining lands southwest of parcel A. What the Johnsons claimed was compensation for the extra costs for having to move their equipment around the loop formed by the connection of the Westchester Road to the Wentworth-Collingwood Road, rather than using the more direct Jersey Road route.

[140] The Board concluded that the Johnsons were likely to develop the blueberry potential on the "crown jewel" lands and that the expropriation would result in additional costs arising from the "floating" or transporting of farm equipment to their fields on either side of the Cobequid Pass. It agreed that their claim for excess costs, projected over a 20 year period and reduced by a discount rate, was

reasonable and appropriate. In its decision, the Board did not identify the provision of the *Act* upon which it based this award.

[141] The Province points out that the Jersey Road was a public road and that its severance for the Cobequid Pass did not involve the taking of any of the Johnsons' land. It says that, as the Board acknowledged, the Jersey Road intersected neither parcel A, nor parcel B, nor the remaining lands of the Johnsons adjacent to those expropriated parcels. According to the Province, the Board's award for extra transportation costs is without statutory foundation and, in particular, it does not come within the definition of injurious affection in s. 3(1)(h)(i)(B) which reads:

> 3(l)(h) "injurious affection" means
>
> (i) where a statutory authority acquires part of the land of an owner,
>
> . . .
>
> > (B) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute.

[142] The Province maintains that the Johnsons cannot establish that the severance of the Jersey Road by the construction and use of the Cobequid Pass would have been actionable at common law because any damages that result from the construction or use or both of the works can only be claimed where the construction or use or both of the works, here the highway, were on the land which had been expropriated from its owners. The Johnsons emphasize that the original consolidation of their properties allowed efficiencies to their farming operation which were lost by the severance of the Jersey Road. They argue that even where no land had been taken from the owner, the courts have recognized loss of traditional access as injurious affection. In that regard they rely upon *R. v. Loiselle* (1962), 35 D.L.R. (2d) 274 (S.C.C.) and *Re City of Windsor and Larsen et al.* (1980), 114 D.L.R. (3d) 477 (Ont. Div. Ct.).

[143] In *Loiselle*, the respondent owned and operated a garage and service station on a provincial highway. As a result of the construction of the St. Lawrence

Seaway, that highway was closed and diverted. His property was then located in a cul de sac at the end of a street and some 1,500 feet from the intersection of the relocated highway. None of the owner's land was taken for the Seaway. The expropriating legislation provided for compensation for damage for injurious affection. The Supreme Court of Canada held that the owner met the conditions giving rise to a claim for compensation for injurious affection to a property when no land is taken. In doing so, it noted that there had been "a physical interference with a right which the owner was entitled to use in connection with his property" which substantially diminished its value as a commercial property.

[144] In *Larsen*, the widening of a highway and the construction of a concrete raised median strip down its centre considerably restricted access to and from a motel located on that highway. The Ontario Divisional Court rejected the argument that the damages complained of occurred as a result of an interference with a public right and not a private right; that is, that the damages suffered were no greater than would be sustained by any member of the general public and that therefore there was no private cause of action. In its view, the facts of the case indicated that there is a private right which was interfered with.

[145] With respect, *Loiselle* and *Larsen* are distinguishable on their facts from the case on appeal. In those decisions, compensation was claimed in regard to lands which lay adjacent to the highways before the expropriations. Here however the lands on either side of the Jersey Road did not belong to the Johnsons. None of their lands were affected by the severance of that road in a way or to an extent similar to the lands in those decisions.

[146] The facts in the appeal before us are more similar to those in *St. Pierre v. Ontario (Minister of Transportation and Communications)*, [1987] 1 S.C.R. 906. There a strip of land adjoining one boundary of the appellant's land situate in a quiet rural neighborhood was taken for a highway. No part of the appellant's land was expropriated. The decision of the compensation board allowing their claim of injurious affection for loss of amenities - loss of prospect and elements of loss of privacy - was upheld by the Divisional Court and then overturned by the Court of Appeal. In dismissing the appeal, McIntyre, J. for the court referred at p. 915 to *Loiselle* and to *Larsen*, and noted that in both those cases the construction of public works were so close to the lands as to change their situation by greatly reducing, if not eliminating, their value for their previous uses and could,

therefore, be classified as nuisances. After stating that the courts have consistently held that there can be no recovery for the loss of prospect, he commented at p. 916:

> . . . I am unable to say that there is anything unreasonable in the Minister's use of the land. The Minister is authorized–indeed he is charged with the duty–to construct highways. All highway construction will cause disruption. Sometimes it will damage property, sometimes it will enhance its value. To fix the Minister with liability for damages to every landowner whose property interest is damaged, by reason only of the construction of a highway on neighbouring lands, would place an intolerable burden on the public purse. Highways are necessary: they cause disruption. In the balancing process inherent in the law of nuisance, their utility for the public good far outweighs the disruption and injury which is visited upon some adjoining lands. The law of nuisance will not extend to allow for compensation in this case.

[147] In my respectful view, on the evidence before it the decision of the Board to award the compensation for extra transportation costs was patently unreasonable. It is not necessary that I deal with the other grounds of appeal pertaining to transportation costs.

