NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Attorney General) v. S&D Smith Central Supplies Limited*, 2019 NSCA 22

Date: 20190326
Docket: CA 467211
Registry: Halifax

Between:

The Attorney General of Nova Scotia, representing
Her Majesty the Queen in the Right of the Province of Nova Scotia
Appellant (Cross-respondent)

v.

S&D Smith Central Supplies Limited
Respondent (Cross-appellant)

v.

Nova Scotia Utility and Review Board
Respondent

Judge:	The Honourable Justice Joel E. Fichaud The Honourable Justice Duncan R. Beveridge (dissenting)
Appeal Heard:	September 12, 2018, in Halifax, Nova Scotia Final submission filed November 7, 2018
Subject:	Expropriation – appealable issues – standard of review
Summary:	S&D Smith Central Supplies Limited ("Central") operates a home hardware business from its lands in Antigonish County. At a public meeting in May 1998, the Province announced that there were three routes to reconfigure the Trans Canada Highway. Two of those possible routes would trigger expropriation of a corridor across Central's parcel. The Province's representative also told Central that, as Central was now aware of the potential expropriation, Central would not be compensated for any future capital improvements on the

parcel. These messages disrupted Central's plans to develop the parcel with a new distribution centre and retail outlet. Over the following several years, Central made other arrangements for those developments.

In May 2012, the Province expropriated the corridor across Central's land. Central claimed compensation under the *Expropriation Act*, R.S.N.S. 1989, c. 156. The Utility and Review Board ("Board") heard the matter and awarded Central compensation for the taken parcel, an amount for injurious affection to the remnant, interest, and $6,739,281 for "disturbance" to Central's business. An award for "disturbance" is a category of compensation under ss. 26(b) and 27(3) of the *Expropriation Act*.

The Province appealed. Central cross-appealed. The appeal and cross-appeal were taken under s. 30(1) of the *Utility and Review Board Act*, S.N.S. 1992, c. 11, which confines appeals to questions of jurisdiction and law.

Issues:

(1) What issues are appealable and what is the standard of review to the Board's Decision?

(2) On the Province's appeal, did the Board commit an appealable error:

(a) by ruling that Central was entitled to compensation for disturbance under ss. 26(b) and 27(3),
(b) by finding that Central's plans for business expansion were thwarted by the impending expropriation,
(c) in its quantification of compensation,
(d) in its award of interest?

(3) On Central's cross-appeal, did the Board commit an appealable error by declining to award compensation for Central's alleged future disturbance losses?

Result:

The Court of Appeal (per reasons of Fichaud J.A., Saunders J.A. concurring) dismissed the appeal and cross-appeal.

Under the *Utility and Review Board Act*, questions of fact are not appealable. The standard of review to the appealable issues is reasonableness.

As to the Province's appeal:

(a) The Board's ruling that Central was entitled to compensation for disturbance reasonably interpreted and applied the *Expropriation Act*'s provisions and objectives.

(b) The Board's ruling that Central's plans for expansion were disrupted by the impending expropriation was based on the Board's application of Supreme Court of Canada's three-part test for disturbance compensation in an expropriation: (a) causation, (b) remoteness and (3) reasonable mitigation. The Board made no error of law, its rulings were reasonable, and its findings of fact were supported by evidence.

(c) The Board's awards of compensation for the taking, injurious affection and disturbance involved no error of law, were quantified from factual and appraisal evidence, and were reasonable.

(d) The Board's award of interest was based on evidence and a reasonable interpretation and application of the provisions in the *Expropriation Act*.

As to Central's cross-appeal, the Board's denial of compensation for the claimed future disturbance losses was based on findings of fact and weight of evidence. The findings were supported by the evidence and, to the extent they were appealable, were reasonable.

Beveridge J.A., in dissent, favoured application of correctness as the standard of review on the issues engaged on the appeal. But on either correctness or reasonableness, the Board erred: in law in its award of $6.7 M, not for any costs or expenses

caused by expropriation, but for Central's claim it would have made more money had it gone ahead with its planned business plans as if the expropriation had not occurred, when nothing prevented them from proceeding with their plans; and, in its award of interest on $1.4M from 2001 for market value for the lands taken in 2012 and injurious affection. The dissent would quash the award for disturbance damages and vary the interest award to the date of expropriation.

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Judges:	Fichaud, Saunders and Beveridge JJ.A.
Appeal Heard:	September 12, 2018, in Halifax, Nova Scotia Final submission filed November 7, 2018
Held:	Appeal and cross-appeal dismissed with costs to the Respondent S&D Smith Central Supplies Limited, per reasons for judgment of Fichaud J.A., Saunders J.A. concurring; Beveridge J.A. dissenting
Counsel:	Mark V. Rieksts, for the Appellant (Cross-respondent) Bruce MacIntosh, Q.C., Sarah MacIntosh, and Julie MacPhee for the Respondent (Cross-appellant) S&D Smith Central Supplies Limited The Respondent Nova Scotia Utility and Review Board not appearing

Reasons for judgment:

[1] S&D Smith Central Supplies owns land in Antigonish County. From there it operates a home hardware business. Over forty years the enterprise has grown significantly. On May 1, 2012, the Province filed a notice at the Registry of Deeds that expropriated a corridor through Central's land. The purpose was to reconfigure the Trans-Canada Highway. The Utility and Review Board fixed Central's compensation under Nova Scotia's *Expropriation Act*. The award is appealed to this Court.

[2] One of the *Act*'s categories of compensation is for loss from "disturbance" due to the expropriation. On May 30, 1998, a Provincial official told Central that a parcel of Central's land may be expropriated for the highway and, as Central was now aware of a prospective expropriation, Central's future capital costs on that parcel would not be compensated. That message disrupted Central's planned development of the parcel over the following years. The disruption was the disturbance that caused the losses for which Central claimed compensation at the Board. The losses occurred before the expropriation document was filed at the Registry in May 2012.

[3] The Board awarded Central over $6,700,000 in disturbance compensation. Citing authority from the Supreme Court of Canada, the Board held that expropriation is a "process", not an event, and Central's disturbance stemmed from an early step in the process. The Province says the Board redressed a non-compensable "pre-expropriation" loss. From that point of departure, this appeal spreads to litigate almost every aspect of disturbance compensation under the *Act*.

Background

[4] Mr. Stephen Smith is the principal of S&D Smith Central Supplies Limited ("Central"). Central retails home hardware and building supplies.

[5] In 1975, Mr. Smith and his brother started the business. They rented premises, but Mr. Smith said they "outgrew that space dramatically". So, in 1979, Central bought 16 acres at Lower South River in Antigonish County. The land is about three kilometers from the boundary of the Town of Antigonish. On the land was an existing retail store to which they added some small buildings. The following year, Central acquired 33 adjacent acres at the rear.

[6] Mr. Smith testified "our vision was to keep growing as we had the opportunity". The Board's Decision (2017 NSUARB 124, para. 22) said "while they had no idea of how much they would grow, they shared a vision of continued growth when opportunities presented themselves", and (para. 24) "Central's practice was to reclaim existing land when it needed room to expand".

[7] Mr. Smith's brother ended his involvement. But their vision materialized. Central added a branch store in New Glasgow and a cabinet assembly and retail store in Sydney. Central built warehouses, a 6,000 square foot retail supply store and an office building in Lower South River, a truss mill in 1987 and a modernized truss mill in 2011-12. The Lower South River property has eight buildings. Central has a window manufacturing and steel door businesses in New Brunswick, and stores in Windsor, Stellarton, Antigonish, Guysborough, Inverness and Port Hawkesbury.

[8] To resume the early chronology – in January 1999, after Mr. Smith's repeated requests, the County extended its water service to Central's property at Lower South River. This would allow the installation of a fire protection system in his planned buildings. Until then, the fire marshal would not approve those developments. Mr. Smith testified that, with the new water service, Central would have had a new retail store in operation by the fall of 1999, to be soon followed by a new distribution centre.

[9] Mr. Smith explained his view of the distribution centre and "big box store" concept. This would permit Central to bulk purchase, obtain vendors' volume discounts, eliminate the distributor middle men and quickly replenish inventory. His testimony elaborates on the benefits of vertically integrated distribution. The Board said (para. 29) "Mr. Smith then had in mind building a big box store and expanding his existing warehousing to a distribution centre on the Lower South River property for all of the stores".

[10] However, Central's plans met a roadblock.

[11] In the mid-1990s, the provincial Department of Transportation ("Department") had begun to study the twinning of the Trans-Canada Highway (Highway 104) through Antigonish County. The Department hosted public meetings to gather input. On May 30, 1998, Mr. Smith and Central's Mr. Kevin White attended one of the meetings. The Department revealed three possible routes, coloured on a map, for the alignment of Highway 104. The "red" and "blue" routes would cut through Central's property at Lower South River. The

"brown" route would not. The highway corridor would sever Central's land into two parcels, rendering the southern remnant unable to serve the operations on the northern remnant. The northern portion had insufficient space to platform Central's planned developments. The Board recited Mr. Smith's reaction:

> [31] . . . He believed that, including the south remnant, about two-thirds of his property would be "taken". His reaction was that if either of the two routes were selected, Central would be "shut down".

[12] After the meeting, Mr. Smith spoke with the Department's Mr. Graydon Bushell. The Board's Decision describes the conversation and its paralyzing effect on Central's plans:

> [32] … Mr. Smith expressed his concern about the impact on his property and his plans to expand Central's business. He testified that Mr. Bushell told him the highway plans were not finalized yet; the route was not settled and could be changed, describing it as "preliminary", and that Central would not necessarily be affected. However, Mr. Smith testified Mr. Bushell told him that, because he was now aware of the potential routes, while he could do anything he chose on the corridor area, he would not be compensated because of that knowledge. Mr. Smith said that was the moment when he concluded he could not do anything on that land. He "knew we were in trouble".
>
> …
>
> [36] As a result of the conversation with Mr. Bushell, Mr. Smith was unwilling to undertake any expansion at Lower South River and turned to other projects, including continuing with capital improvements for the new location in New Glasgow, and later, the new Sydney store. He said he had planned to do the Lower South River store immediately after finishing up in New Glasgow, starting in late 1998 or early 1999. That would have led to an opening in Lower South River in 2001.

[13] After hearing testimony from Messrs. Smith and Bushell, the Board found that Mr. Smith's testimony was factual:

> [759] The Board accepts Mr. Smith's evidence regarding his conversation with Graydon Bushell at the May 1998 meeting.

[14] In April 2000, the Department's Minister approved the "blue route". But there was no official announcement until 2005, after the completion of an environmental assessment. In the meantime, public meetings continued.

[15] The Board summarized how the uncertainty surrounding the proposed routing impeded Central's business planning in the years up to the formal expropriation:

> [39] Mr. Smith said he was aware that there was a lot of discussion and controversy in the area about the proposed routes during that time. Neither he nor anyone at Central was involved with the Atlantic Expressway Committee. He was waiting to see what would happen. As time went on, he realized that the brown route was not preferred. He then had a clearer picture of Central's situation. While Mr. Smith did not participate in the environmental review process, and no one involved consulted him in any way, it was not until it was completed that it was certain which would be the recommended route. In 1999, he understood a preferred route had been identified; he testified he then started "looking around" but did not want to make any decisions until a route was fixed. He remained hopeful that the route might not affect Central, but as time went on, the "danger" became clearer. Once the route was announced, Mr. Smith realized how his Lower South River property would be affected.

[16] There was a trailer park on a neighbouring parcel. In the spring and summer of 2003, Mr. Smith saw the trailers being moved from that property. Then, according to the Board (para. 41) Mr. Smith "knew exactly where the corridor for the highway would be and how much Central's property would be impacted". He learned that the Department had acquired the neighbouring parcel. The Board said:

> [41] … In his words, he was not left with half of his property north of the corridor, but about one-third only, and with no room for expansion as he had planned. He could not have both the big box store and the distribution centre on his land-there was not enough room. He knew he had to do something.

[17] Consequently, Mr. Smith looked for another location for its big box store. In 2004, Central purchased a parcel off Market Street, south of the "old highway" west of Antigonish. In May 2005, Central opened its big box store there with some additional storage space. The Board's Decision terms this the "Market Street store".

[18] Also in 2005, Central converted part of the Lower South River property into a distribution centre for building materials for all Central's stores. Because of spatial constraints due to the prospective expropriation, the distribution centre was smaller than Central originally had planned.

[19] As Central's retail operations grew, it was apparent that the distribution centre at the Lower South River site was insufficient. In 2012-13, Mr. Smith

looked for a secondary site. In late 2015, Central purchased a property at Pomquet for warehousing and a laydown area. The Board recited:

> [46] … Mr. Smith said he would not have needed the second site if it were not for the expropriation. He saw clear benefits from being on one site.

[20] From 2006 to early 2012, Mr. Smith discussed options for highway routing and configuration with the Department's Acquisition Officers. There was brief consideration of a tunnel that would have lessened the impact on Central's property. Nothing was resolved.

[21] On January 18, 2012, Mr. Smith received an email from the Department requesting access to Central's land to begin clearing. There followed a letter of February 27, 2012, under s. 71 of the *Expropriation Act*, R.S.N.S. 1989, c. 156, formally requiring access on March l, 2012.

[22] An Order-in-Council dated February 29, 2012 approved the expropriation of Central's land. The OIC was registered at the Antigonish Registry of Deeds on May l, 2012. The Province expropriated a corridor of some 11 acres, close to one-quarter of Central's land at Lower South River. The corridor bisected Central's land. It left the southern remnant effectively inaccessible and, as the Board later determined (para. 613), "almost worthless". The northern remnant had been developed with structures and related infrastructure.

[23] On March 12, 2015, Central filed with the Utility and Review Board a Notice of Hearing and Statement of Claim under the *Expropriation Act*. Central claimed compensation for: (l) the market value of the lands expropriated, (2) business disturbance damages, (3) injurious affection, (4) loss of special economic advantage in the expropriated and remaining lands, (5) costs, expenses and losses caused by the disturbance, including fencing, legal, appraisal and other professional fees and disbursements, (6) costs of developing and operating a replacement property, (7) prejudgment interest and (8) an access order.

