NOVA SCOTIA COURT OF APPEAL

Citation: *Atlantic Mining NS Corp. (D.D.V. Gold Limited) v. Oakley*, 2019 NSCA 14

Date: 20190306
Docket: CA 475173
Registry: Halifax

Between:

Atlantic Mining NS Corp.
(formerly known as D.D.V. Gold Limited)

Appellant

v.

Wayne Oakley, the Attorney General of Nova Scotia
and the Nova Scotia Utility and Review Board

Respondents

Judge:	The Honourable Justice Peter M. S. Bryson
Appeal Heard:	November 13, 2018, in Halifax, Nova Scotia
Subject:	Expropriation. Disturbance losses.
Summary:	Mr. Oakley's residential property was expropriated by Atlantic. Parties agreed on market value of $305,000. They could not agree on disturbance damages. Atlantic argued that these were confined to economic losses. The Utility and Review Board disagreed and awarded the statutory maximum of 15% of market value for economic and non-pecuniary losses.
Issues:	(1) Were disturbances losses confined to economic losses? (2) What was a proper disturbance loss award?
Result:	Appeal allowed. Board unreasonably interpreted disturbance losses as including such things as anxiety, disquiet and inconvenience. The Court of Appeal allowed 2% of market value for economic loss.

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Respondents

Judges:	Bryson, Oland and Bourgeois, JJ.A.
Appeal Heard:	November 13, 2018, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Bryson, J.A.; Oland and Bourgeois, JJ.A. concurring
Counsel:	John A. Keith, Q.C. and Jack Townsend, for the appellant Robert Pineo and Paul Niefer, for the respondent Wayne Oakley Edward Gores, Q.C. for the respondent Attorney General (not participating) Bruce Outhouse, Q.C., for the respondent NSUARB (not participating)

Reasons for judgment:

Introduction

[1] An owner who is displaced by an expropriation must be paid the property's market value as well as something for his "disturbance". This case is about that "something".

[2] Atlantic Mining expropriated Wayne Oakley's residential property in 2012. In addition to out-of-pocket expenses, Mr. Oakley claimed he should be paid non-pecuniary "losses" for disturbance. The Utility and Review Board agreed with him and awarded the maximum statutory amount of 15% of the market value of the property taken (2018 NSUARB 37). Atlantic appeals, arguing that the Board's decision was unreasonable in two respects. First, it was unreasonable to interpret disturbance "losses" in the *Expropriation Act*, R.S.N.S. 1989, c. 156, as including non-economic "losses" for such things as anxiety, disquiet, inconvenience and the like. Second, the 15% global award was arbitrary and therefore unreasonable.

[3] Mr. Oakley counters that the Board's broad interpretation accords with the purposes of the *Act* which should permit flexibility in addressing the facts and circumstances of each individual case. He adds that Atlantic's second issue impermissibly challenges the Board's factual findings.

[4] The appeal should be allowed because the Board's unprecedented decision misinterprets disturbance "losses" in the *Act*, leading to the unreasonable result that such losses are not simply proprietary and economic but also personal and non-pecuniary. Accordingly, the 15% global award depends on an unreasonable interpretation of the legislation which rewards an absence of pecuniary loss. It should be set aside.

[5] After a brief review of the facts, these reasons will address the standard of review, whether disturbance losses include non-economic "losses", and will conclude with what Mr. Oakley should receive for disturbance.

Factual Overview

[6] Atlantic owns and operates a gold mine in the rural Nova Scotia community of Moose River Gold Mines. Atlantic acquired some surface title by negotiation. In other cases, Atlantic resorted to expropriation.

[7] Mr. Oakley purchased his property in 1997. He built a small single-story home on the property. Atlantic wanted the property for its mine. Negotiations were unsuccessful. So Mr. Oakley's property was expropriated by a vesting order issued by the Minister of Natural Resources under s. 70 of the *Mineral Resources Act*, S.N.S. 1990, c. 18. Section 70(5) of that *Act* deems Atlantic to be the expropriating authority. Expropriation occurred by the filing of a vesting order with the Registry of Deeds on June 18, 2012.

[8] Ultimately the parties agreed on the market value of the property taken. They settled on $305,000. Because they could not agree on disturbance losses, that issue went before the Utility and Review Board.

Standard of review

[9] The Board's decision may be appealed on a question of law or jurisdiction (*Utility and Review Board Act*, S.N.S. 1992, c. 11, s. 30). Interpretation of a statute is a question of law. But the Supreme Court of Canada has decided that even in statutory appeals, questions of law are generally subject to review on a reasonableness standard, (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 and cases cited therein). At least since *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, statutory appeals have been subsumed within the judicial review analytical framework. This assimilation of statutory appeals within judicial review survived the demise of the "pragmatic and functional analysis" when the Supreme Court decided *Dunsmuir v. New Brunswick*, 2008 SCC 9.