7. Business Loss or Damages - Parcel C

[148] The Johnsons claimed a business loss in relation to their alfalfa leafcutter bees and parcel C. For the reasons which follow, I am of the view that in the circumstances of this case the Board's award of compensation for business loss is patently unreasonable.

[149] The importance of bees to blueberry production was summarized by the Board thus:

> ¶ 41 . . . The costs related to pollination are a normal expense incurred by blueberry growers. As noted in literature provided at the hearing, the lowbush blueberry plant is "self sterile", necessitating bees to ensure that cross-pollination occurs. Due to reductions in native bee populations, partly due to the elimination of competing vegetation through the use of Velpar, farmers must manually introduce bees to the blueberry fields. . . . the manual introduction of bees to

> blueberry fields is essential to increased pollination which, in turn, improves the eventual blueberry yield.

[150] The essence of the Johnsons' claim was that prior to the expropriation, they believed that they could cut their pollination costs by using leafcutter bees and that they were committed to using those bees and to producing them for sale to other farmers. This, the Johnsons submit, was harmed by the expropriation of Parcel C, a 10.6 acre field, which could grow the required forage. Evidence before the Board established that certain types of forage which produce high-protein leaves are needed by leafcutter bees to build nests and as food. Leafcutter bees hibernate in the winter. They can be kept in the larvae stage, incubated a month before needed and, once hatched, put out into the blueberry fields.

[151] Following is a chronology of essential evidence pertaining to the leafcutter bees used and produced by the Johnsons:

Before 1995	The Johnsons rent honeybees for blueberry pollination. Parcel C is rented out as grazing land.
Spring and Summer 1995	The Johnsons rent leafcutter bees to custom pollinate the majority of their blueberry fields and honeybees for the remainder. Parcel C is rented out as grazing land.
December 18, 1995	Parcel C is expropriated.
Spring and Summer 1996	A bee incubator room is built on the Johnsons' home property.
Summer 1997	The Johnsons unsuccessfully attempt to use their Scrabble Hill property for forage as replacement for parcel C.

[152] The Board's decision in regard to the Johnsons' claim reads:

> 232 . . . While a forage crop was not growing on Parcel C prior to the expropriation, the Board finds that the Johnsons' decision to integrate the bees into

> their blueberry operation crystallized when they adopted the leafcutter bee to pollinate a majority of their crop for the 1995 season, prior to the expropriation.
>
> 233 Having reviewed the evidence, the Board is satisfied that the leafcutter bee business is one which appears to be viable and ongoing. It is clear that this business was much more than a mere thought or speculative idea prior to the expropriation. Had there been serious doubts about the leafcutter bee, the Board is satisfied that Mr. Johnson, who the Board found to be a careful and prudent person, would not have used the leafcutter bee species to pollinate a majority of his blueberry crop in 1995, several months before the expropriation. In any event, the Board concludes that the growth of the leafcutter bee business from 1995 to the date of the hearing supports the conclusion that the industry holds promise for the future. The Board finds that the Johnsons should be compensated for the loss of bees occasioned by the expropriation of Parcel C, which comprises 10.7 acres.

It allowed the business loss claim in the amount of $28,878, being the value of bees that could have been produced over 20 years, discounted at eight per cent per year.

[153] As indicated at the outset of this decision, a claimant must show that his claim comes within the provisions of the expropriation legislation. The Board failed to specify the statutory basis of its decision awarding compensation for the loss of bees and the leafcutter bee business. The *Act* allows two possibilities, which I will deal with in turn.

(i) Section 29

[154] In their Amended Notice of Hearing, the Johnsons claimed "business loss from land taken" in regard to parcel C. Section 29 of the *Act* provides for compensation for business loss in certain circumstances. It reads in part:

> **Business loss from relocating**
>
> 29 (1) Where a business is located on the land expropriated, the statutory authority shall pay compensation for business loss resulting from the relocation of the business made necessary by the expropriation and, unless the owner and the statutory authority otherwise agree, the business losses shall not be determined until the business has moved and been in operation for nine months or until a two-year period has elapsed, whichever occurs first. (Emphasis added)

[155] Section 29 cannot apply unless there is a business and a relocation of that business made necessary by the expropriation which results in a loss. That provision can have no application since the evidence does not support a finding that the Johnsons had a business when parcel C was expropriated.

[156] Mr. Johnson became aware of leafcutter bees at a meeting of blueberry producers and of studies that indicated potential savings if such bees were used. His interest grew. In 1995 he entered into an agreement with a leafcutter bee business to custom pollinate 115 acres. The summer before the expropriation of parcel C, he used both honey bees and leafcutter bees in his fields.

[157] The Board found as a fact that the Johnsons had not grown forage on parcel C in preparation for a leafcutter bee business before that land was taken. It was clear from the evidence that growing forage is critical to a bee operation - leafcutter bees depend on forage for food when they come off the blueberry fields and for reproduction purposes. The planting of forage is one of the first steps in developing a leafcutter bee business. While some types could produce in a short period of time, other types needed to be planted a year in advance.

[158] While the Johnsons had rented them, they had not purchased any leafcutter bees before the expropriation of parcel C. Nor had they built an incubator or produced any such bees for themselves or for sale. Nor was there any evidence of any detailed analysis, formal business plan, or the retention of a consultant in regard to a specialized venture involving the growth of bees, their use for pollination, or their marketing, distribution and sale to blueberry producers.