[24] During the proceeding before the Board, Central adjusted its claim. It withdrew its claim for compensation for loss of special economic advantage under s. 26(d) of the *Expropriation Act*. Central focused its claim on disturbance from economic obsolescence and delay under ss. 26(b) and 27(3). Central quantified its claimed interest at 12% per annum further to s. 53(4). The *Act*'s provisions are quoted later. Central sought an award for HST and accelerated tax consequences of the expropriation and asked the Board to reserve on these points. In its rebuttal

submission, Central calculated its claim – less any awards for interest, HST and tax consequences – as exceeding $12.2 million.

[25] The Province submitted that Central's award should be between $820,000 to $4.69 million, excluding interest and any tax items.

[26] Ms. Roberta J. Clarke, Q.C., sitting as the Board, heard the matter in February and March 2016. The transcribed evidence and exhibits exceed 15,000 pages, and the briefs plus oral submissions exceed 900 pages. The post-hearing briefs were filed through early June 2016.

[27] On December 20, 2016, while the Decision was under reserve, The Province applied to offer new evidence. On May 17, 2017, the Board declined to reopen the evidence (2017 NSUARB 75).

[28] On July 26, 2017, the Board issued a 291-page decision (2017 NSUARB 124) and Order. The Order required the Province to pay Central compensation of $8,180,497 plus interest on the market value and injurious affection at 10% per annum from May l, 2001 to the date of payment, with no interest payable on disturbance damages. The Board reserved jurisdiction to consider costs and tax consequences, on the motion of either party. The compensation of $8,180,497 comprised: (l) $615,375 for the market value of lands taken under s. 26(a) of the *Expropriation Act*, (2) $788,841 for injurious affection to the southern remnant under s. 26(c) of the *Act*, (3) nil for injurious affection to the northern remnant, (4) $6,739,281 for business losses and disturbance damages under s. 26(b), and (5) $37,000 for "Other Claims – Fencing" (Board Decision, para. 900).

[29] For the market value of the taken parcel and the injurious affection to the southern remnant, the Board accepted the opinion of Central's appraisal expert, Mr. Daniel Doucet. The Board rejected the opinion of the Province's expert, Mr. John Ingram.

[30] Central's disturbance claim related to the delay and alteration of Central's implementation of its expansion plans. Central alleged the disturbance was caused by the "shadow of expropriation" after May 1998.

[31] The Province disputed that Central had expansion plans and that any plans were delayed or affected by the impending expropriation.

[32] The Board's Decision reviewed the evidence and made the critical findings of fact that Central had expansion plans and, but for the prospect of expropriation, Central would have implemented them:

> [723] Consequently, the Board is satisfied, on a balance of probabilities, that Central planned a new retail store to open at Lower South River in 2000, to be followed by a distribution centre, and would have proceeded with this expansion, but for the expropriation, or more precisely, the shadow of expropriation.

[33] The Board (para. 743) accepted January 31, 2001 as the starting date for the delay caused by the disturbance. Quantification of the disturbance losses was the subject of opinion evidence by Central's experts from Pricewaterhouse Coopers, Mr. Paul Bradley and Ms. Charlene Rodenhiser, and the Province's expert, Mr. Ian Wintrip. The Board considered their evidence in detail and concluded:

> [899] The Board finds, on a balance of probabilities, that Central did have expansion plans. It accepts, for the most part, the evidence of PwC, and agrees with the losses for profits at the new retail store and distribution centre, vendor discounts, and incremental operating costs which had been incurred. The Board does not, however, accept the full extent of the loss period determined by PwC, but ends it one year earlier. Further, the Board does not accept the claims for future losses, finding them to be less reliable because they were built on estimates the Board considers too uncertain.

[34] As to the 10% interest, the Board determined:

> [902] Further, the Board finds, pursuant to s. 53(4) that the conduct of the expropriating authority, i.e. the Province, caused delay in determining compensation and therefore warrants the rate of interest on the market value of the land and injurious affection (a total of $ 1,404,216) to be charged at 10% per year from May l, 2001, to the date of payment. No interest is recoverable for disturbance damages.

The Board held that interest would run from May 1, 2001, the date when, in the words of s. 53(1), Central ceased to "make productive use of the lands" from the chilling effect of the impending expropriation.

[35] On August 23, 2107, the Province filed a Notice of Appeal from the Board's order of July 26, 2017.

[36] On September 5, 2017, Central filed a Notice of Cross-Appeal.

[37] On September 12, 2018, this Court heard the matter and reserved.

[38] Since the appeal hearing, the parties have filed supplementary briefs and rebuttals on costs of the appeal.

Issues

[39] The Province's Notice of Appeal lists 30 grounds with 18 sub-grounds. The submissions narrowed the focus somewhat. I will group the arguments into four issues:

1. Did the Board commit an appealable error by ruling that Central was entitled to compensation for disturbance under ss. 26(b) and 27(3) of the *Expropriation Act*?
2. Did the Board commit an appealable error by finding that Central's plan for business expansion was thwarted by the impending expropriation?
3. Did the Board commit an appealable error in its quantification of compensation for market value, injurious affection and disturbance?
4. Did the Board commit an appealable error by awarding 10% interest under s. 53 of the *Expropriation Act* from May 1, 2001?

[40] Central's cross-appeal addresses one issue:

5. Did the Board commit an appealable error by concluding that Central's claimed future disturbance losses were too speculative to be compensable?

What Issues are Appealable?

[41] The reviewing court's "first order of business" is to determine what grounds of appeal are permitted by the legislation. Next is the selection of a standard of review to the appealable grounds. *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, para. 18, and paras. 36, 41 and 51, per Binnie J. for the majority. See also *Teal Cedar Products Ltd. v. British Columbia*, [2017] 1 S.C.R. 688, paras. 41-42.

[42] The Board is established under the *Utility and Review Board Act*, S.N.S. 1992, c. 11 ("*UARB Act*"). The assignment of the Board's substantive authority is left to other statutes. One is the *Expropriation Act*. These substantive statutes do not discuss appeals of the Board's awards. Appeals are governed by the following generic provisions in the *UARB Act*:

> **Jurisdiction**
>
> 22(1) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it.
>
> (2) The Board, as to all matters within its jurisdiction pursuant to this Act, may hear and determine all questions of law and of fact.
>
> **Effect of judgement of court on pending matter**
>
> 23(1) In determining a question of fact, the Board is not bound by the finding or judgment of a court in a proceeding involved in the determination of the fact, but such finding or judgment is, in proceedings before the Board, *prima facie* evidence only.
>
> (2) The Board has jurisdiction to hear and determine a question of fact notwithstanding that a proceeding involving the same question of fact is pending in a court.
>
> …
>
> **Effect of finding**
>
> 26 ***The finding or determination of the Board upon a question of fact*** within its jurisdiction ***is binding and conclusive***.
>
> …
>
> **Appeal**
>
> 30(1) An appeal lies to the Appeal Division of the Supreme Court from an order of the Board upon any ***question as to its jurisdiction or upon any question of law***, upon filing with the Court a notice of appeal within thirty days after the issue of the order.
>
> [italicized emphasis added]

[43] By s. 30(1), the grounds of appeal and cross-appeal are confined to issues of jurisdiction or law. The parties have identified no jurisdictional issue, leaving us with issues of law. This is pertinent because a number of issues in this appeal and cross-appeal are distinctly factual.

[44] Several statutes in Nova Scotia provide for appeals to this Court from administrative tribunals – not just the Utility and Review Board – on questions of "jurisdiction or law". Under those provisions, a body of authority has developed to explain when an issue with a factual undertone may be appealed as a "question of law".

[45] In *International Association of Fire Fighters, Local 268 v. Adekayode*, 2016 NSCA 6, this Court summarized the authorities:

> [42] … Where, as here, the statutory right of appeal is limited to an issue of law, the Court may review a finding of fact only if there is *no* supporting evidence from which the finding may be made or the inference reasonably drawn. That is because a finding based on no evidence is arbitrary, and a tribunal errs in law by acting arbitrarily in any aspect of its process, including fact-finding. The standard of review would be reasonableness (*Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, paras. 34, 38-39, 42), though it is difficult to conceive how an arbitrary finding could be reasonable. Alternatively, if there is *some* evidence, then the tribunal's factual findings and inferences are not appealable under the statute, nor are assessments of credibility, meaning the standard of review is not an issue. *Fashoranti v. College of Physicians and Surgeons of Nova Scotia*, 2015 NSCA 25, paras. 20-21, leave denied Sept 3, 2015 [[2015] S.C.C.A. no. 211]; *Fadelle v. Nova Scotia College of Pharmacists*, 2013 NSCA 26, paras. 12-17, and authorities there cited. See also *Nova Scotia v. Play it Again Sports Ltd.* [2004 NSCA 132], para. 50. [italics in *Adekayode*]

[46] Paragraphs 15 and 16 of *Fadelle*, cited by this passage, referred to Justice Cory's comments in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, para. 44. Justice Cory referenced *Douglas Aircraft Co. of Canada v. McConnell*, [1980] 1 S.C.R. 245, page 277. Also helpful are: *Re Can-Euro Investments Ltd.*, 2008 NSCA 123, para. 24; *Colchester County (Municipality) on Behalf of Tatamagouche Water Utility v. Wall*, 2018 NSCA 67, at para. 66; *R. v. H. (J.M.)*, [2011] 3 S.C.R. 197, para. 25.

[47] Appealable questions of law include, of course, the interpretation of a legal principle or a statute, but also the legal effect of a factual finding, the tribunal's failure to appreciate evidence because the tribunal misapprehended the law, and the tribunal's failure to consider a required element of the test: *R. v. H. (J.M.)*, paras. 28-30; *R. v. Morin*, [1992] 3 S.C.R. 286, pages 294-95; *Teal Cedar Products*, para. 44.

Standard of Review

[48] If the ground is appealable, what is the standard of review?

[49] On paper, the parties were *ad idem* that the standard was reasonableness:

- The Province's appellant's factum:

  > 17. The Appellant submits that the standard of review on all issues on appeal is reasonableness.

- Central's respondent's factum:

> 14. Reasonableness is the applicable standard for all grounds of appeal. …

- Central's cross-appellant's factum:

> 17. Central respectfully submits the issues in the cross appeal are questions of law. The standard of review with respect to remoteness, speculation and uncertainty is reasonableness. …

- The Province's cross-respondent's factum:

> 1. The Appellant agrees with the standard of review for the issues referenced at paragraph 17 of the Respondent's Cross Appeal Factum. …

[50] At the hearing in this Court, however, the Province had second thoughts. Counsel for the Province suggested that correctness should govern the Board's interpretation of the *Expropriation Act*'s provisions. This would be because s. 30(1) of the *UARB Act* assigns appellate authority over "any question of law" and, submits the Province, appellate authority connotes correctness.

[51] With respect, the proposition is unpersuasive. The Supreme Court of Canada has rejected it. Repeated rulings of this Court on appeals from the Board under s. 30(1) have confirmed that, with rare exceptions, the Board's interpretation of its "home or related statutes", including the *Expropriation Act*, are reviewed for reasonableness. The Supreme Court has explained its reasons for the textured, rather than a linear approach to deference. Whether that approach should be revisited is for the Supreme Court, not this Court.

[52] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, para. 68, Justices Bastarache and LeBel expressed the presumption of "relative expertise" for administrative tribunals' interpretation of "the legislation they might often encounter in the course of their functions".

[53] In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654, Justice Rothstein for the majority converted that proposition into a presumption of reasonableness for the tribunal's interpretation of its home or related statutes:

> [34] … unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[54] In *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, [2016] 2 S.C.R. 293, s. 470(1) of Alberta's *Municipal Government Act* permitted an appeal, with leave, from a decision of an assessment review board on an issue of "law or jurisdiction" (see para. 11). The Alberta Court of Appeal applied correctness based on the presumed legislative intent that there be an undeferential analysis of issues of law. The Supreme Court allowed the appeal. Justice Karakatsanis for the majority squarely rejected the submission that a statutory appeal on a question of "law" connotes correctness:

> [27] The Court of Appeal concluded that when the decisions of a tribunal are subject to a statutory right of appeal (or a right to apply for leave to appeal), rather than ordinary judicial review, the standard of review on such appeals is correctness. It determined that a statutory appeal should be recognized as "an addition to or a variation of" the list of correctness categories in *Dunsmuir* (Court of Appeal reasons, at para. 24). Slatter J.A. reasoned that the existence of a statutory right of appeal is a strong indication that the legislature intended the courts to show less deference than they would in an ordinary judicial review.
>
> [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**. [bolding added]
>
> [29] At least six recent decisions of this Court have applied a reasonableness standard on a statutory appeal from a decision of an administrative tribunal (*McLean* [*McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895]; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147; *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 S.C.R. 219).
>
> [30] In *Saguenay* [*Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 S.C.R. 3], this Court confirmed that whenever a court reviews a decision of an administrative tribunal, the standard of review "must be determined on the basis of administrative law principles … regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal (para. 38, per Gascon J.; see also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at paras. 17, 21, 27 and 36; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at paras. 2 and 21.
>
> [31] The Court of Appeal relied on this Court's decision in *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, where the statutory appeal clause was referred to when finding the standard of review

> was correctness (para. 36). However the Court in *Tervita* relied upon the unique statutory language of that particular appeal clause: a decision of the tribunal was appealable "as if it were a judgment of the Federal Court" (*Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp), s. 13(1)). Obviously, judgments of the Federal Court do not benefit from deference on appeal (except on questions of fact, for entirely different reasons). *Tervita* does not stand for the proposition that all issues arising on all statutory appeals are reviewable on the correctness standard.
>
> (3) Contextual Analysis
>
> [32] The Court of Appeal also conducted a review of the relevant contextual factors to support the conclusion that the standard of review is correctness. The presumption of reasonableness may be rebutted if the context indicates the legislature intended the standard of review to be correctness (*Saguenay*, at para. 46; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at para. 16).
>
> [33] The presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. … However, as with judges, expertise is not a matter of the qualifications or experience of any particular tribunal member. Rather, expertise is something that inheres in a tribunal itself as an institution: "… at an institutional level, adjudicators … can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions" (*Dunsmuir*, at para. 68). …
>
> [34] … In light of this strong line of jurisprudence – combined with the absence of unusual statutory language like that at issue in *Tervita* – there was no need for the Court of Appeal to engage in a long and detailed contextual analysis. Inevitably, the result would have been the same as in those cases. The presumption of reasonableness is not rebutted.