[10] One of the important contextual factors identified in *Dr. Q.* was the relative expertise of the Tribunal decision under review, (¶28). That expertise later became institutionally assumed: *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, ¶33, citing *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12. In reality there maybe significant differences of institutional expertise between large well-funded administrative bodies and some under resourced provincial tribunals with part-time members. Deference to the expertise of the former should not automatically be conferred on the latter.

[11] The majority in *Capilano* also made clear that there is no separate correctness standard of review for statutory appeals:

> 28 I disagree. In my view, recognizing issues arising on statutory appeals as a new category to which the correctness standard applies - as the Court of Appeal did in this case - would go against strong jurisprudence from this Court.

But this mistakes the traditional correctness standard of review in statutory appeals on questions of law for a "new category". The correctness standard for statutory appeals is not new; it is based on the law which required that statutory interpretation be correct, not simply "reasonable", (for example, in the expropriation context: *Nova Scotia v. Johnson*, 2005 NSCA 99, ¶46).

[12] *Dunsmuir's* contextual analysis seeks to discern "legislative intent" to assign an appropriate level of deference. But in cases like this one, there is an easier way of determining that intent. Where the statutory right of appeal on a question of law pre-dates the Supreme Court's "contextual analysis", such questions should attract a correctness standard of review because that was the law.

[13] Respectfully, the reasons of the majority in *Capilano* for such an indulgent standard of review as reasonableness, are unconvincing. Respect for legislative preferences cannot explain deference in a statutory appeal on a question of law when that right of appeal long predates later Supreme Court decisions on deference. In such cases, the legislature would have understood the law to require review on a correctness standard. So a reasonableness standard does not respect legislative intent. Legislated deference on questions of fact within a specialized tribunal's area of expertise is a weak basis for supposing a superior expertise on questions of law which is the every day business of Superior Courts to which no such deference is given. That is especially so where presumed expertise may be more generous than the limited resources of some tribunals may justify. A strong "rule of law" argument can be made that on questions of law, the Superior Courts should have the final say because consistency is a hallmark of that rule.

[14] Notwithstanding all of this, the deferential standard of review of reasonableness for statutory interpretation of a tribunal's "home statute" has been fixed by the Supreme Court and applied by this Court. Accordingly, that standard will be applied in reviewing the Board's interpretation of the *Expropriation Act*.

[15] In *West Hants (District) v. Nova Scotia (Utility and Review Board)*, 2016 NSCA 57 this Court quoted the Supreme Court respecting the reasonableness standard:

> [14] Reasonableness has been described by the Supreme Court of Canada as:
>
> > . . . concerned mostly with the existence of justification, transparency and intelligibility within the decision‑making process . . . [but is also concerned with] whether the decision falls within a range of possible,

> acceptable outcomes which are defensible in respect of the facts and the law.
>
> *Dunsmuir v. New Brunswick*, 2008 SCC 9
>
> [15] The standard does not involve two different inquiries; one for reasons and the other for outcomes. Rather the exercise is "organic"; "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within the range of possible outcomes" (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, para. 14 and *Dunsmuir*).

[16] But "if application of principles of statutory interpretation yield only one reasonable interpretation, an administrative decision maker must adopt it" (*Izaak Walton Killam Health Centre v. Nova Scotia (Human Rights Commission) 2014 NSCA 18* at ¶15, citing *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67). For reasons that follow, this is the kind of interpretative case described by *McLean* and applied in *Killam*.

Do disturbance losses include non-pecuniary losses?

[17] No Canadian court or tribunal has interpreted disturbance "losses" as non-pecuniary. But in this case the Board did so.

[18] Section 26 of the *Act* authorizes compensation for disturbance losses:

> 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;***
>
> [Emphasis added]

[19] Section 27 of the *Act* elaborates:

> 27(3) […] the value of the land expropriated is the greater of
>
> (a) the market value thereof determined as set forth in subsection (2); and
>
> (b) the aggregate of
>
> (i) the market value thereof determined on the basis that the use to which the land expropriated was being put at the time of its taking was its highest and best use, and

> ***(ii) the costs, expenses and losses arising out of or incidental to the owner's disturbance including moving to other premises but if such cannot practically be estimated or determined, there may be allowed in lieu thereof a percentage, not exceeding fifteen, of the market value*** […]
>
> [Emphasis added]

[20] The Board recognized that "costs" and "expenses" are pecuniary. But the Board treated "losses" as non-pecuniary:

> [93] The ordinary meanings of the words "losses" and "disturbance" are very robust. The former includes the loss of virtually anything. Its wide-range in an expropriation context may encompass being deprived of one's property and home; losing the calm, rest, order, and quiet of one's life; losing time which could have been spent on other matters; having an interruption in their life; being agitated, worried, unsettled; or experiencing a disadvantage or detriment. As with other broad terms, the Board has not attempted to determine an exhaustive list of losses. Rather, the types of losses will be dependent upon the facts and circumstances of each individual case.