[159] I am respectfully of the opinion that the Board's conclusion that the Johnsons had a leafcutter bee business is patently unreasonable. The evidence is only sufficient to show that in the months before the expropriation, they had entered into a rental agreement and had used the rented bees to pollinate some fields, and that Mr. Johnson had discussed his plans regarding a leafcutter bee business in general terms with others. Not until after the expropriation did the Johnsons plant forage and build an incubator, both of which were necessary for such an enterprise. Not until after the expropriation did they purchase and produce leafcutter bees. In these circumstances, when the Province took parcel C no leafcutter bee production business had been established. Without a business, there could be no business loss nor any arising out of any relocation necessitated

by the taking of parcel C. The Johnsons' claim for a business loss could not succeed under s. 29.

(ii) Section 3(l)(h)(i)(B)

[160] The Johnsons argued another statutory basis for their claim, namely "business damages" under s. 3(l)(h)(i)(B) of the *Act*. The definition of injurious affection reads in part:

> 3(l)(h) "injurious affection" means
>
> (i) where a statutory authority acquires part of the land of an owner,
>
> (A) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and
>
> (B) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute, . . . (Emphasis added)

[161] The Johnsons rely on this provision in submitting that their leafcutter bees claim is not one for business loss or loss of profit, but rather is directed to the costs to their own business. The business damages claimed are described as flowing from their inability to produce their own bees for the pollination of their own fields.

[162] With respect, I am unable to agree. When parcel C was expropriated, the Johnsons had not used leafcutter bees exclusively nor did they own any leafcutter bees nor had they produced any such bees for their own use.

[163] In the result, the Board did not identify the basis of its award. Whether it relied upon s. 29 or s. 3(l)(h)(i)(B) its determination of compensation for the leafcutter bee claim was patently unreasonable. Counsel did not suggest that the award could be founded on any other provision of the *Act*. It is not necessary that I deal with the remaining grounds of appeal which pertain to the leafcutter bee

claim, which grounds include mitigation efforts elsewhere and the appropriate discount rate.

(E) Noise Disturbance

[164] The Board awarded compensation for devaluation, on account of traffic noise, to the Johnsons' home property and to their future home property. One lane of the Cobequid Pass and part of an access ramp were built on parcel C approximately one kilometre from their present residence on the Station Road. Parcel B, north of their future residence on the Westchester Road, was used for two carriageways of the highway.

[165] Both the Johnsons testified as to the amount of traffic noise from the Cobequid Pass and its effect on them personally. The Board also had a tape recording taken from their backyard, its own observations from its site visit to both properties, the Guidelines for Environmental Noise Measurement and Assessment adopted by the provincial Department of the Environment, the measurements of noise recorded in graphs presented by Dr. John Walker, an expert in the field of environmental physics, and his testimony as to how noise is measured and how it can be mitigated. Dr. Walker was not permitted to testify as to the interpretation of the measurements taken because no written report had been filed before the hearing as required by the Board's procedural rules.

[166] For the devaluation of the Johnsons' present home on the Station Road because of traffic noise, the Board allowed $7,000 which was the amount agreed to by two real estate appraisers, Mr. Smith for the Province and Lee Weatherby for the Johnsons. It accepted the opinion of the Johnsons' expert witnesses that the market value of the future home site near parcel B was $10,000 less. The Board then considered remedial measures and stated:

> 275 Based upon its observations during the site visit, and upon the evidence of Mr. and Mrs. Johnson, which it considers credible, the Board is satisfied that the noise originating from the Cobequid Pass highway does materially interfere with the lives of the Claimants (even applying the principles of **Sisters of Charity of Rockingham v. The King**, [1922] 2 A.C. 315, and **Edwards v. Minister of Transport**, [1964] 2 Q.B. 134, cited by [counsel for the Province]). Further, the Board notes that the noise measurements taken by Dr. Walker exceed, in some

> instances, the Guideline of the N.S. Department of the Environment. This fact, to a certain extent, corroborates the testimony of the Johnsons respecting the impact of the noise. With the exception of the replacement of exterior siding with brick veneer, the Board considers the remedial measures, as outlined in paragraph 122, to be reasonable and appropriate. It awards compensation to the Claimants in the amount of $46,375 with respect to these remedial measures. (Emphasis added)

The remediation included an air conditioning unit, a privacy fence over 200 feet long, door replacement and triple glazed windows.

(i) The Rule in *Edwards* Case

[167] The Province's essential argument is that the Board failed to apply the rule in *Edwards v. Minister of Transport*, [1964] 2 Q.B. 134 and so erred in law. I am not persuaded that the Board so erred.

[168] Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada*, supra explains the limitation set out in that rule thus at p. 338:

> **The Land Affected Must have Been Depreciated in Value by Activities Upon the Expropriated Land ("The Edwards Rule")**
>
> The "common law" rule is that in a partial taking situation the owner can claim compensation only for "pure injurious affection" (i.e.: depreciation in the value of the remaining property), which results, or may result, from the use of the land taken from the owner. The owner cannot recover compensation for deleterious effects which originate from the use of land acquired from other owners or already owned by the public authority.