[55] Earlier, in *Canada v. Khosa*, *supra*, at paras. 21-26, Binnie J. for the majority had dismissed a submission similar to that rejected by Karakatsanis J. in *Edmonton (City)*. The Supreme Court regularly has reiterated the presumption of reasonableness for a tribunal's interpretation of its home or related statutes: *Smith v. Alliance Pipelines Ltd.*, [2011] 1 S.C.R. 160, para. 26; *McLean*, paras. 19-22; *Tervita*, para. 35; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471, paras. 24-25; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, [2016] 1 S.C.R. 29, paras. 32 and 34; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, paras. 45-47.

[56] Recently, in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, at paras. 45-47, Justice Gascon for the majority

said that contextual analysis may overcome this presumption of reasonableness only "occasionally", "sparingly" and in "exceptional" cases.

[57] Next is Nova Scotia's caselaw under s. 30(1) of the *UARB Act*.

[58] This Court frequently has ruled that reasonableness governs appeals under s. 30(1) of the *UARB Act* from the Board's decisions that interpret the various statutes within the Board's administrative authority. Since 2015, these rulings include: *Colchester County v. Wall*, *supra*, paras. 40, 48-52, 61; *Antigonish (Town) v. Nova Scotia (Utility and Review Board)*, 2018 NSCA 8, paras. 21-25; *Tasty Budds Compassion Club Inc. v. Nova Scotia (Attorney General)*, 2017 NSCA 22, para. 3; *Ghosn v. Halifax (Regional Municipality)*, 2016 NSCA 90, paras. 20-21; *West Hants District (Municipality) v. Nova Scotia (Utility and Review Board)*, 2016 NSCA 57, paras. 12-15; *Richmond County (Municipality) v. Nova Scotia (Attorney General)*, 2016 NSCA 11, paras. 16-25 (correctness applied to constitutional issue only); *Martell v. Halifax (Regional Municipality)*, 2015 NSCA 101, paras. 12-13; *Northern Construction Enterprises Inc. v. Halifax (Regional Municipality)*, 2015 NSCA 43, paras. 27-28; *Cape Breton Explorations Ltd. v. Nova Scotia (Attorney General)*, 2015 NSCA 35, paras. 40-41.

[59] Those passages cite authorities of this Court to the same effect from before 2015.

[60] One statute in the Board's bailiwick is the *Expropriation Act* which, by ss. 3(1)(aa), 24 and 47(1), says the Board is to determine compensation and related issues in accordance with the provisions of that *Act*. This means s. 22(2) of the *UARB Act* authorizes the Board to "determine all questions of law and of fact" in an expropriation proceeding such as this one.

[61] Clearly the *Expropriation Act* is "related legislation that [the Board] might often encounter in the course of [its] functions" [*Edmonton (City)*, para. 33] and is a statute "closely connected to its function, with which it will have particular familiarity" [*Alberta Teachers'*, para. 34]. This triggers the presumption that the reasonableness standard applies.

[62] *Nova Scotia v. Johnson*, 2005 NSCA 99, leave denied [2005] S.C.C.A. no. 446, was an expropriation appeal from the Utility and Review Board. This Court applied correctness for issues of pure law and patent unreasonableness for issues of mixed law and fact:

> [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. [bolding added]

[63] *Johnson* pre-dated *Dunsmuir*, the re-structuring of three standards into two, *Dunsmuir*'s definition of reasonableness methodology and the formal presumption of reasonableness for the interpretation of "home and related statutes". Since *Johnson*, the Supreme Court of Canada has thoroughly refashioned the landscape. As Justice Moldaver put it in *McLean v. British Columbia*, *supra*:

> [33] … as this Court has repeatedly indicated since *Dunsmuir*, … the resolution of unclear language in an administrative decision maker's home statute is usually best left to the decision maker. …

In *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, [2013] 1 S.C.R. 594, para. 16, the Supreme Court applied reasonableness to the judicial review of an expropriation award. To similar effect: *Smith v. Alliance*, paras. 23-27 and *Teal Cedar Products*, paras. 74-75, 79.

[64] *Yarmouth (Town) v. Gateway Importers and Exporters Ltd*., 2011 NSCA 17, and *Guysborough (District) v. PEV International Research and Development Incorporated*, 2012 NSCA 87, were appeals from expropriation rulings of the Utility and Review Board. Both decisions post-dated the Supreme Court of Canada's enunciation of the "home and related statute" presumption of reasonableness. This Court accepted reasonableness as the standard of review: *Yarmouth*, paras. 4, 15, 21, 22, 25; *Guysborough*, paras. 15-17. In *Guysborough*, Justice Hamilton (para. 16) quoted the following from this Court's decision in *Nova Scotia (Assessment) v. van Driel*, 2010 NSCA 87, para. 14, a property assessment appeal from the Utility and Review Board:

> … Reasonableness governs the Board's use of its institutional expertise to apply and administer its home statutes, including the *Assessment Act*.

In *Guysborough*, Justice Hamilton then said:

> [17] While this appeal concerns expropriation rather than assessment, the same standard applies.

[65] The courts of other provinces similarly have held that a tribunal's interpretation of an expropriation statute is reviewed for reasonableness: *e.g. D.D.S. Investments Ltd. v. Toronto (City)* (2010), 261 O.A.C. 12 (Div. Ct.), para. 36; *Houle v. Manitoba*, [2016] M.J. No. 223 (C.A.), para. 22; *Zahmol Properties Ltd. v. Calgary (City)*, [2012] A.J. No. 284 (C.A.), para. 9.

[66] The legal issues in this appeal turn on the interpretation of provisions in the *Expropriation Act*, particularly ss. 2(1) for statutory purpose, ss. 26(b), 27(2) and 27(3) for disturbance compensation and s. 53(4) for interest. As I will discuss, the analyses of those issues involve a choice whether to imply criteria to modify general statutory standards. See below paras. 79-97, 108-113, 121-26, 157 and 210. Those choices pivot significantly on the application of the *Act*'s policy and objectives. That is a "home statute" function under the Supreme Court's directives for selection of a standard of review. The Board's interpretation of those provisions is subject to the presumption of reasonableness and nothing in this case rebuts the presumption. Reasonableness governs all the appealable issues on this appeal and cross-appeal.

[67] What does reasonableness mean?

[68] Generally, the reviewing court follows the tribunal's reasoning path to assess whether the tribunal's reasoning is understandable and leads to an outcome that is permitted by the legislation. If the answer is Yes, the court does not ask whether the court would prefer another outcome. *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708, paras. 14-17, per Abella J. for the Court; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, [2013] 2 S.C.R. 458, para. 54, per Abella J. for the majority; *McLean*, *supra*, paras. 32-33.

[69] On the other hand, "[w]here the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable – no degree of deference can justify its acceptance": *McLean*, para. 38.

[70] Recently, in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, Justice Gascon for the majority summarized:

> [55] … When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute (*McLean*, at para. 33). Reviewing

> courts must also refrain from reweighing and reassessing the evidence considered by the decision maker (*Khosa* [*Canada (Citizenship and Immigration v. Khosa*, [2009] 1 S.C.R. 339], at para. 64). At its core, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court's preferred solution.

Issue #1 – Entitlement to Compensation for Disturbance

[71] The following provisions of the *Expropriation Act* pertain to disturbance:

> PART III
>
> COMPENSATION
>
> …
>
> 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 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.
>
> 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.
>
> (3) Where the owner of land expropriated **was in occupation** of the land at the time the expropriation document was deposited in the registry of deeds and, as a result of the expropriation, it has been necessary for him to give up occupation of the land, 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 the 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 determined as set forth in subclause (i),
>
> plus the market value to the owner of any element of special economic advantage to him arising out of or incidental to his occupation of the land, to the extent that no other provision is made by this clause for the inclusion thereof in determining the value of the land expropriated.
>
> [emphasis added]
>
> . . .
>
> Business loss from relocating and loss of goodwill
>
> 29(l) 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 has been in operation for twelve months or until a three-year period has elapsed from the date of expropriation, whichever occurs first.
>
> (2) Where it is not feasible for the owner of a business to relocate, there shall be included in the compensation payable an amount for the loss of the business where the compensation for the land taken is based on the existing value of the land.
>
> (3) For the purposes of determining the compensation for loss of goodwill, the value of goodwill shall be determined in accordance with generally accepted accounting principles.

[72] Under ss. 26(b) and 27(3), the Board awarded $6,739,281 for "Business losses/disturbance damages" plus $37,000 for "Other Claims – Fencing".

[73] In this Court, the Province submits that Central is not entitled to disturbance compensation for five reasons:

- under s. 27(3), the owner must be in "actual" occupation of the land at the expropriation date and Central's land was not actually occupied at that date;

- the actual occupation must be by the owner's "business", rather than in another capacity;
- disturbance compensation is unavailable for losses that predate the deposit of the expropriation document at the Registry of Deeds; and
- disturbance compensation is recoverable only when the entire parcel is taken, and not after a partial taking;
- Central's awards of market value and disturbance compensation offend the formula in s. 27(3).

[74] I will address these points in turn.

[75] **First – meaning of "occupation"**: Section 27(3) prescribes as a condition for recovery of disturbance damages that "the owner of land expropriated was in occupation of the land at the time the expropriation document was deposited".

[76] The Province submits that "occupation" means "actual occupation" which requires an operating business structure. The Province's factum says:

> 32. … As of the date of expropriation, Central was not actually occupying the lands expropriated as part of the expanded retail/distribution centre which it said it was going to construct in 2001, which is what the Board assessed loss for. …
>
> 33. "Occupation" means "actual occupation" at the date of expropriation when read in context with other sections of the *Act* ….
>
> …
>
> 39. The pre-expropriation damages sought in this claim were not based on actual occupation by the owner of the expropriated lands on the date of expropriation. It was an error by the Board to interpret the section to allow compensation without considering the actual occupation being made by Central on the lands as of the date of expropriation. ...

[77] The Board's definition of "occupation" in s. 27(3) is an appealable issue of law and is governed by reasonableness.

[78] The *Expropriation Act* does not define "occupation". Neither does s. 27(3) use the adjective "actual" or say that "occupation" must involve "use of a building". The Province asked the Board to read in those qualifications by implication.

[79] The Board (paras. 665, 667) noted that "occupation" was undefined, then turned to the statute's objective, context and scheme. This is consistent with the accepted approach to legislative interpretation.

[80] As to the legislative objective, the Board (para. 675) cited the *Interpretation Act*, R.S.N.S. 1989, c. 235, s. 9(5)(c), that the legislation is to be interpreted as remedial to achieve its object. The Board said the *Expropriation Act*'s object was full compensation:

> [676] The Board considers that "the 'object to be attained' in the [*Expropriation*] *Act* is the full compensation of a land owner whose property has been taken. This is confirmed in *Dell* [*Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32] and recognized by the Board in previous decisions. The Board also considers that it should interpret the *Act* to consider the "mischief to be remedied." Thus, it should not interpret the provision of the *Act* and, in particular, s. 27(3) so as to interfere with or prevent compensation by a narrow interpretation of occupation.

[81] The Board's view is consistent with s. 2(1) of the *Act*: "[i]t is the intent and purpose of this Act that every person whose land is expropriated shall be compensated for such expropriation". It also applies the Supreme Court of Canada's directives on the interpretation of expropriation statutes: *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32, paras. 20-21, 23, 26-27 (quoted below, para. 104).

[82] As to context and scheme, neither ss. 26(b) nor 27(3) refers to "actual" occupation. The Board (para. 665) noted that s. 26(d) requires "actual occupation" for recovery of the value of a "special economic advantage". From that juxtaposition, the Board deduced that s. 27(3) contemplated something wider than "actual" occupation.

[83] Absent a statutory definition of "occupation", the Board (para. 667) sought guidance from the common law. The Board cited *Morrison v. Muise*, 2010 NSSC 163, which (para. 26) adopted a passage from Professor Anne La Forest's well-known text, Anger and Honsberger, *The Law of Real Property*, 3rd ed. (Aurora: Canada Law Book, 2006), p. 29-19 – 29-20:

> Whether there has been sufficient possession of the kind contemplated by the statute is **largely a question of fact in each case in which due regard is to be had to the exact nature and situation of the land in dispute**. Possession must be considered in every case **with reference to the peculiar circumstances**, for the facts constituting possession in one case may be wholly inadequate to prove it

> in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to their own interests, are factors to be taken into account in determining the sufficiency of possession. [bolding added; footnotes omitted]

[84] From this perspective, the Board (para. 667) concluded that "what constitutes occupation depends on the nature of the land".

[85] To apply that test, the Board turned to the evidence on the nature of Central's land.

[86] The Board found that the evidence established Central's "occupation" at the date of expropriation:

> [669] Additionally, the photographic evidence referred to by Mr. MacIntosh and the evidence of Mr. Smith persuade the Board that areas of the taking were occupied by the owner, Central, and that it constructively occupied and controlled the other areas, including the southern remnant.
>
> [670] The matter is distinguishable from *Harrison Blueberry* where the Board found there was no evidence of occupation.

[87] On May 6, 2016, the Chair attended at the site for a visual inspection (Decision, paras. 553-57). This Court has not had such an opportunity.

[88] The record contains many aerial and surface photographs, taken at various dates. The photos were discussed in the appraisal reports and in the testimony. That evidence supports the Board's findings in para. 669.

[89] Central's memorandum to the Board (Appeal Book, Vol XII, pp. 7902-08, paras. 48-69) fairly describes the particulars of Central's usage that appear from the evidence.

[90] Some of the taken parcel was treed or wetland. Much was cleared and grubbed by Central. Central had trenched, excavated and harvested lumber, and installed pathways. Central had placed storage containers and a gas tank, at one point a greenhouse, and utilized a laydown area for lumber materials. Central's trucks used the property, leaving tracks. Central exerted control over the land to support its operations.

[91] The Province emphasizes that Central had no actively functioning buildings on the taken parcel when the expropriating document was filed at the registry on

May 1, 2012. That was because, on May 30, 1998, the Province warned Central the parcel might be expropriated and, as Central had been told of the pending expropriation, there would be no compensation for future capital improvements on the land. But for that warning, in the normal course Central would have erected structures (Board's findings quoted above, paras. 12-13, 32-33, and below, paras. 148-49 and 206). It was the Province's warning that disturbed Central's planned use of the land. Now, with deft sleight of hand, the Province says that Central's failure to erect a structure by May 1, 2012 disentitles Central to compensation for that disturbance.