[21] Unhindered by inconvenient authority or contextual analysis, the Board applied an "ordinary meaning" interpretation to "losses", which became "virtually limitless", distinguished jurisprudence elsewhere because of claimed material wording differences in the legislation, dismissed respected academic authority as dated, and relied upon inapplicable Supreme Court precedent and an Ontario Law Reform Commission Report.

[22] The Board referred to the purpose of the Nova Scotia *Act* with respect to home expropriations by referring to s. 2(2) "… the homeowner [should be] in substantially the same position after the expropriation as before it". The Board decided this meant the homeowner should be compensated "… for the turmoil, upheaval, worry, agitation, etc. incidental to losing one's home".

[23] The Board drew support for its conclusion from generic language in the 1967 Ontario Law Reform Commission Report which resulted in the 1968 Ontario *Expropriation Act*. The Board equated the following from the Report with the Nova Scotia *Act*'s purpose regarding homeowners:

> [178] […] in the fulfilment by the state of its obligation to repair the injury caused to particular individuals for the public good, and to minimize the loss, inconvenience, and disturbance to the life of its citizens to as great an extent as possible.

[24] The Board's reliance on the Ontario Law Reform Commission is misplaced. The Report's recommendations for disturbance loss emphasise financial loss:

> In the case of residential property where a home-owner is uprooted, he should receive some allowance for being forced to move from the home in which he has established himself. Furthermore***, he will have to spend considerable time and effort in finding a new home and undoubtedly incur many miscellaneous small expenses which might not be covered under*** the traditional elements of disturbance damage. […] To compensate the home-owner for these various matters, he should be paid a percentage allowance, consisting of 5 per cent of the market value, as disturbance damages.
>
> [Emphasis added]

[25] The Commission's recommendation was implemented. The Ontario *Expropriation Act* provides displaced homeowners with 5% of the property's market value "for inconvenience and the cost of finding another residence". The Nova Scotia *Act* makes no mention of compensation for "inconvenience". Apart from this word, both the Commission Report on which the Board relied, and the Ontario legislation which followed, limited loss for disturbance to pecuniary loss.

[26] The Board dismissed Atlantic's reliance on a leading expropriation text which described disturbance damages as economic:

> Disturbance damage may be defined generally as ***economic loss*** suffered by an owner by reason of having to vacate expropriated property.
>
> E. Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed, 1992 at p. 274.
>
> [Emphasis added]

[27] The Board declined to apply *Todd* owing to statutory differences across the country, the date of the text, and subsequent Supreme Court decisions. As we shall see, these reasons are unpersuasive.

[28] The Board's predecessor—the Nova Scotia Expropriations Compensation Board—adopted *Todd's* description of disturbance losses as economic in nature, from the first edition of his text. In *Whynot v. Bridgewater (Town)* (1982), 53 N.S.R. (2d) 47, Chairman Palmeter quoted *Todd*:

> 29. […]
>
> > Disturbance damages may be defined generally as ***personal economic loss*** suffered by an owner by reason of his having to vacate the expropriated property.
>
> […] Again *Todd, supra,* on page 223 in referring to *National Capital Commission v. Millen*, [1965] 1 Ex. C.R. 49, and other similar cases states:
>
> > . . . it was said that, in the case of residential property, disturbance damages might include ***the costs*** of moving, acquiring new premises, temporary interim accommodation, and the depreciated value of redundant furnishings such as drapes and rugs which cannot reasonably be used in substitute premises. Finally ***there may be miscellaneous expenses*** arising from personal inconvenience and effort and the general disruption of family life necessarily incidental to moving from one residence to another.
>
> [Emphasis added]

[29] The Board in *Whynot* went on to award a global sum of 5% because it was satisfied the claimant had suffered greater *economic* loss than described in the evidence:

> 30. In the matter before this Board, ***the claimant has provided very little evidence of economic loss*** caused by the dispossession other than reference to moving charges in the approximate amount of $348 and a vague reference to monies paid to another solicitor. It is clear that the claimant was not properly prepared at the time of hearing to present all details of disturbance, if in fact she was able to get such details. The Board is of the opinion that ***the claimant has suffered disturbance damage to an amount in excess of those amounts mentioned in evidence***. Accordingly, the Board will exercise its discretion under the provisions of Section 27(2)(a)(ii) where the costs, expenses and losses arising out of or incidental to the owner's disturbance cannot practically be estimated or determined, and allow a percentage of five per cent of the market value of $65,000 aforesaid in lieu thereof. The Board orders that the respondent pay to the claimant the sum of $3,250 as disturbance damages.
>
> [Emphasis added]

[30] *Whynot* was not cited to the Board in this case and as Mr. Oakley argues, would not be binding (*Myers v. Mannette*, 2003 NSCA 64, ¶20), but it supports Atlantic's position before the Board that disturbance losses are economic and coincides with jurisprudence elsewhere.

[31] The Board commented that *Todd's* text is 25 years old, implying that somehow this weakened its import. But the relevant sections of the *Act* have not changed since Todd's text was written. Then the Board observed that *Todd's* book

predates *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32 and *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13. The Board does not explain how these cases impair *Todd's* interpretation.

[32] Neither *Dell* nor *Antrim* say that disturbance damages include non-economic losses. In fact, *Dell* dealt with a business loss claim. *Antrim* was also a business loss claim involving injurious affection. Both types of loss were economic. Invoking *Dell* and *Antrim* does not diminish *Todd's* authority.

[33] The Board correctly observed that the Ontario legislation differs from Nova Scotia's in several respects, including absence of the word "losses" when describing compensation for disturbance. But then how could *Dell* and *Antrim*—both Ontario appeals—compromise *Todd*? The Board does not say.

[34] The Board also distinguished compelling authority from Manitoba which attributed a pecuniary character to losses described in Manitoba legislation. In *Houle v. Manitoba*, 2016 MBCA 76, the Court of Appeal had to interpret the obligation of the expropriating authority to pay "… an owner in respect of disturbance, such reasonable *costs*, *expenses* and *losses* as arise out of or are incidental to the expropriation …" Losses were held to mean economic losses.

[35] The venerable provenance of *Todd* did not deter the Manitoba Court of Appeal in 2016 from adopting *Todd's* definition of disturbance damage as "economic loss suffered". The Court of Appeal also cited Kenneth James Boyd's *Expropriation in Canada: A Practitioner's Guide* (Aurora Canada Law Book, 1988) which says that the primary purpose of compensation is to place the owner whose land has been taken in the same position *financially* as he was in prior to the taking. The Court of Appeal also referred to *Dell* and clearly saw no inconsistency between *Dell* and Messrs. Todd and Boyd regarding the economic character of "losses" for disturbance.

[36] The Board distinguished *Houle* on the basis of differences in language between Nova Scotia and Manitoba legislation. The Board incorrectly describes the equivalent sections of the Manitoba and Ontario *Acts* as the same. Unlike Manitoba and Nova Scotia, the Ontario *Act* does not refer to disturbance damages as "reasonable costs, expenses and losses"; rather the Ontario *Act* requires reimbursement of "reasonable costs" for disturbance. Manitoba and Ontario are similar in awarding a percentage amount for "inconvenience" for disturbance to a displaced owner. But if "inconvenience" were naturally included in the word

"losses" it would have been unnecessary to specifically describe it as the Manitoba *Act* does.

[37] The Board adds that Manitoba's *Act* says that costs, expenses and losses arise out of or must be incidental to the *expropriation*, whereas in Nova Scotia the "losses" relate to the owner's *disturbance*. The actual language in Manitoba is "… the authority shall pay to an owner *in respect of disturbance*, such reasonable costs, expenses and losses as arise out of or are *incidental to the expropriation*". In both Nova Scotia and Manitoba losses are paid for a disturbance. In both cases the disturbance must be a result of the expropriation. The Board makes a distinction without a difference.