[169] The *Edwards* rule is founded upon Privy Council decision in *Sisters of Charity of Rockingham v. The King*, [1922] 2 A.C. 315, (1922), 67 D.L.R. 209. The Minister of Railways and Canals had expropriated two small promontories owned by the Sisters on the eastern side of an existing railway, on the margin of Bedford Basin, for the construction of a railway shunting yard. The Sisters claimed compensation on the ground that their property on the western side of the railway, which had not been taken, had been injuriously affected by the construction of that yard. The Privy Council noted at p. 216 that a claimant is not

entitled to compensation arising from the anticipated construction of works upon lands taken from others. It then continued:

> The problem of applying the above principles in a case where the mischief complained of has arisen partly on lands taken from the claimants, and partly on other lands outside their property, can only be settled by a consideration of all the circumstances in a particular case. Clearly in this case the appellants are entitled to a less amount of compensation than if all the lands taken in the laying out of the shunting yard had belonged to them, but on the other hand, the fact that other lands are comprised in the scheme in addition to the lands taken from the appellants, does not deprive the appellants of their right to compensation, so long as their claim is not extended beyond mischief which arises from the apprehended legal user of the two promontories of a railway shunting yard. (Emphasis added)

[170] The English Court of Appeal applied the rule from the *Sisters of Charity* decision in *Edwards*, supra. There the claim pertained to traffic noise resulting from the construction of a truck road both within and without the boundaries of lands compulsorily acquired from the claimant. The decision limited compensation to the depreciation caused by the noise, vibration, smoke, etc. actually done on only the piece of land taken from the claimant.

[171] The rule in *Edwards* was subsumed in the definition of injurious affection in the *Act*, which I repeat here for convenience:

> 3(1) In this Act,
>
> (h) "injurious affection" means
>
> (i) where a statutory authority acquires part of the land of an owner
>
> (A) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or by any combination of them, . . . (Emphasis added)

[172] The application of the rule in *Edwards* can be seen in *Hammerling et al. v. A.G.N.S.*, [1979] 6 R.P.R. 20. There lands in a developing part of Dartmouth had been acquired by expropriation and purchase for highway alterations. The claimants argued that because the highway had been brought closer, their remaining lands would be affected by traffic noise. In making an award for this injurious affection claim, the Expropriations Compensation Board noted at p. 34 that: "…The effects of more proximate traffic on this much travelled highway can be expected to cause a further loss of value in this sector." It assessed that the noise created by the use of the undertaking impacted three acres of the remaining property and that that acreage suffered a 20% loss in value.

[173] The Province says that the Board was obliged to explain how it applied the principles of the rule in *Edwards* and that on the evidence, it was not possible to distinguish the noise created over the parcels actually taken and in particular at the present home which is located near an intersection. For example, Dr. Walker testified that it was impossible to tell the source of the noise from the sound measurements - thus while the jake brakes on trucks made a distinctive noise he could not tell on which of two hills a truck might be braking. At the hearing the Province did not introduce evidence that provided a measurement of the noise level nor suggest any alternate means to calculate the loss of value. Nor did it specify how the Board failed to apply the principles of the rule in *Edwards*.

[174] In my respectful view, the Province has not established grounds for this court to interfere with the Board's decision. The Board was clearly aware of the correct principles of law. It not only specifically referred to both the *Sisters of Charity* and *Edwards* decisions but stated in its § 27 that it had applied them. According to § 133 of its decision, the Board had heard the noise caused by traffic, including truck traffic, on the Cobequid Pass when it visited the Johnsons' present home on the Station Road and when it visited and walked on the site of their future home on the Westchester Road. The Board also had noise measurements taken over periods of several hours over two nights, the testimony of Dr. Walker, of appraisers Weatherby and Smith, and of the Johnsons themselves as to the noise from the Cobequid Pass, and maps contained in exhibits which set out the proximity of the highway to the home properties. That evidence together with its own observations from its site visits would have given the Board a good sense of the traffic noise and the extent which might be fairly attributed as originating from the expropriated parcels.

[175] Given the evidence before it and the absence of contrary evidence presented by the Province, the Board's awards of compensation in regard to the loss of value of the proposed home site on the Westchester Road and of their residence on the Station Road cannot be said to be patently unreasonable. It identified and made its determinations, as directed in *Sisters of Charity*, after considering all the circumstances of the case.

(ii) Double Compensation

[176] The Province submits that having ordered $7,000 compensation for devaluation, the Board's award of $46,375 to cover the cost of remediation amounts to double compensation. I agree. The Johnsons should not have received both and the figure for remediation should be decreased accordingly.

(iii) Mitigation

[177] Mrs. Johnson testified that because of the traffic noise they closed their windows and attempted, when the bedroom got very hot in the summer, to sleep in the basement. The Province argued that had they made greater and different attempts to mitigate the effects of the noise, what remediation efforts were necessary and effective would have been clearer. In my view, whether or not that may be the case has no legal ramifications here. It was for the Board to determine what remediation was appropriate and the cost of such remediation. These are factual matters within the jurisdiction of the Board and I cannot discern grounds for interference with its decision.

(F) Personal Damages - Owners' Time and Pension

[178] The Johnsons claimed compensation for "compliance costs," namely the owners' time and expenses related to the preparation and presentation of their expropriation claim. At the time of the hearing before the Board, their claim exceeded $64,000.