[92] Later (para. 104), I will refer to the remedial interpretive principles that govern an expropriating statute. Rewarding the expropriating authority's disingenuous stewardship of the process isn't one of them.

[93] The passage from Professor La Forest's text, cited above, says "[p]ossession must be considered in every case with reference to the peculiar circumstances". Those circumstances, in Central's case, include the ongoing chill from the Province's warning to Central on May 30, 1998.

[94] When the expropriating document was filed at the registry, Central had tailored its usage of the taken parcel to suit its objectives, though the nature of that usage had been constrained by the Province's warning on May 30, 1998. The Board concluded that Central's usage sufficed as occupation.

[95] The Board applied the proper test, then found as a fact that there was occupation at the critical date. Except in the limited circumstances described above (paras. 45-47), findings of fact are not appealable to this Court under s. 30(1) of the *UARB Act*.

[96] The Board's reasoning path was understandable. The steps in its interpretation of "occupation" were permitted by the legislation and authorities. The Board's findings of occupation were supported by evidence.

[97] The Board's ruling that Central "was in occupation of the land" under s. 27(3) was reasonable.

[98] **Second – occupation by the "business:** The Board said:

> [668] Further, the Board agrees with Mr. MacIntosh that it is the owner, and not the business, which must be in occupation.

[99] The Province's factum, without citing authority, submits that mere occupation by an "owner" is insufficient. Rather, the owner must occupy in a "business" capacity:

> 40. The Board erred in finding that it is only the owner, and not the business that must be in occupation of the lands under s. 27(3). …
>
> 42. Central is a business, and is claiming business losses under disturbance damages as a business. "Occupation" by the owner, therefore, as required under Section 27 is actual occupation by the owner's business on the lands expropriated at the date of expropriation.

[100] Section 27(3) says simply disturbance is compensable "[w]here the owner of land expropriated was in occupation". It neither qualifies occupation nor says that an owner's atypical occupation will be uncompensated. In any case, Central was both owner and operator of the business and its occupation served the business. There is neither a legal nor an evidential basis to split Central's occupational personality. The Board reasonably applied the plain meaning of the statute.

[101] **Third – losses pre-dating deposit of the expropriation document:** The Province submits that Nova Scotia's *Expropriation Act* does not compensate for disturbance losses that pre-exist the deposit of the expropriation document in the Registry of Deeds which, in Central's case, was May l, 2012.

[102] The Board disagreed. The Board held that expropriation is a process, not an event, and Central's disturbance losses were caused by an early step in the process. So the losses were recoverable. The Board applied the principles stated by Cory J. for the majority in *Dell*. The Board's Decision says:

> [741] The Board agrees that expropriation is a process. It is a process that should be broadly and liberally interpreted, and not restrictively interpreted. In *Dell*, just prior to the passage quoted by the Province, the Court said:
>
> > The courts have long determined that the actual act of expropriation of any property is part of a continuing process. [*Dell*, para. 37]
>
> [742] The Court went on to say, at paragraph 42, before embarking on its analysis of *Shun Fung* [*Director of Buildings and Lands v. Shun Fung Ironworks Ltd.*, [1995] 2 A.C. 111 (P.C.)]:
>
> > It would be unfair if Dell were to be denied compensation for disturbance damages simply because the nature of its business was such that no action could be taken to mitigate the damages caused by the expropriation. Indeed, damages caused by the expropriation can and frequently do occur prior to the actual date of expropriation. In my view, the expropriated

> party should be and is entitled to recover those damages. I find support for that conclusion in the reasoning and conclusions set out in *Shun Fung, supra*. [Board's underlining]

[103] In this Court, the Province submits that *Dell* applied Ontario's *Expropriations Act* whose wording differed materially from Nova Scotia's ss. 26(b) and 27(3). The Province says the Board erred in law by applying *Dell*.

[104] To address the submission, it is necessary to understand *Dell*:

- Dell Holdings was a land developer. It owned 40 acres for which it had applied to the City for residential development approval. Meanwhile, the Toronto Transit Authority was considering two sites for a transit station. Both were on Dell's land. The City withheld development approval for Dell's residential project until the Toronto Transit Authority decided which parcel it wanted. While the Toronto Transit Authority was considering which parcel to expropriate, the development of Dell's un-expropriated parcel was delayed for two years.

- Ontario's Municipal Board held that Dell's losses from that delay, quantified at $500,000, were recoverable disturbance damages under s. 13(2)(b) of the *Expropriations Act*, R.S.O. 1980, c. 148. The Board found that the delay was caused by an integral step in the expropriating process – namely, the decision of which parcel to acquire. The Board held that Dell was entitled to pre-expropriation disturbance damages caused by that delay as if the damages arose from the expropriation itself (Board's reasons summarized in Cory J.'s Decision, para. 6).

- The pertinent provisions of Ontario's *Expropriations Act* said (Supreme Court's reasons, para. 5):

> 13(l) Where land is expropriated, the expropriating authority shall pay the owner such compensation as is determined in accordance with this Act.
>
> (2) Where the land of an owner is expropriated, **the compensation payable to the owner shall be based upon**,
>
> (a) the market value of the land;
>
> (b) **the damages attributable to disturbance**;
>
> (c) damages for injurious affection; and
>
> (d) any special difficulties in relocation,

> but, where the market value is based upon a use of the land other than the existing use, no compensation shall be paid under clause (b) for damages attributable to disturbance that would have been incurred by the owner in using land for such other use.
>
> …
>
> 18(l) **The expropriating authority shall pay** to an owner other than a tenant, **in respect of disturbance, such reasonable costs as are the natural and reasonable consequences of the expropriation, including**,
>
> …
>
> (b) where the premises taken do not include the owner's residence, the owner's costs of finding premises to replace those expropriated, provided that the lands were not being offered for sale on the date of expropriation; and
>
> (c) relocation costs, including,
>
> (i) the moving costs, and
>
> (ii) the legal and survey costs and other non-recoverable expenditures incurred in acquiring other premises.
>
> 19(1) Where a business is located on the land expropriated, the expropriating 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 expropriating authority otherwise agree, the business losses shall not be determined until the business has moved and been in operation for six months or until a three-year period has elapsed, whichever occurs first.
>
> [emphasis added]

- The Divisional Court and Court of Appeal held that Dell's damages were not compensable. Both courts held that pre-expropriation delay was not "disturbance", under Ontario's *Expropriations Act*. The Supreme Court of Canada allowed the appeal and restored the Municipal Board's award.

- Justice Cory for the majority (6 of 7 judges) began with the legislative objective. He said (para. 19) that the *Expropriations Act* "is clearly a remedial statute enacted for the specific purpose of adequately compensating those whose lands are taken to serve the public interest". From that objective, Cory J. extrapolated the interpretive principles for an expropriating statute:

> 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. [citations omitted]
>
> 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. …
>
> …
>
> 23. It follows that the *Expropriations 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 has been taken.
>
> [bolding added]

- Cory J. then characterized Dell's claim:

> 24. … In essence, as the Divisional Court described it, the damages represented the financial loss suffered from the extra costs incurred and profits which were lost as a result of the delay by the Authority in acquiring the site. …

- Ontario's s. 13 was the menu for compensation. Cory J. cited s. 13, then said:

> 26. This, then, is a charging section which provides that compensation is to be awarded on the total of the amounts calculated under each of the four components. I agree with the view expressed by K.J. Boyd in *Expropriation in Canada* (1988), at p. 109, that the objective of these provisions is to ensure "that on the one hand double recovery does not occur, and on the other hand that no legitimate item of claim is overlooked". Indeed, the overriding objective of the entire Act is to provide **fair and proper indemnity** for the owner of the expropriated land. … [bolding added]

- Next Cory J. turned to disturbance damages, governed by s. 13(2)(b):

> D. *How Should the Provisions as to Disturbance Be Interpreted?*
>
> 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* [*Laidlaw v. Toronto (Municipality)*, [1978] 2 S.C.R. 736], Spence J., on behalf of the Court, attached **particular significance to three factors**: <u>first</u>, the legislative intent to provide indemnity for losses suffered; <u>second</u>, that the right to disturbance damages is conferred in broad, inclusive language and, <u>third</u>, that the

> legislature chose to illustrate, but not define the term "disturbance": [passage from pp. 744-45 of *Laidlaw* omitted]
>
> Thus it is clear that the Act should be interpreted in a broad, liberal and flexible manner in considering the damages flowing from expropriations. [Cory J.'s underlining] [bolding added]

- Cory J. then determined that Dell's delay damages were a "natural and reasonable consequence of the expropriation" under s. 18(1):

> 28. … When the Authority determined that some portion of Dell's 40 acres might be required for a GO Station, that entire parcel of land was frozen. The municipality could not grant zoning approval for the development of any part of the property within the 40 acres. … It follows that **it was the expropriation which caused the delay**. Damages resulting from the delay in the development are therefore **the natural and reasonable consequence of the expropriation**. [bolding added]

- Cory J. squarely rejected the submission that losses occurring before the formal expropriation could not be caused by the expropriation. He said:

> H. *The Process of Expropriation*
>
> 37. **The courts have long determined that the actual act of expropriation of any property is part of a continuing process.** In *McAnulty Realty* [*City of Montreal v. Daniel J. McAnulty Realty Co.*, [1923] S.C.R. 273], at p. 283, Duff J. noted that the term "expropriation" is not used in the restrictive sense of signifying merely the transfer of title but in the sense of the process of taking the property for the purpose for which it is required [Cory J.'s underlining]. Thus whether the events that affected the value of the expropriated land were part of the expropriation process, or, in other words, a step in the acquisition of the lands, is a significant factor for consideration in many expropriation cases. See *Tener, supra*, at pp. 557-59. Here there can be no doubt that Dell's land would have come on stream for sale as developed lands in 1981 rather than 1984 but for the process of expropriation. **Damages should therefore be awarded for the losses occasioned as a result of the process of expropriation.**
>
> I. *Should Compensation Be Payable for Damages Which Arose Prior to the Actual Expropriation?*
>
> 38. The Court of Appeal accepted the approach taken by the Divisional Court which characterized the delay in this case as "pre-expropriation delay" which was not compensable. With respect **I cannot agree** with that position. The approach to damages flowing from expropriation should not be a temporal one; rather it should be based upon causation. It is not uncommon that damages which occurred before the expropriation can in fact be caused by that very expropriation. …

…

42. … Indeed, **damages caused by the expropriation can and frequently do occur prior to the actual date of expropriation**. In my view, **the expropriated party should be and is entitled to recover those damages.** I find support for that conclusion in the reasoning and conclusion set out in *Shun Fung* [*Director of Buildings and Lands v. Shun Fung Ironworks Ltd.*, [1995] 2 A.C. 111 (P.C.)]

43. … The claimant [in *Shun Fung*] sought compensation for loss of profit which occurred in the "shadow period" after the announcement of the intended expropriation but before the land was actually taken. The majority of the Law Lords found that the losses sustained in this period were caused by the expropriation and that damages should be awarded. Lord Nicholls of Birkenhead put forward his position in this way (at pp. 135-37):

> This claim raises the question whether a loss occurring *before* resumption can be regarded, for compensation purposes, as a loss *caused* by the resumption. At first sight the question seems to admit of only one answer. Cause must precede effect. That is a truism. A loss which precedes resumption cannot be caused by it. Hence, it is said with seemingly ineluctable logic, a pre-resumption loss cannot be the subject of compensation.
>
> The difficulty with this approach is that it leads to practical results from which one instinctively recoils. Pursued to its logical conclusion it would mean that the businessman who moves out the week before resumption cannot recover his removal expenses; he should have waited until after resumption. It would also run counter to the reasoning underlying *Pointe Gourde Quarrying and Transport Co. v. Sub-Intendent of Crown Lands*, [1947] A.C. 565. A landowner cannot claim compensation to the extent that the value of his land has increased by the very scheme of which the resumption forms a part. The principle applies also in reverse. A loss in value attributable to the scheme is not to enure to the detriment of a claimant [citation omitted]. The underlying reasoning is that if the landowner is to be fairly compensated, scheme losses should attract compensation but scheme gains should not. Had there been no scheme those losses and gains would not have arisen. <u>But if business losses arising in the period post-inception of the scheme and pre-resumption are to be left out of account, a claimant will not receive compensation for those losses although they were attributable to the scheme.</u> … [Cory J.'s underlining]

…

> The starting point for a consideration of this conundrum must be to remind oneself that, far from furthering the legislative purpose of providing fair compensation, the Crown's contention would have the opposite effect. It would stultify fulfilment of that purpose. Coming events may cast their shadows before them, and resumption is such an event. **A compensation line drawn at the place submitted by the Crown would be highly artificial, for it would have no relation to what actually happens. That cannot be a proper basis for assessing compensation for loss which is in fact sustained.** [bolding added]
>
> 44. He [Lord Nicholls of Birkenhead] summarized his position in this way at pp. 137-38:
>
> > … losses incurred in anticipation of resumption and because of the threat which resumption presented are to be regarded as losses caused by the resumption as much as losses arising after resumption. …
>
> 45. I am in complete agreement with these reasons….

Cory J. noted (para. 35) that the term "resumption" used in *Shun Fung*'s reasons was synonymous with expropriation.

[105] The Supreme Court has reiterated the application of *Dell*'s approach to the interpretation of expropriation statutes: *Smith v. Alliance*, para. 55; *Teal Cedar Products*, para. 91.

[106] The Province submits that *Dell* does not apply to Central's case because Nova Scotia's statute has different wording than Ontario's.

[107] I disagree. The elements that supported Cory J.'s interpretation of Ontario's provisions exist in Nova Scotia's provisions, though their placement differs:

- Nova Scotia's s. 2(1) says "[i]t is the intent and purpose of this Act that every person whose land is expropriated shall be compensated for such expropriation". This represents the legislative intent to indemnify for losses caused by the expropriation, *i.e.* the first of the three factors that Cory J. (para. 27) cited from the reasons of Spence J. in *Laidlaw*.

- Ontario's ss. 13(2)(b) and 18(1) say that compensation "shall" relate to damages "attributable to disturbance" that are "the natural and reasonable consequences of the expropriation".