[38] The Board also distinguished the British Columbia Court of Appeal's decision of *Patterson v. British Columbia (Minister of Transportation & Highways)*, [1997] B.C.J. No. 1642, because the British Columbia *Act* explicitly refers to disturbance damages as including financial losses. But the Pattersons' claim for personal losses did not turn on this wording. The Court was considering whether the phrase "reasonable personal … losses" would support a nuisance-type claim for injurious affection. The Court quoted from the 1971 British Columbia Law Reform Commission Report on Expropriation which confronts the problem of compensating for non-economic loss:

> … emotional distress and sentimental value are simply not capable of measurement in terms of dollars … these elements will be different in every case and it would be a virtually impossible task to judge each case on its merits. …

[39] In concluding that non-pecuniary loss for injurious affection was not contemplated by the British Columbia *Act*, the Court found support in the Supreme Court's decision in *Dell*:

> [46] I also note that Cory J. in *Dell*, in referring to the Ontario Law Reform Commission recommendations, equated doing justice under expropriation legislation with "providing indemnification". In my view, ***the concept of indemnification is consistent with the principle of economic reinstatement*** referred to by the B.C. Law Reform Commission, but ***it does not accord with an award of damages for non-pecuniary damages*** such as are claimed here.
>
> [Emphasis added]

[40] Like the Manitoba Court of Appeal, the British Columbia Court of Appeal interpreted *Dell's* exhortation to give full indemnity as economic, not non-pecuniary.

[41] In the end, the Board emphasized what it called the "ordinary meaning" of losses:

> [195] In conclusion, ***the Board finds the ordinary meaning of the word "losses"*** includes losing anything or may be "a detriment" or "a disadvantage". An owner's "disturbance" can include the loss of "rest" or "calm", or cause "worry". These words by themselves are not restricted to pecuniary losses. The Legislature could have restricted the word "losses" with a pecuniary adjective like "financial", as was done in British Columbia, but it did not do so. The legislation in Ontario and Manitoba, other than "inconvenience", are generally restricted to pecuniary losses. Once again, these examples were not adopted by the Nova Scotia Legislature.
>
> [Emphasis added]

[42] To conclude as it did, the Board ignored or discounted the purpose and objects of the *Act*, the purposes of expropriation legislation generally, the apparently unwelcome authorities discussed above, and the context of the word "losses" in ss. 26 and 27 of the *Act*.

[43] One begins with the words used. But words acquire meaning from context and standing alone, may be ambiguous:

> [21] [. . .]
>
> > It has been long established as a matter of statutory interpretation that "***the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament***": see 65302 British Columbia Ltd. v. Canada, [1999] 3 S.C.R. 804 at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, ***where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role***. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.
>
> ***The words, if clear, will dominate; if not, they yield to an interpretation that best meets the overriding purpose of the statute***.

> (*Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1 quoting *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, quoted with approval in *EllisDon Corp. v. International Union of Operating Engineers, Local 721*, 2018 NSCA 36 at ¶81)
>
> [Emphasis added]

[44] In *Dell*, the Supreme Court characterized the interpretative task in this way:

> [27] ***The words of the section should be given their natural and ordinary meaning in the context of the clear purpose of the legislation to provide fair indemnity to the expropriated owner for losses suffered as a result of the expropriation***. In *Laidlaw*, *supra*, Spence J., on behalf of the Court, attached particular importance to three factors; first, the legislative intent to provide ***indemnity for losses suffered***; second, that the right to disturbance damages is conferred in broad, inclusive language and, third, that the legislature chose to illustrate, but not to define the term "disturbance".
>
> [Emphasis added]

[45] The Supreme Court went on to quote from *Laidlaw v. Metro Toronto*, [1978] 2 S.C.R. 736 which again involved a claim for an out-of-pocket expense. *Dell* said an owner should get "fair indemnity" for "losses suffered". Neither *Dell* nor *Laidlaw* said that owners should be compensated for non-pecuniary losses.

[46] The "broad and liberal interpretation" of expropriation legislation counselled by *Dell* does not overcome an absence of language authorizing the particular type of compensation sought (*Johnson*, ¶49, 50).

[47] The Board's reliance on *Dell* detracts from rather than enhances its interpretation of losses as embracing non-pecuniary inconvenience to a claimant.

[48] Here context is everything. Alone, "losses" convey deprivation without explanation. Explanation must be found in the context. Context starts with the *Act*'s purposes.

[49] The pecuniary purpose of compensation under the *Expropriation Act* is apparent because the loss addressed is proprietary. Section 2 says:

> 2 (1) ***It is the intent and purpose of this Act that every person whose land is expropriated shall be compensated for such expropriation.***
>
> (2) Further, it is the intent and purpose of this Act that ***where a family home is expropriated the position of the owner in regards to compensation shall***

> ***be such that he will be substantially in the same position after the expropriation as compared with his position before the expropriation.***
>
> (3) Recognizing that strict market value is not in all cases a true compensation for a family home that is expropriated since it may not provide equivalent accommodation to the owner of the family home, this Act shall be interpreted broadly in respect of the expropriation of a family home so that effect is given to the intent and purpose set forth in subsection (2).
>
> (4) The protection given by subsections (2) and (3) shall not extend to any person whose land is a money asset or investment and not a family home.
>
> [Emphasis added]

[50] The compensation described here depends upon ownership of property and its loss. That ownership is a pre-condition to compensation. The interest protected is not personal but depends upon the proprietary status of the claimant. In relation to a family home, subsection (2) links compensation to ownership. Restoration post expropriation is to "the position of the owner".