(i) Owners' Time

[179] The Board found that the Johnsons should be compensated for their "compliance costs," stating:

> ¶ 279 The Board is satisfied that an expropriation claim of the nature existing in this case involved a significant commitment of time and expense by the Claimants in preparing for the hearing, including meeting with legal counsel and the experts assembled to assess their claim. Additional time and expense was required to submit to discovery examination and respond to inquiries for information from DOT. The Claimants' tasks were further complicated by the fact that four individual expropriations occurred in four separate locations, each raising complexities of their own. Also, the hearing itself, which ran 15 days over the span of a month, involved a significant commitment by the Johnsons. In the Board's view, their attendance was both reasonable and appropriate. In the end, the time expended to prepare their claim and attend the hearing prevented them from committing these same resources to their own business. The Board is satisfied that their managerial effort would have further added to the continued growth of their business, had they been allowed to direct their efforts in that direction.

[180] As discussed earlier, while a person is to be compensated when land is taken, the basis for each claim must be identified and grounded in a statutory provision. The *Act* does not speak of "compliance costs," the term used by the Board. The Board did not specify the statutory foundation for its award.

[181] The question reduces to whether compensation for "compliance costs" was awarded as costs or as damages. For the reasons which follow, I am satisfied that whether the Board awarded compensation for "compliance costs" as costs or as damages, its determination does not satisfy the standard of review of correctness.

(A) Costs

[182] If costs, the claim would have to fall under "other costs," either (a) "legal and other costs reasonably incurred" prior to or after the commencement of proceedings (s. 35), or (b) "reasonable legal, appraisal and other costs actually incurred by the owner for the purposes of determining compensation" where the award is 85% or more of the offer made by the statutory authority or "costs as [the Board] considers appropriate" if the award is under 85% of that offer (s. 52).

[183] In making its award, the Board relied in part on decisions of the Alberta Land Compensation Board (the Alberta Board) including *Smith v. The Queen* (No. 2) (1984), 31 L.C.R. 172, *Schwindt v. Minister of Transportation* (No. 2) (1983),

27 L.C.R. 205, and *Lorenz et al. v. City of Lloydminster* (No. 2) (1982), 26 L.C.R. 326 wherein an owner's time was compensated as part of reasonable legal, appraisal and "other costs." *Schwindt* is illustrative of the reasoning in those cases. In taxing the owner's claim for his time in connection with the hearing and for travel time, the Alberta Board noted the difficulties in determining such costs, including lack of detailed time records and uncertain hourly wages or remuneration (such as for a self-employed farmer). It continued at p. 211:

> . . . Notwithstanding such difficulties it is usually clearly evident that an owner has lost wages or other remuneration and has expended time in dealing with matters arising out of the involuntary taking of his or her land. The owner must expend time negotiating with the expropriating authority, meeting with his lawyer and other experts to advance his claim and attending the compensation hearing. The over-all tenor and intention of the Act is that an owner should not be out of pocket as a result of the expropriation.

[184] I do not agree with the Province that the Alberta Court of Appeal overturned the Alberta Board decisions cited above in *Ravvin Holdings Ltd. v. Calgary (City)* (1990), 44 L.C.R. 198 (L.C.B.), reversed (1992), 48 L.C.R. 81. It appears that the Alberta Board had found that a claim for the time spent by the president and managing officer of the landowner would not come within "reasonable legal, appraisal and other costs actually incurred by the owner" unless such time was a sum expended or loss sustained and *ejusdem generis* with legal and appraisal costs. In dismissing the appeal, the Court of Appeal did not state that an owner can never get compensation for his time as a head of costs. At p. 2 it merely indicated that this particular claim was neither reasonable nor well founded, the owner not having been shown to be out of pocket "in a true sense" nor to possess "any expertise of a recognized sort."

[185] The Board here also relied upon the decision of the Manitoba Land Value Appraisal Commission (the Manitoba Commission) in *Glenlea 75 Servicecentre Ltd. v. Manitoba (Department of Highways and Transportation)* (No. 2) (1993), 52 L.C.R. 70 where the legislation provided for payment, where compensation has been agreed upon, of "an amount equal to the legal, appraisal and other costs reasonably incurred by the owner". In considering the claim of the principal owner of the landowner for costs and loss arising from his preparation and

presentation of the compensation claim, the Manitoba Commission stated at p. 75 that in its opinion, the words "other costs":

> . . . encompass all time spent by an owner, with a solicitor or elsewise, reasonably incurred for the purpose of determining the due compensation payable, if an out-of -pocket loss is proved or an actual loss can be readily surmised from the nature of the owner's business and the extraordinary involvement of the owner in the expropriation". ([Emphasis added)

While no out-of-pocket losses were proven, the Manitoba Commission stated that it could readily surmise that the claimant suffered a loss, given the amount of time the expropriation required and the nature of the business and his involvement. See also the earlier decision of the Manitoba Commission in *Gulak et al. v. City of Winnipeg* (1983), 29 L.C.R. 261.