Nova Scotia's ss. 26(b) and 27(3)(b)(ii) each say that the owner shall be compensated for the costs, expenses and losses "arising out of or incidental to the owner's disturbance". Nova Scotia's "or incidental to" is, if anything, broader than Ontario's formulation.

- Nova Scotia's s. 26(b) provides that compensation shall be the reasonable costs, expenses and losses "determined as hereinafter set forth". The Province notes that "determined as hereinafter set forth" does not appear in Ontario's statute.

Nova Scotia's "determined as hereinafter set forth" incorporates the formulae to quantify the losses set out in ss. 27(3) and 29. Section 29 compensates for "business loss resulting from the relocation", does not use the term "disturbance", and does not pertain to Central's claim. Section 27(3)(b)(ii) is wider and compensates for "the costs, expenses and losses arising out of or incidental to the owner's disturbance **including** …". This is akin to Ontario's s. 18(1) that compensates for costs "including …"

Both statutes use the "inclusive" formulation for disturbance losses. This is *Laidlaw*'s second factor that Cory J. (para. 27) cited in *Dell*.

- Cory J. (para. 27), citing *Laidlaw*'s third factor, thought it was significant that Ontario's statute did not define "disturbance". Neither does Nova Scotia's *Expropriation Act*. So "disturbance" has its common meaning, as Cory J. described it in *Dell*:

> 31. … the entire business of developing the land was disturbed during the waiting period. These damages were suffered as a consequence of the disturbance of Dell's land development business, which included both the expropriated and remaining lands.

- The formula in Nova Scotia's s. 27(3)(b) (compensation for disturbance losses plus market value of existing use) is phrased somewhat differently than the equivalent passage at the end of Ontario's s. 13(2). The difference is immaterial to this case because, as discussed later (paras. 127-39), Central's award of market value assumed the existing use, meaning the disturbance award satisfies the formula in s. 27(3)(b).

- Nova Scotia's s. 27(3) says that the owner's "occupation of the land at the time the expropriation document was deposited in the registry" is a prerequisite to disturbance damages. The Province correctly points out that no such condition appears in Ontario's statute.

> The condition means that, had Central not occupied the land at the date of deposit, Central would be disentitled to compensation for disturbance. Here, the Board found that Central was in occupation at that date. As discussed above, the Province's appeal from that finding should be dismissed. Central satisfied the prerequisite.

[108] The crux of the Province's submission is the proposition that Nova Scotia's *Expropriation Act* effectively says:

> The owner is not entitled to disturbance compensation for losses that occurred before the deposit of the expropriation document at the Registry of Deeds.

Consequently, according to the Province, all losses caused by an earlier step in the expropriation process – however clear the disruption, direct the linkage to the expropriation process and substantial the proven loss – are unrecoverable by law.

[109] The difficulty with the Province's proposition is that the *Act* doesn't say it. Rather, ss. 26(b) and 27(3)(b)(ii) combine to say that an owner (who occupied at the date the expropriating document was filed) "shall be" compensated for the losses "arising out of or incidental to the owner's disturbance", with "disturbance" being undefined. The Province's proposition would have to be read in by implication.

[110] The question for the Board was – Does the *Expropriation Act* impliedly adopt the Province's proposition? The Board said – No.

[111] The question for this Court is – Did the Board's reasoning on that point intelligibly lead to an outcome that is permitted by the *Expropriation Act*?

[112] To address that question, it is helpful to identify some features of the Province's proposition:

- The proposition conflicts squarely with Cory J.'s ruling that expropriation is a continuing process, not an event, and a disturbance loss caused by an early step in the process is compensable.
- It is antithetical to the rationale for that ruling, adopted by Cory J. from Spence J.'s decision in *Laidlaw*, Duff J.'s ruling in *McAnulty Realty* and particularly the Privy Council's compelling reasons in *Shun Fung*.
- It is inconsistent with the authorities throughout Canada that have applied *Dell*'s ruling that expropriation is a process, not an event, with

consequences for compensation: *e.g. Bernard Homes Ltd. v. York Catholic District School Board* (2004), 188 O.A.C. 115 (Div. Ct.), paras. 41-42; *D.D.S. Investments Ltd. v. Toronto (City)* (2010), 261 O.A.C. 12 (Div. Ct.), paras. 31-33; *Toronto (City) v. Simone Group Properties Ltd.* (2012), 303 O.A.C. 354 (Div. Ct.), paras. 23-24; *Thunderbird Entertainment Ltd. v. Greater Vancouver Transportation Authority*, 2011 BCSC 636, para. 162, appeal dismissed 2012 BCCA 294; *Jardins Lachenaie inc. v. Québec (Attorney General)*, [2006] R.J.Q. 619 (C. du Q.), para. 278.

- By denying compensation for a proven economic loss caused by the expropriation, the Province's proposition would stifle the Legislature's declaration in s. 2(1) that "[i]t is the intent and purpose of this Act that every person whose land is expropriated shall be compensated for such expropriation".

- The proposition thwarts Cory J.'s exposition of that interpretive directive – *i.e.* unless there is clear legislative language to the contrary, an expropriation enactment should be construed to indemnify the owner for losses that are a proven consequence of the government's exercise of its ultimate power of eminent domain.

[113] If the Province wants to deny compensation for a proven economic loss caused by the Province's expropriation process, the Province should invite the Legislature to say so by clear wording. It is not for the Board or reviewing court to patch penurious implications over holes in this remedial statute.

[114] The Board's ruling is reasonable under the standard of review.

[115] **Fourth – partial taking**: In *Johnson*, *supra*, this Court said:

> [202] … 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. [bolding added]

[116] Only part of Central's land was expropriated. The Province submitted that *Johnson* precludes Central's recovery of disturbance damages.

[117] In *Dell*, the Supreme Court explicitly rejected that submission. Cory J. said:

> F. *Should Disturbance Damages Be Limited to Losses Which Can Be Related Only to the Expropriated Land and not to any Remaining Portion of the Land?*

> 29. The Authority contended that disturbances damages are only available if they arise in relation to the expropriated land itself and not to any adjoining land which the owner retained after the expropriation**. I cannot accept that position.** There is nothing in the words of the section to indicate that there should be such a restriction imposed on those disturbance damages which can accurately be described as the natural and reasonable consequences of an expropriation. If it is a reasonable and natural consequence of the expropriation that the owner experiences losses with regard to the remaining land then this, just as much as losses relating solely to the expropriated land, must come within the definition of disturbance damages. If it had wished to do so, the legislature could have limited disturbance damages to the expropriated land. However it chose to enact an open-ended and flexible definition. …
>
> 30. The reasons expressed by Donnelly J., in *Lafleche v. Ministry of Transportation and Communications* (1975), 8 L.C.R. 77 (Ont. Div. Ct.), are in my view correct and apposite. … Donnelly J. on behalf of the court stated:
>
> > We adopt the statements of the Land Compensation Board in *Blatchford Feeds Ltd. v. Board of Education for City of Toronto* (1974), 6 L.C.R. 355, where it was stated at p. 388 that the Act clearly intends to provide a statutory code of full and fair compensation for lands expropriated and that the Act is intended to provide full and fair compensation <u>for all aspects of disturbance damages</u> provided the damage incurred is not too remote and is the natural and reasonable consequence of the expropriation. [Cory J.'s underlining]
>
> **This is, I think, the appropriate approach to take to disturbance damages.** [bolding added]

[118] In Central's case, the Board (paras. 672-81) analyzed the Province's submission and, based on Cory J.'s para. 29, concluded:

> [680] Provided there is a causal connection and they are not too remote, the Board finds that business losses may be compensated under s. 27(3). The Board concludes this is so in the event of any expropriation, whether full or partial, and that, as noted in *Dell*, a remnant parcel may suffer disturbance damages.

[119] On appeal, the Province repeats its submission that para. 202 of *Johnson* bars disturbance compensation after a partial taking in Nova Scotia.

[120] I respectfully disagree.

[121] Nothing in the *Expropriation Act* excludes compensation for a proven disturbance loss caused by a partial taking. The Supreme Court of Canada's ruling in *Dell* explicitly supports the availability of such a claim. If, in *Johnson*, this Court had meant to bar such a claim as a matter of law, one would see in the

Court's reasons some reference to a supporting provision in the *Act* and an explanation of why *Dell* is distinguishable.

[122] The Province's position would mean that an expropriating authority could avoid paying disturbance compensation simply by leaving a bite-sized parcel un-expropriated. If *Johnson* had intended to make a binding pronouncement of law, the Court's reasons would have addressed that artifice.

[123] In *Johnson*, the Court said:

> [196] … The case law wherein s. 27(3) has been considered has **usually** involved the relocation of a business. … [bolding added]

[124] Disturbance loss is more likely when there is an entire taking, after which relocation is the owner's only option. With a partial taking, depending on the circumstances, the owner may have the option of remaining on the remnant parcel and may adjust the usage perhaps with minimal or no disturbance. The Court's reference to what "usually" occurs signals a factual distinction.

[125] I read the statement in *Johnson*'s para. 202 as addressing the circumstances of that case, by an *obiter* comment after the Court had rejected the claim on other grounds.

[126] Compensation for a proven disturbance loss caused by a partial taking is available in appropriate cases under Nova Scotia's *Expropriation Act*. The Board's conclusion, applying *Dell*, is reasonable.

[127] **Fifth – the formula in s. 27(3):** Section 27(3) says the compensation shall be the greater of:

> (a) the market value of the taken parcel, calculated under s. 27(2) at the parcel's highest and best use; and
>
> (b) the total of the disturbance losses plus the market value of the taken parcel based on its existing use at the date of the taking.

Depending on the numbers, option (a) may exceed option (b) when the highest and best use is appreciably more valuable than the existing use with which the disturbance losses are associated. On the other hand, if the market value under s. 27(2) assumes the existing use, the proven disturbance losses are recoverable.

[128] The formula rests on common sense. The owner may not recover two heads of compensation derived from mutually exclusive assumptions. If the current use is sustenance farmland, but the land is suited for conversion to a more profitable use for a shopping centre, then the owner may recover the higher of (a) the market value of the land's potential use as a shopping centre, or (b) the market value of the farming use plus the owner's disturbance losses to sustain the farming. As a farm and a shopping centre would not coexist, the owner cannot have both.

[129] The Province says the Board's award offended s. 27(3). The Province submits that the Board's award of market value assumed a higher and better use than the existing use for which disturbance losses were awarded.

[130] To address this submission, it is necessary to discuss the valuation evidence.

[131] The Board had appraisal reports from Mr. Daniel Doucet of Altus Group Limited for Central, and Mr. John Ingram of ARA Ingram Varner for the Province. The reports dealt with the market value of the taken parcel and injurious affection.

[132] The Board accepted Mr. Doucet's appraisal and rejected Mr. Ingram's. The Board set out various reasons (paras. 581-93) for its finding that Mr. Doucet's opinion was more reliable. The Board concluded:

> [593] After considering these matters, the Board accepts Mr. Doucet's opinion of the market value of the taking at $630,000, less $14,625 as estimated by Alva Construction (Exhibit S-17), for a total compensation for market value of the land taken of $615,375.

[133] Mr. Doucet used the direct sales comparison approach. He examined eleven transactions in the Antigonish area, adjusted for time and comparability, then arrived at a market value of $1.50 per square foot for the land. The total came to $630,000. The Board subtracted $14, 625, being a contractor's estimate to fill and compact part of the land for use as a laydown area.

[134] Mr. Doucet testified that Central held the parcel as a site for future development of Central's business. That was consistent with Mr. Smith's evidence. Mr. Smith spoke of his plans for a distribution centre and retail outlet which were delayed because of the prospective expropriation (above, paras. 9, 15, 32-33, and below paras. 148-49).

[135] Mr. Doucet valued the parcel as a continuation of that use. His report, p. 38, said:

> **Highest and Best Use – "Before the Antigonish By-pass"**
>
> In the absence of the construction of the Antigonish By-pass, the highest and best use of the property would have been the continuation of the current use as a distribution centre and truss plant with +/- 28.83 acres of available land suitable for continued expansion of the business.
>
> **Highest and Best use – "The Taking"**
>
> The highest and best use of the taking is part of the larger parent property. The "taking lands" would have been used to expand the site.

[136] Counsel for the Province cross-examined Mr. Doucet at length on highest and best use. Mr. Doucet was adamant that the use underlying his valuation was a continuation of the use for which Central held the land before the expropriation. The Board accepted Mr. Doucet's opinion. The Province has cited nothing to suggest that the Board's view was unreasonable or erroneous in law. In this Court, the Province's submission basically reiterates the proposition that made no headway in Mr. Doucet's cross-examination.

[137] Mr. Doucet's use for market value matched the premise of the PwC valuators for their calculation of the delay costs that constituted the disturbance claim.

[138] PwC assumed (and the Board found) that, but for the shadow of expropriation that emanated in May 1998, Central would have used the taken parcel for a distribution centre and "big box" retail outlet. Given the expropriation process, Central first delayed that development, then made alternate arrangements elsewhere. PwC calculated the disturbance loss as the cost to Central of that delay and alteration, attributable to the impending expropriation, in the implementation of its planned initiatives. In other words, PwC assumed that, but for the shadow of expropriation, Central would have used the taken parcel for business expansion associated with Central's existing hardware business. This is the same as Mr. Doucet's highest and best use.

[139] Both the market value and disturbance assumed the expropriated parcel's use for potential business expansion. The disturbance was the delay and disruption of that expansion. This is not a case of mutually exclusive uses for different heads of compensation. The disturbance compensation satisfies s. 27(3)(b).

[140] **Summary:** I would dismiss the Province's grounds of appeal that challenge Central's entitlement to compensation for disturbance.