[51] Similarly, s. 26(b) says the owner will be compensated for "reasonable costs, expenses and losses arising out of or incidental to the *owner's* disturbance ..." Disturbance is clearly related to ownership.

[52] In s. 27(3)(b)(ii) similar language is employed. The owner is entitled to "… costs, expenses and losses arising out of or incidental to the *owner's disturbance* …" The disturbance described refers to the ownership enjoyed. Ownership involves a proprietary status.

[53] Mr. Oakley argued in his factum that the Board was "acutely aware" that s. 27 of the *Act* dealt with "special protection for the expropriation of family homes". In fact, s. 27 does not talk about homeowners, but owners "in occupation". That includes businesses. Section 27 is not especially aimed at homeowners.

[54] Two other contextual factors favour ascribing an economic meaning to "losses". As the Board conceded, "costs" and "expenses" are pecuniary. The word "losses" appears in the same breath, conjunctively connected by "and". The Board's conclusion that losses are broader because the word "financial" does not precede them ignores the language of the entire sentence. The more logical view would be that losses are of a like kind to costs and expenses because they appear in sequence without a disassociating conjunction (*McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, ¶30).

[55] The Board's interpretation would be better served by the addition of the word "non-pecuniary" before "losses" to distinguish it from the two preceding words describing pecuniary loss. Similarly, the only statutory example of loss described is the out-of-pocket expense of "moving to other premises". That example is not conclusive. But it does not describe a non-pecuniary loss. Contextual analysis of the subparagraph itself indicates that "losses" have a pecuniary meaning.

[56] Then the Board says that the award of a percentage of the value of the expropriated property for losses which "cannot practically be estimated or determined" means non-pecuniary losses. This confuses the difficulty of calculating damages with the incalculability of a loss. The former is a practical problem. The second is one of principle.

[57] General damages for pain and suffering in a personal injury case cannot be "calculated"; not because it is difficult to do so, but because they are not calculable. A figure is ascribed based on the injuries sustained and the precedents that apply. On the other hand, out-of-pocket expenses that are difficult or impossible to calculate do not make them non-pecuniary.

[58] A good analogy can be made to injunction law where "irreparable harm" includes out-of-pocket losses which will occur but will be impossible to calculate. For example, irreparable harm includes the loss of sales a business may sustain for breach of patent: *American Cyanamid v. Ethicon*, 1975 A.C. 396, adopted by the Supreme Court of Canada in *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. Such pecuniary losses are described as "irreparable harm", not because they are not economic losses but because they are virtually impossible to calculate.

[59] Finally, the Board's interpretation is unreasonable because it contemplates an award of losses that would be broader than anything the common law would allow. It is a well-known principle of statutory interpretation that the legislature assumes the existing state of the law (*Nova Scotia (Attorney General) v. Brill*, 2010 NSCA 69, ¶94-95). Absent injury, the law does not award damages for emotional upset (*Saadati v. Moorhead*, 2017 SCC 28). The Board's decision would allow such a claim—one that an accident victim cannot make nor a Superior Court award. Nothing in the *Expropriation Act* authorizes such legal novelty.

[60] Atlantic also points out that the Nova Scotia *Expropriation Act* is very similar to the federal *Expropriation Act*. Section 27(3)(b)(ii) of the Nova Scotia

Act addressing "losses" for disturbance is identical to s. 24(3)(b)(ii) of the Federal *Act*. Atlantic notes that upon introducing the Federal *Act*, the Canadian Minister of Justice described disturbance damages as providing "… for all appropriate compensable *economic* loss flowing from the taking of property".

[61] *Todd's* commentary on the Federal *Expropriation Act* makes the same point about economic loss (E. Todd, *The Federal Expropriation Act: A Commentary*, Carswell, 1970).

[62] Mr. Oakley replies that interpretation of the Nova Scotia *Act* cannot depend on the Federal Minister's comment on the Federal *Act*. Mr. Oakley is right. Although Atlantic may be correct in the inferences it draws, there is an insufficient record to sustain those inferences.