[186] Claims for payment of a landowner's time as a costs item in provinces other than Nova Scotia have not always been approved. For example, in *Shell Canada Ltd. v. Alberta (Minister of Transportation and Utilities)* (1991), 46 L.C.R. 133 (Alta. Land Compensation Board) the Alberta Board denied a claim for executive time with respect to an expropriation on the basis that "other costs" must be *ejusdem generis* with legal and appraisal costs. In *Tomshak v. Alberta (Minister of Transportation)* (2003), 81 L.C.R. 66, decided after the Alberta Board's decisions in *Smith, Schwindt* and *Lorenz* and after the Alberta Court of Appeal's decision in *Ravvin*, the Alberta Board refused the owner's claim for payment for the hearing days. The expropriation statute authorized payment for "reasonable legal, appraisal and other costs actually incurred" or as a disturbance damage. There was no evidence of costs incurred in relation to their time nor had any loss or damage suffered because of that time.

[187] In *Reon Management Services Inc. v. British Columbia* (2001), 72 L.C.R. 257 the British Columbia Expropriation Compensation Board denied a claim by the owner's manager, a chartered accountant, for attendances, communications with appraisers and lawyers, and preparation for the expropriation hearings, all allegedly beyond the normal course of his employment. It found that he had not been constituted as an independent consultant entitled to bill his own company and then to seek reimbursement from the Province and that moreover, the claim lacked the requisite authenticity and reliability.

[188] An owner's claim for his time was also rejected by the Manitoba Commission in *Stewart v. Winnipeg (City)* (1998), 65 L.C.R. 270 which stated at § 21 that compensation has been awarded almost exclusively to wage earners who prove lost wages, not owners in private practice on a fee for service basis or for entrepreneurs such as farmers who can arrange their work to accommodate the time required to deal with the expropriation so as not to suffer a reduction in income.

[189] As yet there does not appear to be a bright line in the decisions from other provinces with regard to whether a landowner's claim for time expended in connection with an expropriation can qualify as an item of costs and, if so, in what circumstances and what evidentiary foundation is required for such a claim to succeed. It is not necessary that I decide this issue on the basis of the authorities upon which the Board relied. In my view, its disposition hinges on the Board's failure in its decision to refer to and to follow the leading case in Nova Scotia on this point, namely the decision of the Nova Scotia Supreme Court, Appeal Division in *Park Projects Ltd. v. City of Halifax* (1982), 25 L.C.R. 193 which dealt with the taxation of costs in relation to an expropriation.

[190] In *Park Projects* the appellant had claimed for the services of its principal officer and shareholder in record reconstruction, attendances with lawyers, consultants, accountants, city officials and at meetings of city council, and preparation for and attendance at the expropriation hearing. The taxing master's reduction of the claim from over $39,000 to $1,600 for 5 days' negotiation and preparation for trial and 3 days' attendance at the hearings was upheld on appeal to a judge of the Nova Scotia Supreme Court, Trial Division, and then further appealed.

[191] After setting out the provision for costs in both ss. 35 and 52 of the *Act*, Pace, J.A. for this court stated at p. 201:

> I am not prepared to interpret the words "other costs" as it appears in s. 52(1) of our *Expropriation Act* in such broad terms as did Taxing Officer McBride. The words imply to me that the legislature had in mind to provide reasonable and fair compensation to the owner for such costs incurred by him beyond legal and appraisal fees which directly relate to and are, for the purposes of determining the compensation payable. <u>These costs do not include time spent personally by the</u>

> owner in negotiations and preparation for the hearing before the Board nor do they include attendances before the Board nor do they include attendances to instruct or advise counsel. (Emphasis added)

The five days' negotiation and preparation was disallowed. The appellant recovered $500 for the three days its officer attended the hearing.

[192] Quite simply, *Park Projects* remains the law in this province. The Board made no mention of that decision. Its determination that an owner's time is compensable under the *Act*, if made as an item of costs under s. 35 or s. 52, is contrary to binding legal precedent in this province. It consequently would constitute an error of law.

(B) Damages

[193] The *Act* authorizes the types of damages for which a claimant may receive payment. The first type would come under injurious affection as defined in s. 3(1)(h)(i)(B) which I set out once again:

> 3(l)(h) "injurious affection" means
>
> (i) where a statutory authority acquires part of the land of an owner,
>
> . . .
>
> (B) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute, (Emphasis added)

[194] Only one decision raised by the Johnsons allowed a claim for owner's time as injurious affection which is available when, as here, parts of an owner's lands were expropriated. In *Kowalik et al. v. Ministry of Transportation & Communications* (1986), 36 L.C.R. 382 the Ontario Municipal Board acknowledged that an owner's time claim under injurious affection might be questionable but where it was small in light of the entire matter (over $240,000), that Board allowed $12,000. In doing so it neither cited any authority nor provided any legal analysis.

[195] The second type of damages for which a claimant might receive payment for his time would be disturbance damages. I cannot agree that s. 26(b) of the *Act* provides for such compensation. That provision reads:

> **Aggregate of items to be compensated**
>
> 26. The due compensation payable to the owner for lands expropriated shall be the aggregate of
>
> . . .
>
> (b) the reasonable costs, expenses and losses arising out of or incidental to the owner's disturbance determined as hereinafter set forth. (Emphasis added)

The wording of s. 26(b) which I have emphasized makes it evident that the basis for any such claim lies elsewhere in the *Act* and not within that sub-section itself.