Issue #2 – Central's Business Plans and Causation

[141] The Board found that the impending expropriation thwarted Central's business plans:

> [718] … Here, Central had property of considerable size to accommodate its growth, and had engaged, and would have continued, in the Board's view, to engage in using increasing areas of its land, but for the expropriation.
>
> …
>
> [719] … Central's plans were part of an ongoing, and in Mr. Doucet's words, "logical", expansion of its business. …
>
> [720] … the lack of documentation on which the Province relies, does not lead the Board to conclude that Central had no credible plans for expansion.
>
> …
>
> [722] The Board finds that Central's plans were not remote or speculative.
>
> [723] Consequently, the Board is satisfied, on a balance of probabilities, that Central planned a new retail store to open at Lower South River in 2000, to be followed by a distribution centre, and would have proceeded with this expansion, but for the expropriation, or more precisely, the shadow of expropriation.
>
> …
>
> [737] The thrust of the Province's position on causation is based on its submissions on a lack of expansion plans which were impacted by the expropriation or the shadow of expropriation.
>
> [738] The Board has, in this Decision, found that Central did have such plans. The Board agrees that the plans could not be implemented as a result of the expropriation. Therefore, the requirement of causation has been met.
>
> …
>
> [763] The Board notes that the burden of proof of the failure to mitigate, or insufficiently mitigate, is on the Province. The Province did not lead any evidence to support its submissions. Thus, the Board finds that the Province has not discharged its burden.
>
> …
>
> [899] The Board finds, on a balance of probabilities, that Central did have expansion plans.

[142] On the appeal, the Province submits the evidence did not support the Board's findings. Its factum says:

> 55. At the hearing, Central provided no evidence that it had any active business plan to expand its operations, other than what its principal said he planned to do. …
>
> 58. The Province submits that the Board's decision was unreasonable in awarding disturbance damages for pre-expropriation delay, in the absence of evidence at, or prior to the time these plans were allegedly to be carried out, or in any subsequent records that any such plans existed or were delayed. …

[143] The legal test has three steps. In *Dell*, Cory J. said (1) "the approach to damages flowing from expropriation … should be based upon causation" (para. 38), (2) "provided the damage incurred is not too remote" (para. 30), and (3) also provided it is "not a loss which a reasonable person would have avoided" (para. 44, quoting *Shun Fung*).

[144] The Board (paras. 722-23, 763) applied those tests to Central's claim. The northern remnant had been developed, leaving insufficient space for the planned retail outlet and distribution centre, while the southern remnant was cut off by the new highway, leaving it unusable and "almost worthless" according to the appraisers and the Board (para. 613). The taken parcel was necessary for Central's new retail outlet and distribution centre. The Board found that the pending expropriation – *i.e.* the "shadow" of expropriation as *Dell* and *Shun Fung* termed it – impeded Central's plans for those developments.

[145] The Province challenges the Board's assessment of the sufficiency of evidence. This a factual matter that is unappealable, save for the limited bases set out earlier (paras. 44-47). The Board heard witnesses who generated a 7,200-page transcript while discussing thousands of pages of exhibits. Sections 26 and 30(1) of the *UARB Act* say the Board's findings of fact are binding and conclusive and an appeal is limited to issues of jurisdiction or law. These provisions do not contemplate that, after hearing counsel cite some extracts from the appeal books for a few hours, this Court may reweigh the trial evidence.

[146] As to the existence of Central's business plans, Mr. Smith testified at length about Central's planned business expansion, in general and at the critical time, including the future retail outlet and distribution centre on the subject property. Central's growth trajectory over the years is apparent, as discussed earlier, and corroborates Mr. Smith's described vision of expansion.

[147] The Board (para. 713) found that Mr. Smith's testimony about Central's plans was corroborated also by the evidence of: (1) senior management at Central, (2) the Municipal Warden, (3) Mr. Doucet, a real estate appraiser, (4) an exchange

of correspondence between Ms. Tse of the County and Mr. Croft, (5) correspondence from Central's Mr. White and Mr. Croft, (6) Mr. Welsh, (7) Mr. Chiasson, (8) the Province's investigation of a tunnel route which, the Board found, resulted from the Province's belief that the expropriation thwarted Central's expansion plan, and (9) the observations of PwC's witnesses.

[148] Then there is the thwarting. Earlier (paras. 10-18) I set out the Board's narrative of Mr. Smith's reaction to Mr. Bushell's message at the meeting of May 30, 1998, when Mr. Smith first learned of the pending expropriation. Mr. Smith's testimony on the point includes:

> Well, it was going to shut us down. I mean, it was - you know, we had a lot of plans, we had short-term plans. You know, we had – at that time we had plans on expanding the truss mill, on building a new store, on expanding our distribution centre. …
>
> …
>
> But he [Mr. Bushell] also told me that now that you know about this and you see this corridor, that anything you do on your land in the corridor, where the corridor was, you can do it. I said – well, I actually said to him, "What if I just go and build on there, you know?" And he said, you know, "We don't own the land you do, you can. We haven't expropriated it. But anything you do from now on you would not be compensated for it." So in other words, he said, "If you go and put a building on that land or expand your yard in that land, the cost to replace that you will not be compensated for because now you know about the path."
>
> …
>
> … that's when I said, "I can't do anything on this land. I can't make future plans. I can't build a building and then lose that land," because you not only didn't get compensated for the building, whatever land you were using, you know – or if I did put a building up and I used the land behind it, what would be the good of it, you know, if I didn't have enough there, you know?

[149] The Board accepted Mr. Smith's testimony:

> [759] The Board accepts Mr. Smith's evidence regarding his conversation with Graydon Bushell at the May 1998 meeting. Mr. Bushell acknowledged that Mr. Smith's recollection could be clearer than his. The Board accepts that Mr. Smith considered it was appropriate to put aside his plans for the Lower South River site and focus on other aspects of his business. …

To similar effect, see the Board's paras. 723 (quoted above, para. 32) and 862 (quoted below, para. 206) and see paras. 9, 15 and 33 above.

[150] The evidence supports the Board's findings that Central had business plans which were thwarted by the impending expropriation, with no proven failure to mitigate by Central. To the extent the Board's findings may be appealable, they were reasonable.

[151] My colleague would overturn the Board's finding that there was causation of loss. My colleague says that, at any time before the expropriation in May 2012, Central was legally free to build on the parcel to be expropriated, meaning Central's failure to do so was Central's choice. Hence there was no "legal causation" of loss and the Board had no jurisdiction to award compensation based on the Board's view that Central acted reasonably.

[152] With respect, the test is not whether Central was *legally* obligated to follow a course that caused a disturbance loss. Nor is it whether Central was *legally* precluded from avoiding one. The test is (1) whether Central followed a course for which, *in fact*, a disturbance was the "reasonable and natural consequence" and which (2) was "not too remote", provided that (3) Central's loss was not one that "a reasonable person would have avoided" by mitigating (*Dell*, paras. 28, 29-30, 44-45 adopting Lord Nicholls' reasons in *Shun Fung*, pages 137-38). "[R]easonable and natural consequence" appears in the Ontario *Act*. Nova Scotia's ss. 26(b) and 27(3)(b)(ii) compensate for "reasonable" losses "arising out of or incidental to the owner's disturbance". The difference in statutory wording is immaterial. In *Dell*, para. 38, Cory J. said:

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

[153] The Board, after extensively reviewing the evidence in several passages throughout its decision, said:

> [723] Consequently, the Board is satisfied, on a balance of probabilities, that Central planned a new retail store to open at Lower South River in 2000, to be followed by a distribution centre, and would have proceeded with this expansion, but for the expropriation, or more precisely, the shadow of expropriation.

[154] These are findings of fact. If the Board's findings are supported by some evidence – *i.e.* they are not arbitrary – they are unappealable under s. 30(1) of the *UARB Act.* (*Adekayode*, quoted above, para. 45).

[155] The Board's findings were well-supported.

- Neither Central, nor any reasonable operator, would invest substantial sums and effort to establish a new retail store and distribution centre on land that it expects to be expropriated. After the expropriation, Central would just have to duplicate the investment and effort somewhere else, likely on an emergency timeline after being suddenly dispossessed by the notice of expropriation. Had Central chosen that wasteful course, Central's claim would have faced an argument of failure to mitigate. Central wanted one retail outlet and distribution centre to serve its ongoing operations, functionally and without disruption, not as a legal object lesson for a compensation claim. That business reality is a matter of factual causation.

- Further, and apart from the above, in May 1998 the Province's Mr. Bushell told Mr. Smith that, if Central did choose to erect a structure, as Central was aware of the impending expropriation there would be no compensation. To Mr. Smith, this was the *coup de grâce*.

[156] It was for the Board to draw inferences from the evidence. It is not for this Court to retry the facts.

[157] My colleague says that Mr. Bushell's comment – that Central would not be compensated – was wrong in law, and Central could recover the market value of improvements at the date of expropriation in the expropriation proceeding, but that Central's only recourse to recover consequential disturbance-type damages was to sue in tort, e.g. for negligent misrepresentation. I respectfully disagree with the last point.

- The *Expropriation Act*'s scheme, proclaimed by s. 2(1) and explained by Cory J., is "to fully compensate a land owner" for its loss caused by the expropriation (*Dell*, para. 23). Assessing this full compensation is the function of the proceeding before the Board. The owner need not launch a collateral lawsuit in the Supreme Court of Nova Scotia.

- In that comprehensive proceeding before the Board, if there is causation, the loss is not too remote, and the owner acted reasonably to mitigate, the owner is entitled to compensation for disturbance (*Dell*, paras. 30, 38 and 44 – quoted above, para. 143). There is no requirement to prove fault, such as a tort, by the expropriating authority. The Board did not make a ruling of tortious misrepresentation under the guise of "disturbance". The Board merely applied the evidence to the legal prerequisites of "disturbance" under the *Expropriation Act*.

[158] I would dismiss this ground of appeal.

Issue #3 – Quantification of Compensation

[159] The Province submits that the Board:

- erred by accepting Mr. Doucet's depth analysis;
- erred by accepting PwC's calculation of disturbance loss; and
- erred by finding that disturbance loss continued after 2005.

[160] I will address these points in turn.

[161] **First – Mr. Doucet's depth analysis:** The Province says that Mr. Doucet applied an incorrect discount for depth to value both the taken lands and injurious affection of the northern remnant.

[162] Mr. Doucet derived a value per square foot from the comparable market data. Then he adjusted the value for depth and checked his adjustments against what is termed the "rule of thumb called the 4-3-2-1 rule". The Board's Decision explains:

> [171] Based on a relative comparison of the market data, Mr. Doucet concluded that a value of $65,240 per acre, or $1.50 per sq. ft., reflects the market value of the developed area of the Claimant's property. He said:
>
> > Size, depth and utility are perhaps the most important site characteristics requiring adjustment because larger parcels often sell for less per unit (per acre or square foot) than smaller parcels, all other factors being relatively similar. … Depending on the use, the depth of a commercial/industrial property can impact its utility and thus value. The impact of depth is lessened for a DC [distribution centre] site since much of the land is used for storage and laydown area… [Board's underlining]
>
> [172] Mr. Doucet said, in taking depth into consideration, certain portions of the property have a greater land value than others, and he therefore adopted a "rule of thumb called the 4-3-2-1 rule" to create a depth table. Under this rule, the first 25 percent of depth equates to 40 percent of the market value, the next 25 percent to 30 percent of the market value, the next 25 percent to 20 percent of the market value and the final 25 percent to 10 percent of the market value. In using this table, Mr. Doucet found an average per sq. ft. value of the property to be $1.18, and the total value to be $2,519,000. He confirmed, in his evidence, that exact 25 percent areas were not applied because the Claimant's property did not divide into four parts of equal size.

> [173] This rule is usually applied to irregularly shaped property. Mr. Doucet agreed it is subjective and some flexibility is allowed to arrive at a reasonable value. On cross-examination, he acknowledged that the percentages in the rule and the table he prepared were "a bit skewed". However, he maintained that it was reasonable and not enough to make a difference. He had used the rule in other appraisals. He based the percentages used in the report on the data available to him, using a range of sales from his overall market analysis.
>
> [174] Mr. Doucet did not agree that the rule was not applicable and confirmed he had used it as "a check" to his conclusions about the value of land at various depths. In response to Board questions, he said that his conclusion would not have changed if he had not used the "4-3-2-1 rule".

[163] The Board accepted Mr. Doucet's approach:

> [610] Mr. Doucet had assigned a lower value to the southern remnant lands when calculating the value of the entire Central parcel with his use of the "4-3-2-1 Rule". While the Province submitted this is an inappropriate method, the Board sees merit in the conclusion that the value of the rear lands is not as great as lands closer to the highway.

[164] In this Court, the Province says the Board's adoption of Mr. Doucet's view is an appealable error.

[165] Mr. Doucet testified that he derived the discounts for depth from his analysis of market data, then checked the results against the 4-3-2-1 rule of thumb. He said the rule of thumb is recognized in the professional literature. His eventual numbers were adjusted to his view of the circumstances involving Central's land and did not precisely match a 4-3-2-1 allocation.

[166] The Board applied the expert opinion of a qualified appraiser. The opinion derived from the appraiser's tenable view that the land's per square foot value reduces with distance from a road. The expert exercised his professional judgment and used a recognized appraisal approach to check his conclusion.

[167] This is standard fare in a valuation case. The Province has identified no error, certainly not an appealable error of law. I would dismiss this ground of appeal.

[168] **Second – PwC's calculation of disturbance loss:** The Board had expert reports authored by Mr. Paul Bradley, C.A. and Ms. Charlene Rodenhiser, C.A., both chartered business evaluators with Pricewaterhouse Coopers, on behalf of Central. The Board had opinion reports from Mr. Ian Wintrip, CA, assisted by Mr. Donald Thompson, Ph.D., for the Province.

[169] Ms. Rodenhiser's testimony explained in simple terms the value of a distribution centre:

> For Central in particular, you know, Mr. Smith has always stated that his fill rates are very important. And what he means by that he doesn't want a customer walking into his store and finding, you know, that the screws they need to do their project that day are not on the shelves, and a distribution centre allows the individual stores to ensure that their inventory is always maintained, and yet they can maintain it at such a level that they're controlling their costs as well.
>
> And so that's – you know, a DC really does improve the profitability of an operation overall because of that inventory management. So you've got savings by bringing in bulk, by getting discounts you're able to fulfil your store's requirements through inventory management. So it's very beneficial in that way.

[170] Central's actual performance reflected this view. Ms. Rodenhiser testified:

> Well, we, you know, visually saw once they did establish their modified DC, the impact that had on their operations. We saw the improvement in profitability. We saw the improvement in their gross profit margin.