[63] No Canadian court has described losses for disturbance to a homeowner as non-pecuniary in nature as the Board did in this case. Notwithstanding statutory differences, this makes sense in principle because the interests protected by expropriation legislation are proprietory, not personal. They relate to ownership and enjoyment of use of that ownership. Similarly, the compensation paid for that loss relates to ownership and enjoyment of property. The claimant comes to the Court as a property owner, not an accident victim. Assimilating a property owner's claim for compensation to that of a tort victim exceeds the statutory purposes, ownership interests, and remedial goals described in the *Expropriation Act*. Going beyond what the common law would award an accident victim for a loss transcends the common law in a way neither authorized nor contemplated by the statute. The Board's interpretation of losses as non-pecuniary and virtually unlimited is an unreasonable conclusion. Like *McLean*, this is a case where interpreting losses as pecuniary is the only reasonable outcome.

What should Mr. Oakley receive for disturbance losses?

[64] To reiterate, s. 26 of the *Act* says that in addition to market value, an owner should receive "… reasonable costs, expenses and losses arising out of and incidental to the owner's disturbance determined as hereinafter set forth".

[65] Section 27(3)(b)(ii) of the *Act* allows for:

> (ii) the costs, expenses and losses arising out of or incidental to the owner's disturbance including moving to other premises but if such cannot practically be estimated or determined, there may be allowed in lieu thereof a percentage, not exceeding fifteen, of the market value determined as set forth in subclause (i);

[66] The Board went on to find that the following could be claimed by Mr. Oakley:

> [299] The Board finds that from August of 2004 to when Mr. Oakley was resettled in his new home after the expropriation of 2012, he experienced reasonable costs, expenses and losses arising out of or incidental to his disturbance caused by the development of Gold's mine for which his Lands and home were ultimately expropriated. These included:
>
> - Expenses and losses to move after the expropriation;
> - Legal costs of migrating the Lands;
> - ***Loss of fully enjoying his home and property;***
> - ***Other losses including:***
>   - ***Having his life interrupted;***
>   - ***Losing his Lands and home;***
>   - ***Being deprived of the calm, order and quiet of his life;***
>   - ***Being agitated, worried and unsettled; and***
>   - ***Experiencing disadvantages and detriments;***
> - Expenses and losses for the initial steps to relocate after the 2008 meeting; and
> - Lost time:
>   - Attending at Gold's offices after the March 2008 meeting;
>   - Finding another property;
>   - Initial steps to relocate his home, shed and personal items in 2008;
>   - Negotiations with Gold;
>   - Migrating the Lands; and
>   - Moving after the Expropriation.
>
> [Emphasis added]

[67] It follows from the analysis of the meaning of "losses" that the emphasised language describes alleged losses for which compensation is not available.

[68] In awarding the global sum of 15% of the market value of the land expropriated, the Board applied its broad definition of losses to Mr. Oakley's claim. Mr. Oakley had no receipts and no detailed evidence of the losses for which he sought compensation. The Board does not explain how the evidentiary vacuum justified such interpretive generosity. Atlantic aptly complains of a 15% expropriation "tax".

[69] Because Mr. Oakley had done his own moving and arranged for free storage, he had no expenses for either. Nevertheless, the Board concluded that Mr. Oakley should receive something for moving expenses. If he had not done it himself, he

would have had to pay a third party to do it, and so can be justified as compensation for a loss. The Board assigned no amount to this loss.

[70] In 2008, Mr. Oakley had negotiations with Mr. Bucknell, Atlantic's general manager, with respect to the potential sale of his property. Although the Board found that Mr. Oakley was clearly given the impression that an agreement had been made, Mr. Bucknell did nothing to finalize that agreement, nor did he inform Mr. Oakley once he had decided to repudiate it. The Board found that this involved additional time and expense to Mr. Oakley:

> [230] Mr. Oakley's costs and expenses included his efforts in securing another property to relocate his home and shed; clearing and levelling the property; purchasing, delivering and placing timbers in the area where they would rest. It also included him locating and meeting with a company to move his home, taking the company over the route the buildings would travel, and determining what prep work was required. This resulted in Mr. Oakley cutting approximately six feet of trees, brush and vegetation on either side of the road on the property. He also moved his personal belongings to a storage facility in Halifax for three or four months, before moving them back to his home on the Lands.

[71] To the extent that this could be categorized as "moving expenses" unnecessarily incurred, these losses are of a kind contemplated by s. 27 of the *Act*. Although no figure is attributed to these expenses and losses, it was reasonable for the Board to conclude that they fall within the statute.