[196] Disturbance damages are compensable pursuant to s. 27(3) as "costs, expenses and losses arising out of or incidental to the owner's disturbance including moving to other premises" where, as a result of the expropriation, it was necessary for an owner in occupation of the land when expropriated to give up occupation. The case law wherein s. 27(3) has been considered has usually involved the relocation of a business. For example, in *Reardon v. Dartmouth (City of)* (1981), 46 N.S.R. (2d) 568, the Nova Scotia Expropriations Compensation Board allowed a claim under s. 27((2)(b)(ii) for the time of the owner-manager of the expropriated premises in acquiring alternate premises and arranging financing. In *PANS v. Dartmouth (City of)* (1981), 49 N.S.R. 407 the claimant had similarly purchased a property to which it would relocate. See also *Shell Canada Ltd. v. (Alberta) Minister of Transportation and Utilities*, supra wherein pursuant to a similar provision the Alberta Board allowed costs related to the relocation of a bulk storage facility for gasoline and petroleum products.

[197] The claim here is not for disturbance damages as relocation costs but as reimbursement for time necessarily expended and therefore not available to earn income. The Johnsons do not raise any Nova Scotia authority but rely in part on two New Brunswick decisions.

[198] In *McLeod v. New Brunswick*, [2000] N.B.J. No. 86, the New Brunswick Queen's Bench Trial Division cited *Glenlea 75*, supra in awarding an owner compensation for his time preparing for his expropriation claim. Rideout, J. at § 84 stated his belief that it was fair to say that such an allowance is not the norm and usually only permitted in unusual circumstances. While there was no proof of either the hours or the hourly rate, there had been eight days each of trial and discovery and in the judge's view some compensation for the self-employed woodlot owner for whom time away from work has a direct impact was appropriate. He allowed, admittedly on a somewhat arbitrary basis, $3,000 compensation.

[199] In *McLeod*, the judge neither identified the particular statutory provision for awarding compensation for owner's time nor specified whether the award was as for costs or as for damages. However his statement in § 85 that "this too could be argued as a matter of costs" would indicate that he had awarded compensation as damages.

[200] In the second decision from New Brunswick, *Stephen Moffett Ltd. v. New Brunswick (Minister of Transportation)* (2004), 81 L.C.R. 161 (N.B. Queen's Bench), the claimant had claimed an "expropriation management fee" to compensate for his time and expenses. The president and principal shareholder of the claimant testified he had spent on average of 24 full days per year over an eight year period looking after the management of the expropriation. Landry, J. found this an excessive amount of time. However, the case having been more complex than the norm and of necessity more time consuming for the claimant, he decided to "arbitrarily award" $5,000 under the heading of "expropriation management fee." In doing so the judge simply relied upon *McLeod*, supra. As in that decision, *Moffatt* did not set out the statutory basis for the award. The Nova Scotia *Act* which governs the Johnsons' claim does not authorize payment of an "expropriation management fee."

[201] In addition to *McLeod*, supra and *Moffatt*, supra the Johnsons also rely upon the Manitoba Commissions decisions in *Gulak*, supra, *Glenlea*, supra and *Stewart*, supra in claiming compensation for owner's time as damages. In both *Gulak* and *Glenlea*, that Commission stated that where no out-of-pocket loss was proved, payment could be certified if a loss could be readily surmised from the time the expropriation required, the nature of the claimant's business and an extraordinary

involvement in that business. However both those decisions considered compensation claims as "other costs" and did not deal with them as claims for damages or as disturbance damages. In addition, under *Stewart*, supra only wage earners who can prove lost wages can succeed in recovering time expended in relation to an expropriation.

[202] In my view, the case law does not clearly establish that a claim for owner's time is compensable as injurious affection or as disturbance damages in the sense maintained by the Johnsons. Even if I had accepted disturbance damages under s. 26(b) as urged by the Johnsons, which I have not, such damages are only applicable where an entire parcel of land has been taken. That is not the case here where the Province acquired only portions of each of the four parcels taken from the Johnsons.

[203] Consequently, any recovery of owner's time as damages must be as injurious affection as defined in s. 3(h)(i)(B) which encompasses "personal and business damages, resulting from the construction or use, or both, of the work."

[204] According to *Dell Holdings*, remedial legislation such as the *Act* is to be given a broad and liberal interpretation consistent with its purpose. At § 21 of that decision, the Supreme Court of Canada noted that in the event of an ambiguity, a remedial statute is not to be interpreted to deprive one of common law rights unless the statute is plain.

[205] However even when read broadly, in my view the wording of s. 3(h)(i)(B) does not permit reimbursement for time expended by an owner in relation to an expropriation. The definition of injurious affection is limited to damages which result from the construction or use of the works, which here is the Cobequid Pass. The "compliance costs" claimed by the Johnsons do not result from construction or use but to the initial expropriation of property for the purpose of that construction or use.

[206] In summary, the Johnsons' claim for their time in preparing for the hearing, including meetings with their legal counsel and experts, discovery examinations, and responses for information are not, in view of *Park Projects*, supra costs nor are they injurious affection or disturbance damages. It would appear that the most that they can recover is an amount for their time in attending the hearing before

the Board, which was all that was allowed in *Park Projects*, supra. The quantum is to be determined by the Board. As indicated at § 280 of its decision, it retained jurisdiction to address the issue of quantum, should the need arise.