[171] Mr. Bradley explained the parameters of the PwC opinion:

> … They had intended to build a retail store and to build a distribution centre on the Lower South River site in 2000 and they were not able to do that.
>
> They ultimately did proceed with a new box store and they proceeded with a new box store on Market Street in 2005 and then they built a distribution centre at the Lower South River site. But in general there was a five-year delay caused by the expropriation.
>
> So what we endeavoured to do was measure the financial impact of that delay on the business so that's generally what we're trying to do. …
>
> …
>
> … so we've got a "but for" and what would have happened but for the delay, and then the bottom line is the actual. And if you look over at the right-hand side, the years 2000 to 2005, they're, for want of a better phrase, the missing years or they're the years of delay when Central did not do the expansion that it intended.
>
> …
>
> So the loss period for us started at the year 2000 because we're trying to measure the profits but for the delay, and we effectively used the actual results from 2005 through 2014 as a measure, as a basis for estimating what would have happened but for the delay.
>
> …

> So subject to being able to make adjustments for things like inflation, which we did, we believe that the market information and the sales and the earnings information from operating the retail store at Market Street provided the best information and the best evidence to estimate what would have happened but for the delay.

[172] PwC's Report, pp. 16-21, accompanied by the testimony of Mr. Bradley and Ms. Rodenhiser, explained the quantification of Central's loss. Briefly:

- Using Central's performance after 2005 (when the Market Street store and the distribution centre at Lower South River began to operate) as a guide, PwC estimated the profits that would have been earned had Central established its planned retail outlet and distribution centre at Lower South River at the start of 2001.

- PwC made evidence-based adjustments, as explained by their witnesses, for items such as inflation.

- The distribution centre at Lower South River was significantly smaller than the planned distribution centre, had there been no expropriation. This was the result of the space constraints at Lower South River due to the impending expropriation. The smaller-than-planned distribution centre meant that certain products were not carried there and had to be delivered directly to retail stores. Central was unable to bulk purchase those items and lost the benefit of vendor discounts. PwC added the value of the lost vendor discounts to the loss column.

- The smaller-than-planned distribution centre at Lower South River increased Central's operating costs over those that Central would have incurred, but for the impending expropriation, had Central established the planned distribution centre at Lower South River. PwC calculated and added the sum of those incremental costs to the loss column.

- The change from the planned distribution centre and retail outlet at Lower South River as of the start of 2000 to the actual operations in 2005, resulted in an earlier than planned expansion of Central's Sydney retail store and a delay in financing costs for the distribution centre. These were benefits to Central that PwC calculated and subtracted from the loss claim.

[173] PwC's conclusions on these amounts, in its initial report, were adjusted in several supplementary reports. The Board's Decision, para. 826, summarized and accepted PwC eventual amounts for "past losses":

- lost profit – Antigonish retail: $5,301,499
- lost profit – distribution centre: $2,112,504
- lost profit – vendor discounts: $1,086,279

  Subtotal $8,500,282
- Less - delay in financing costs: $118,530
  - Sydney early profits: $2,206,328

  Subtotal $6,175,424
- Plus – incremental operating costs: $563,857

  Total $6,739,281

[174] PwC also calculated "future losses" after January 31, 2013. These losses are the subject of Central's cross-appeal and will be discussed under Issue #5.

[175] The Board's Decision described its approach to the quantification of Central's loss from disturbance:

> [777] The Board is mindful that the burden is on the Claimant to satisfy the Board, on a balance of probabilities, of the amount of compensation that should be paid for business losses as disturbance damages. …
>
> …
>
> [780] … the Board considers that PwC undertook a comprehensive review of the industry, the economy, and the situation of Central. The Board notes it relied on information it received from Mr. Smith and others of Central's senior management; however, the Board is satisfied that they appropriately assessed the basis on which they concluded that their assumptions were reasonable.
>
> …
>
> [784] The Board has concerns about the influence of Mr. Thompson on the Wintrip Report. While perhaps it was not as overt as Mr. MacIntosh alleged, the Board considers that the various email exchanges where Mr. Thompson expressed doubt over the ability of Mr. Smith to have the plans "in his own head", taken with his persistent misapprehension about the distribution centre which Central planned, imported a flavour of doubt or disbelief to the report. Further, the Board found Mr. Thompson to be somewhat flippant as a witness, casting doubt on his objective assessment of Central's plans.
>
> [785] The Board understands that the PwC determination of the losses suffered by Central resulted from delay. Their premise is that, but for the expropriation, or more accurately, the shadow of expropriation which fell over the Lower South

River property, Central would have built a new retail store and distribution centre from which it would have earned profits in 2000.

[786] Part of the profits it would have earned would be in the form of increased vendor discounts because it would have had sufficient space to accommodate more products. Buying products in greater bulk warrants discounts by the vendors. Further, Central would have earned transfer profit with a larger distribution centre as it would have had more product to "sell" to the stores within its group.

[787] Additional losses arose from increased operating costs already incurred, and according to PwC to be incurred in the future, as well as future capital costs for a second site.

[788] To calculate the losses, PwC took a period from the end of the year ending January 31, 2001, to the year ending January 31, 2014. It projected that the results from the year ending January 31, 2006 (the year when Market Street opened) would have been earned starting at the beginning of the loss period (January 31, 2001).

[789] It used cumulative net income before income taxes for the full period as if the new Lower South River store and distribution centre had opened in 2000, and deducted from that the cumulative actual net income before income taxes, and then further deducted the actual income earned during the period from the 2000 to 2005 fiscal years. PwC did this for both the retail operation and the distribution centre.

[790] It calculated the lost vendor discounts by examining the discounts which were being earned, and estimating what would have been earned in the period.

[791] PwC set off income earned at the new Sydney retail store, which Central opened earlier than it would have because it could not expand at Lower South River, against the losses. PwC also set off the financing costs of the planned expansion which were delayed and thus saved.

[792] Mr. Wintrip's main adjustments to these amounts resulted from his use of a shorter loss period, one which ended in May 2005. He made other adjustments to the assumptions used by PwC.

[793] The incremental operating costs which had been incurred were taken from Central's financial records. The Board notes that Mr. Wintrip accepted those amounts. The future incremental operating and capital costs were based on estimates. Mr. Wintrip opined that these costs were too uncertain.

[794] The Board notes that as this is a claim for loss due to delay or, as some cases describe it, the "loss of a chance", it must, by its very nature, be hypothetical. It would be difficult, if not impossible, to do anything other than estimate the amounts. The Board must be satisfied that the estimates are based on reasonable assumptions.

> [795] The Province had argued that speculative profits are not recoverable, and cited the *Loren and Neulib* decision [*Loren and Neulib v. Nova Scotia* (1978), 25 N.S.R. (2d) 463 (Exp. Comp. Bd.), paras. 10-12]… .
>
> [796] In the Board's view, Central's claim can easily be distinguished on the facts. The Board does not consider that Central's expansion plans were "… the product of a penchant for optimistic overstatement …", nor could it be said that there is a "… lack of business experience …" on the part of Mr. Smith or Central. The degree of speculation in that case does not exist here, and Central had a clear record of its past performance.
>
> [797] In this matter, the Board generally prefers the PwC loss calculations with respect to past losses, finding them to be reasonable and based on the available information and the experience of the business valuators undertaking the task. …

[176] In this Court, the Province submits:

- the Board's use of foregone profit and incremental operating costs was duplicative;
- the Board's use of foregone profit and foregone vendor discounts was duplicative;
- the Board erred by assuming that foregone vendor discounts negatively affected potential profit;
- the Board wrongly adjusted post-2005 results;
- the Board erroneously used actual results at Market Street without making appropriate adjustments;
- the Board erred by insufficiently discounting for risk and in calculating the losses from the available data;
- the Board erred by not considering the impact on all Central's retail operations;
- the Board erred by not using Mr. Wintrip's calculations instead of PwC's.

[177] The Province's factum delivers these submissions as pithy salvos. They are unaccompanied by references to the explanatory reasoning in the testimony of the PwC witnesses. Underscoring the Province's submission is the *sotto voce* proposition: this award just can't be right.

[178] Mr. Bradley and Ms. Rodenhiser explained why there is no duplication. Their calculation of loss assumed the performance of the reduced-scale distribution

centre at Lower South River meant: (1) there was insufficient space for certain lines of inventory, so those items were shipped directly to the retail outlets (without a vendor discount), instead of being purchased in bulk (with a vendor discount) and stored at the distribution centre; (2) Central incurred incremental costs, compared to the costs Central would have incurred at the planned larger distribution centre had there been no shadow of expropriation. These assertions were supported by Central's evidence that the Board accepted as factual. Consequently, the foregone vendor discounts and incremental costs should be added to the disturbance loss.

[179] Mr. Bradley and Ms. Rodenhiser explained their reasons, based on market circumstances, for making an adjustment when occasion warranted, and for not adjusting when it didn't. They considered and adjusted for the performance of Central's other outlets. For instance, they reduced Central's claim by the earlier profits from the Sydney store. They were cross-examined on these matters. Their cross-examination did not disturb the cogency of their explanations. The Board accepted their conclusions.

[180] Mr. Bradley and Ms. Rodenhiser explained at length their use of the available data from Central's operations –particularly the post-2005 data from the distribution centre at Lower South River – to calculate Central's loss from disturbance "but for" the projected expropriation. This was the heart of their opinion. The cross-examination left their approach solidly intact. The Board accepted their calculations.

[181] Mr. Bradley and Ms. Rodenhiser made some adjustments to their calculations because of Mr. Wintrip's opinions. Their testimony itemized and explained why they disagreed with the other aspects of Mr. Wintrip's conclusions. The Board accepted PwC's view of "past losses" and preferred Mr. Wintrip's assessment that the claimed "future losses" were too remote. The Province's factum does not cite any error of law by the Board. The Province simply asks this Court to replace PwC's conclusion on past losses with Mr. Wintrip's. Mr. Wintrip's report calculated Central's past losses as somewhere between $560,291 and $4,428,071, a spread that is more question-begging than helpful.

[182] The Board committed no error of law. I decline the Province's invitation to make an end run around the PwC evidence. To the extent the factual issues are appealable, the Board's findings were well-supported by the testimony of Mr. Bradley and Ms. Rodenhiser. The Board's reasoning path is clear. Its conclusions

are reasonable. I would dismiss the Province's grounds of appeal that challenge the Board's quantification of the disturbance loss.

[183] **Third – disturbance loss after 2005:** The premise of Central's claimed disturbance loss was that, but for the shadow of expropriation that appeared in May 1998, Central would have established a "big box" store and distribution centre at Lower South River in 2000. Those initiatives would have increased Central's revenue and lowered its expenses, for instance from vendor discounts attributable to volume purchases. However, with the expropriation in the offing, Central delayed and altered the implementation of those initiatives: in 2005, Central opened both a big box store at the Market Street location, near Antigonish, and a reduced-area distribution centre at Lower South River. Central's disturbance loss was the forgone profit caused by the delay and alteration.

[184] The Board's findings accepted the factual premises for the loss. The issue here is whether the Board committed an error of law in its quantification of compensation.

[185] The Province's expert, Mr. Wintrip, opined that Central's loss period should stop in 2005 when the new premises opened.

[186] The PwC experts said that Central's loss did not end so tidily. Mr. Bradley noted that the exercise was to compare what would have happened, but for the shadow of expropriation, to what actually happened. He said Central's disturbance loss did not end with a curtain drop in 2005 but would diminish over time as the Market Street operation became established.

[187] The Board accepted PwC's approach over Mr. Wintrip's.

[188] At the Board hearing, under cross-examination by the Province's counsel, Mr. Bradley of PwC explained:

> … I think there's more to it than just the time period of opening the doors at Market Street. There is a – by being disadvantaged, the company has permanently lost those incremental sales, and then there's a continued growth with respect to those incremental sales that, if you will, ripples into succeeding years.
>
> And that's why, when you look at the graphical trend of the profit, it shows that the projected profit and the actual don't converge until much later, 2010, 2011.
>
> So it's like any business, if a business interruption event happens and a business has to close for two years and then it opens its doors, it doesn't follow that the loss period stops there; if they've lost customers, if there's growth opportunities

> on those customers that have been lost it's not going to be a tidy end of the loss period just when the two year interruption happens. There's growth because of the other ripple effects on the broader business.
>
> So that's why I think it's more appropriate to look at what the results have been but for the delay and looking at it in a longer term horizon. But then looking back retrospectively, we're looking at really the cumulative profits to date and I think that more effectively captures the long-term effect on the business, rather than just looking arbitrarily at the five-year delay period itself. Because the business isn't that simple that it just – you just deal with an event and then the event stops and then you get on with business as normal. There's a period of catch-up before the business gets back to where it would have been.
>
> …
>
> I don't think it's appropriate to stop it when the Market Street store opens. I just don't think five years – I don't think the opening of the Market Street store signals the end of the loss period. For me, the loss period ends when the Claimant is back in the position that it would have been but for the delay.
>
> And when you look at the trend of the earnings that happens around 2011 or 2012… .

[189] The Board (para. 262) quoted this passage and then accepted Mr. Bradley's methodology as realistic.

[190] The Board cited another factor that extended the loss after the 2005 openings:

> [268] With respect to vendor discounts, Ms. Rodenhiser said that when the Market Street retail store opened, Central was able to use the Lower South River location for a distribution centre. She said, however, that the size of the location did not permit Central to have the extent of products for which they could have obtained vendor discounts. PwC examined a sample of vendors and determined what discounts, and the level of discounts which Central was not able to obtain.

[191] The Board had a reasoned opinion from experts in business valuation. The experts' view was that market exigencies would taper the loss over time after 2005. Central's post-2005 financial results supported that view. Further, PwC's projections at the outset of the loss period assumed a graduated incremental loss; an example is foregone vendor discounts. PwC's tapering approach at the end of the loss period was consistent and realistic.

[192] On the appeal, the Province reiterates its submission to the Board. Essentially, the Province asks the Court for a do-over and substitution of Mr. Wintrip's opinion for PwC's opinion.

[193] Whether there were losses after 2005 is an issue of fact. This is not a trial *de novo*. The Province identifies no error of law by the Board.

[194] The assessment of valuation evidence is at the heart of the Board's function under the *Expropriation Act* and is basic to the presumption of its expertise under *Dunsmuir* and *Alberta Teachers*. The Board's view was well-supported by evidence. To the extent the point is appealable, the Board's conclusion is reasonable under the standard of review.

[195] **Summary:** I would dismiss the Province's grounds of appeal related to the quantification of the award.