[72] In addition to land migration costs of $1,500, the Board found that Mr. Oakley was put to the time and trouble of finding a witness to assist in having the property successfully migrated. The Board added that this effectively reduced the cost of his legal services because he did work which otherwise a lawyer would have had to do. Although this amount was not quantified, Mr. Oakley's efforts relate to a migration expense incidental to the expropriation. This conclusion has statutory and evidentiary support.

[73] The Board was satisfied that Mr. Oakley had lost time doing tasks incidental to his disturbance:

> [258] In this case, the Board finds Mr. Oakley lost time doing the following tasks, which the Board finds arose out of or were incidental to his disturbance of Gold's mine and are compensable under s. 27(3)(b)(ii):
>
> - Attending at Gold's offices after their meeting on March 18, 2008;
> - Finding another property;
> - Initial steps to relocate his home, shed and personal items in 2008;

- Negotiations with Gold;
- Migrating the Lands; and
- Moving after the Vesting Order.

[74] Owner's time has not been held compensable under s. 27 before:

> [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.
>
> *Johnson*

[75] The Board distinguished *Johnson* by observing:

> [254] As compensation of an owner's time for his disturbance when his entire property is taken was not before the Court of Appeal, this issue was not decided by it.

[76] Some owner's time—apart from preparing for litigation—will be involved in most expropriations. Unless it can be linked to pecuniary loss—as in losing employment or business income, it lacks pecuniary character and should not attract compensation: *Durette v. New Brunswick (Minister of Transportation)* (1980), 21 L.C.R. 124, ¶28; *Lauzon v. Windsor (City)* (1974), 7 L.C.R. 11, ¶40; *Glenlea 75 Servicentre Ltd. v. Manitoba (Department of Highways & Transportation)* (1993), 52 L.C.R. 70, ¶12. The point is not to compensate for time spent, but for a loss incurred.

[77] Problematically, the Board ordered something for "other losses":

> [277] As noted above, the Board has found that the types of losses an owner may receive compensation for under s. 27(3)(b)(ii) may include the personal experiences and feelings of being deprived of the calm, order, and quiet of one's life; being agitated, worried, and/or unsettled; experiencing a disadvantage or detriment; having an interruption in their life; and losing one's property and home.
>
> [278] The Board finds that from the facts and circumstances of this case, that Mr. Oakley experienced all of these at different stages and at varying degrees throughout the shadow period from August 2004 when his life became unsettled. The Board finds these losses and disturbances were exacerbated by Gold not communicating with Mr. Oakley for almost two years after their proposed

> settlement between March of 2008, and February 2010. As Mr. Oakley stated it was not two weeks, but two years. The duration of time his life was disturbed (eight (8) years) also increases the losses and, therefore, similarly the amount of compensation.

[78] These "losses" lack a pecuniary character and do not constitute disturbance losses.

[79] The Board concluded that 15% of the market value of the land should be awarded for disturbance. Without apparent explanation, the Board said:

> [289] Mr. Oakley has requested 15% of the market value of the Lands which is $45,750. The Board finds that for all of the above, including a reduction for the fact that the proposed settlement of 2008 was not an agreement, the Board would have awarded Mr. Oakley an amount in excess of this sum. However, the maximum the Board may award is 15%, therefore, the Board awards that percentage.

[80] How or why the Board would have awarded more than $45,750 for the "losses" goes unexplained. The Board doesn't even attempt to quantify Mr. Oakley's time or ascribe a value to it even if that were compensable. To the extent that Mr. Oakley spent time to forego the costs of moving, storing his personal belongings and saving legal fees regarding migration, compensation can be justified as related to a loss. What the loss may be is difficult to say. As in *Whynot*, it is appropriate to make a percentage award where "cost, expenses and losses arising out of or incidental to the owner's disturbance cannot practically be estimated or determined". Also, like *Whynot*, there was very little evidence in this case of economic loss. We have a choice of deciding the matter or sending it back for another Board to assess. But there is no indication that a new Board would have a better record than we do. To save further time and expense, this Court should fix a percentage. Keeping in mind the kind of expenses that Mr. Oakley's time has saved, and all of the circumstances, a 2% award would give Mr. Oakley approximately $6,010.00 for his mostly unexplained "losses". I would include the $1,500.00 for migration costs in the $6,010.00.

[81] I would allow the appeal and award 2% of the market value of the expropriated property—$6,010.00.

[82] Although Atlantic has largely been successful, I would accept its submission that there should be no costs of the appeal. We have been told that there was an offer to settle with respect to proceedings before the Board. Accordingly, Atlantic asks that the Board deal with costs before it. I would so order.

Bryson, J.A.

Concurred in:

Oland, J.A.

Bourgeois, J.A.