(ii) Pension Loss

[207] The Board also awarded compensation for eight days Mr. Johnson was absent from work. It found that all of the days fell within the period within which the lands were being cleared of timber for highway construction and that all activities related to the work carried out on the Johnson lands and those of abutters, including dealing with access and wood fibre issues and meetings with appraisers, surveyors and his solicitors.

[208] Again the Board did not specify the statutory foundation for its award which it described as for "Compliance costs-pension and bridging costs." For the reasons set out above with respect to owner's time, I am of the view that its award of compensation in this regard does not meet the correctness standard.

8. Disposition

[209] Both the Province and the Johnsons urged this court, were we to allow the appeal or any part of it, to determine the compensation which the Johnsons should receive. They emphasized that remitting the matter for rehearing would be both expensive and time-consuming.

[210] This is not a case where the Board enjoyed any particular advantage over the court by reason of having seen and heard the witnesses. In reviewing conflicts in evidence, it made no express findings of credibility. The entire record of the hearing including the exhibits are before the court. In these circumstances and where the parties have requested that the court do so, we will determine the compensation arising from the expropriation.

[211] Below are the headings in the Board's summary of compensation. Under each I will indicate whether or not the matter was appealed; if so, whether the Board's award was disturbed and, if so, the calculation of the compensation now determined.

Parcel A: Wentworth-Collingwood Road

Loss of value from lost road frontage
Not appealed

Loss of expropriated land and protection strip
Parcel A: $8,100 (23.04 acres @ $350/acre per Smith report)
Protection Strip: $3,472 (9.92 acres @ $350/acre per Smith report)
Total: $11,572

Cost of river crossing (southwest of Parcel A)
As determined by the Board

Discounted additional transportation costs (20 years)
No compensation

Replacement of culvert and access road (northeast of Parcel A)
Not appealed

Parcel B: Westchester Road

Loss of value of proposed home site
As determined by the Board

Loss of expropriated land and protection strip
Parcel B: $8,700 (11.65 acres @ $750/acre per Smith report)
Protection strip: $2,970 (3.96 acres @ $750/acre per Smith report)
Total: $11,670

Sterilization of land between highway and field (l4 acres)
No compensation

Encroachment area
Not appealed

Loss of value of land east of highway
Not cross-appealed

Parcel C: Station Road

Loss of home value due to noise
As determined by the Board

Loss of expropriated land
$10,640 (10.64 acres @ $1,000/acre per both Smith and Ryle)

Mitigation costs - Scrabble Hill
No compensation

Discounted excess costs for leafcutter bees (20 years)
No compensation

Parcel D: Spencer Cross Road

Loss of estate-type residential lot
Not cross-appealed

Loss of expropriated land
$13,210 (13.21 acres @ $1,000/acre for four acre portion and .89 acre woodlot per Smith report and 8.32 acres cultivated/pasture lands at $1,000/acre per both Smith and Ryle)

Loss of 4.29 acre landlocked lot (north)
As determined by the Board

Loss of four acre existing blueberry field (south)
None, as still farmed

Encroachment area
Not appealed

Other:

Costs of remedial measures due to road noise
$39,375 ($46,375 - $7,000 devaluation of home)

Loss of pension benefits due to time lost regarding expropriation
None

[212] Below is a summary showing the compensation as determined by the Board and as ordered by the court.

George and Carolyn Johnson SUMMARY OF COMPENSATION		
Parcel A: Wentworth-Collingwood Road	**NSURB**	**NSCA**
Loss of value from lost road frontage	$ 8,046	$ 8,046
Loss of expropriated land and protection strip	39,010	11,572
Cost of river crossing (southwest of Parcel A)	47,500	47,500
Discounted additional transportation costs (20 years)	31,178	0
Replacement of culvert and access road (northeast of Parcel A)	2,000	2,000
Total	$127,734	$ 69,118
Parcel B: Westchester Road		
Loss of value of proposed home site	$ 10,000	$ 10,000
Loss of expropriated land and protection strip	31,823	11,670
Sterilization of land between highway and field (l4 acres)	19,446	0
Encroachment area	335	335
Loss of value of land east of highway	0	0
Total	$ 61,604	$ 22,005
Parcel C: Station Road		
Loss of home value due to noise	$ 7,000	$ 7,000
Loss of expropriated land	1,064	10,640
Mitigation costs - Scrabble Hill	14,400	0
Discounted excess costs for leafcutter bees (20 years)	28,878	0
Total	$ 51,348	$ 17,640
Parcel D: Spencer Cross Road		
Loss of estate-type residential lot	$ 0	$ 0
Loss of expropriated land	17,812	13,210
Loss of landlocked lot (north)	5,722	5,722
Loss of existing blueberry field (south) - still farmed	12,000	0
Encroachment area	740	740
Total	$ 36,274	$ 19,672

Other:		
Costs of remedial measures due to road noise	$ 46,375	$ 39,375
Loss of pension benefits due to time lost regarding expropriation	21,329	0
Total	$ 67,704	$ 39,375
TOTAL	$ 344,658	$ 167,810

[213] I would allow the appeal only to the extent set out in my decision. In light of the mixed results, each party shall bear its own costs of the appeal.

Oland, J.A.

Concurred in:

Roscoe, J.A.

Hamilton, J.A.