Issue #4 – Interest

[196] Interest is governed by s. 53 of the *Expropriation Act*:

> **Interest on outstanding compensation**
>
> 53 (1) Subject to Sections 13 and 15, the owner of lands expropriated is entitled to be paid interest on the portion of the market value of his interest in the land and on the portion of any allowance for injurious affection to which he is entitled, outstanding from time to time, at the rate of six per cent a year calculated **from the date the owner ceases to reside on or make productive use of the lands**.
>
> (2) Subject to subsection (3), where the Board is of the opinion that any delay in determining the compensation is attributable in whole or in part to the owner, it may refuse to allow him interest for the whole or any part of the time for which he might otherwise be entitled to interest, or may allow interest at such rate less than six per cent a year as appears reasonable.
>
> (3) The interest to which an owner is entitled under subsection (1) shall not be reduced for the reason only that the owner did not accept the offer made by the expropriating authority, notwithstanding that the compensation as finally determined is less than the offer.
>
> (4) Where the board is of the opinion that **any delay in determining compensation is attributable in whole or in part to the expropriating authority**, the Board may order the expropriating authority to pay to the owner interest under subsection (1) at **a rate exceeding six per cent** a year but not exceeding twelve per cent a year.
>
> [bolding added]

[197] The Province makes two submissions respecting the Board's award of interest.

[198] **Interest rate:** Section 53(4) permits the Board to raise the interest rate if "delay in determining compensation" was partly attributable to the Province. The Board (para. 856) found that the expropriating authority delayed the determination of compensation. Under s. 53(4), the Board raised the interest rate to 10%.

[199] The Board found there were several instances of such delay. The findings were supported by evidence.

[200] On the appeal, the Province challenges the increased rate. The Province submits that "delay in determining compensation" under s. 53(4) applies only to the delays in the compensation proceeding that follows the notice of expropriation, and any other delay is irrelevant.

[201] The Board rejected that submission. The Province notified Central of the prospective expropriation in May 1998, effectively freezing Central's development of the parcel, but did not file the notice of expropriation until 14 years later. The Board said, reasonably in my view:

> [849] Further, the Board concludes that "determining compensation" does not mean simply the Board making a finding. It is clear from a plain reading of the *Act* (*e.g.*, s. 12, s. 13, s. 15) that compensation may be settled before, or without, the involvement of the Board.
>
> [850] Therefore, the Board finds that it can consider the kinds of conduct referred to by Mr. MacIntosh in setting an increased interest rate if that conduct delayed compensation.

[202] In any case, there is evidence of delay, attributable to the Province, after the notice of expropriation, and directly related to the ascertainment of compensation. The evidence materialized particularly during the cross-examination of the Department's Acquisition Officer, Mr. Rod MacInnis. Fourteen years after announcing the prospective expropriation, the notice of expropriation was filed in May 2012. Then the Province delayed over a year the delivery of its appraisal and offer. The timing was inconsistent with the statutory protocol in s. 13. Mr. MacInnis testified this was further to the direction of the Department's Manager of Acquisition and Disposals, Mr. Stephen MacKenzie. Mr. McInnis said that he was unaware of any other expropriation where there had been such a delay. He testified:

> **Mr. MacINTOSH:** Thank you.
>
> So when you're writing this email to Mr. Smith and you're talking about, "We believe it's a benefit for both parties to advance expropriation" and so on, that

> was a successful delay tactic on the part of the department because it could get in and get control and ownership over the lands and not have to deal with the valuation part. Correct?
>
> **Mr. MacINNIS:** Correct.

[203] The Board said (para. 855) "the Province, in the person of Mr. MacKenzie, delayed the determination of compensation".

[204] The Board's findings of fact are supported by evidence, and the weight of that evidence is un-appealable.

[205] The Board's decision to raise the interest rate to 10% is reasonable.

[206] **Commencement date of interest:** Section 53(1) says the interest runs "from the date the owner ceases to reside on or make productive use of the lands". The Board decided that interest should run from May 1, 2001. The Board (para. 862) found that was the date when the impending expropriation persuaded Central that "it would not be prudent to develop the Lower South River property any further".

[207] On appeal, the Province says the Board erred by not starting the interest from the date of expropriation. As authority, the Province cites *Partition Holdings Ltd. v. Ontario (Minister of Transportation and Communications)* (1986), 56 O.R. (2d) 738 (C.A.), leave to appeal dismissed [1987] S.C.C.A. No. 79. The Province takes the unconventional approach of relying on Thorson J.A.'s dissenting reasons.

[208] In *Partition Holdings*, s. 35(1) of Ontario's *Expropriations Act* was worded similarly to Nova Scotia's s. 53(1). Both statutes permitted interest from "the date the owner ceases to … make productive use of the lands".

[209] With due respect to Thorson J.A., I prefer the majority's reasons in *Partition Holdings.* Cory J.A. (as he then was), with whom Tarnopolsky J.A. concurred, said:

> … In this case, it was found by the Ontario Municipal Board that the owner was unable, as a result of the actions of the Minister, to make productive use of his land after March, 1972, almost three years before the date of expropriation.
>
> Fairness would seem to dictate that interest should be payable from that earlier date when the land could no longer be used productively. …
>
> …

> It has long been recognized that it is most unfair for an expropriating authority effectively to tie up or prohibit the productive use of vacant land. To do so without paying any interest as compensation is unconscionable. …
>
> …
>
> Fairness requires that interest should be paid from the date that it is found that the owner can no longer make productive use of the land. The clear wording of s. 35(1) indicates that interest should be calculated and paid from that same date. …

[210] The Province would read the concluding words of s. 53(1) to say that interest is "calculated from the date the owner ceases to reside on or make productive use of the lands, *but no earlier than the date of deposit of the expropriating document at the registry*". The italicized words are not in the statute. The Board saw no basis to imply such a condition. In the Board's view, "calculated from the date the owner ceases to … make productive use of the lands" applies when the owner ceased to make productive use of the land because of an earlier step in the expropriation process. The Board's view was consistent with the wording, context and purposes of the *Expropriation Act*, and Cory J.'s interpretive directives in *Dell*, paras. 20-21, 23, 37-45 (above, para. 104).

[211] The Board's ruling on the commencement date of interest is reasonable. I would dismiss this ground of appeal.

Issue #5 – Central's Cross-appeal: Future Losses

[212] The Board found that the loss period for Central's disturbance award ended January 31, 2013. The Board said:

> [824] … the Board considers that it should use January 31, 2013, the end of the fiscal year in which the expropriation occurred, and when Central was likely in the position it would have been in, as the end of the loss period.

[213] The Board disallowed Central's claim for future costs. These included vendor discounts and incremental operating costs for a two-year period, and indefinite incremental operating costs and future capital costs. That total claim was $3.35 million, reduced from an earlier estimate of $3.5 million (Exhibit S-62). The amounts of future costs were estimated by Central's experts, Mr. Bradley and Ms. Rodenhiser of PwC. (Board Decision, paras. 816-17)

[214] The Board summarized PwC's development of the numbers:

> [818] For vendor discounts, PwC stated that Central estimated an additional two years before they would have an additional facility at Lower South River to allow them to do the necessary bulk buys. Using the average lost vendor discounts and an average profit margin, they calculated a loss for a two-year period.
>
> [819] The future incremental operating costs were based on the need for a second location and were based on costs incurred. PwC estimated that these costs would apply for a two-year period and then would continue for the second location. They required them to capitalize estimated annual costs "… using a capitalization rate based on the Company's estimated weighted average cost of capital" and the present value of the costs. This exceeded $2.7 million.
>
> [820] The future capital costs were based on an estimate of capital for the second site, not including the cost of land.

[215] The Board noted that the experts disagreed on whether these estimates were too speculative:

> [821] PwC maintained that these costs were reasonable and were the result of the expropriation. Mr. Wintrip [the Province's expert] maintained that there was insufficient information to assess whether the costs were reasonable. The amounts, the timing and the nature of the costs caused him to question whether they were necessary, or perhaps would have been incurred in any event, or not at all.

[216] The Board found that the claimed future costs were too remote:

> [822] The Board has noted above that, of necessity, estimates must be employed in calculating a claim of this nature. However, the Board is not persuaded, on a balance of probabilities, that the future costs, whether operating or capital, should be recovered by Central. They rely on layers of estimates which contributes, in the Board's view, to an unacceptable degree of speculation. Further, the Board considers that there is merit in the submissions of the Province that these costs are too remote to be compensable in the circumstances of this matter. Accordingly, the Board denies these elements of the claim.
>
> …
>
> [899] … The Board does not, however, accept the full extent of the loss period determined by PwC, but ends it one year earlier. Further, the Board does not accept the claims for future losses, finding them to be less reliable because they were built on estimates the Board considers too uncertain.

[217] Central's cross-appeal targets the future costs that the Board disallowed. Essentially, Central makes two arguments.

[218] First, Central challenges Mr. Wintrip's evidence. Central's factum criticizes Mr. Wintrip's reliability and credibility at length, then says:

> 48. Despite all of this implied skepticism about the weight and credibility of Wintrip's opinions, the Board in a single paragraph embraced the consequences of his opinion with respect to uncertainty of future costs. …

[219] Second, Central submits that the Board improperly used inadmissible evidence to support the Board's rejection of the future costs claim. This would be the evidence tendered for the Province's motion to re-open the hearing, that the Board dismissed on May 17, 2017 (above, para. 27). Central acknowledges that nothing in the Board's decision cites inadmissible evidence. Central's factum says:

> 50. The Decision of the Board appropriately makes no reference to the evidence on sale presented to the Board at the Province's post-hearing Motion to Re-Open, which Motion was dismissed by the Board in its Decision dated May 17, 2017. However, because of the absence of any reasoning path or evidence that would otherwise support the Board's rejection of future losses, the undeclared elephant remains in the room. Central submits that the Board was improperly distracted by that post-hearing evidence, which should not have had any influence on uncertainty.

[220] Then Central joins its two submissions:

> 60. … Central acknowledges that it is pure speculation to infer from the Decision that the fact of sale influenced the Board's finding. However, other than the discredited opinions of "uncertainty" expressed by Wintrip, there was no other such evidence. …

[221] I respectfully disagree.

[222] In *Dell*, Cory J. said "the approach to damages flowing from expropriation … should be based upon causation" (para. 38), "provided the damage incurred is not too remote" (para. 30) and provided there was no failure to mitigate.

[223] Applying that test, the Board (para. 822) found that Central's claim for future losses was "too remote" based "on a balance of probabilities", which is the appropriate standard of proof.

[224] There was admissible evidence from which the Board could make that finding. The Board was entitled to draw its own inferences, whether positive or negative, from PwC's evidence. In addition, the Board had the evidence of Mr. Wintrip.

[225] Mr. Wintrip's testimony included:

> … And so, again, going back to trying to assess what future operating costs are, we now have new information about this new site being purchased. We're not really sure about what the status is of adding additional space at the DC [distribution centre], and we also don't really understand what the impact will be with the existing secondary DC, which is at Market Street. And so the introduction of this new information just adds another layer of complexity to the calculation and uncertainty with estimating not just what future costs may be, but what the incremental future costs would be in the future.
>
> …
>
> … it has to deal with estimates and also you have to extract out, again, what the "but for" plan was, because ultimately everything has to be compared to that "but for" plan to determine what's incremental. And I suggest the "but for" plan wasn't initially documented so we're relying on what actually happened at Market Street, we're now relying on a new piece of property that was purchased for the purposes of expanding the DC. At the end of the day we don't have a kind of consolidated here's what would have happened, but for the expropriation to compare this estimate of costs going forward into the future.

[226] The Board summarized Mr. Wintrip's views on the uncertainty of Central's claimed future losses:

> [348] With respect to incremental future costs, Mr. Wintrip said that PwC had estimated temporary and longer term costs, based on management estimates. He said these are not "out of pocket" costs, and they may not be incurred at all, or may be different, and therefore, uncertain. He said PwC had not done any analysis of what the incremental costs would be, because they had not looked at costs which would have been incurred but for the expropriation.
>
> [349] … He said that, in his opinion, there was insufficient evidence to support it; one could never know what the costs would be and there was nothing to compare it to in order to look at incremental costs. …
>
> [350] Mr. Wintrip noted that, in its first report, PwC had talked about the possibility of a second site, and by the time of his revised report, a second site had been acquired. Because the incremental costs were unknown, this, in his view, added complexity to determining any loss. In the absence of a plan for what would have happened but for the expropriation, there is no basis for comparison. As a result, he estimated future costs at nil. …

[227] As this Court said in *Adekayode* (quoted above, para. 45):

> [42] … if there is *some* evidence, then the tribunal's factual findings and inferences are not appealable under the statute, nor are assessments of credibility, meaning the standard of review is not an issue. … [emphasis in *Adekayode*]

[228] The weight and credibility of a witness's testimony are "quintessentially questions of fact": *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, para. 38, per McLachlin C.J.C. for the Court. Mr. Wintrip's credibility and the weight of his evidence are not appealable issues of jurisdiction or law under s. 30(1) of the *UARB Act*. This is not a re-trial.

[229] As to Central's second point, nothing suggests that the Board applied inadmissible evidence to assist its finding of remoteness. The Board merely found that Central's estimates of future losses were not established on the balance of probabilities.

[230] The Board did its job. To the extent the ground of cross-appeal is appealable on these factual points, the Board's findings were supported by evidence and the Board's ruling is reasonable. I would dismiss Central's cross-appeal.

Conclusion and Costs

[231] I would dismiss the appeal and the cross-appeal.

[232] The parties filed submissions on costs of the appeal.

[233] Neither the *UARB Act* nor the *Expropriation Act* expressly addresses costs of an appeal to this Court.

[234] Section 52 of the *Expropriation Act* speaks to costs up to the Board level. Section 52(2) says that, subject to s. 52(5), the owner is entitled to "the reasonable costs necessarily incurred by the owner for the purpose of asserting a claim for compensation". Section 52(5) permits costs to be adjusted downward when the compensation does not exceed the expropriating authority's offer to settle.

[235] In this case, the Board has not determined costs. The Board left costs for the parties to settle and reserved jurisdiction to deal with the matter, if necessary, on the motion of either party.

[236] *Civil Procedure Rule* 90.48(1)(c) gives this Court discretion to fashion a costs award for a civil appeal. By Rule 90.51, on a tribunal appeal, no costs are awarded "unless the Court of Appeal orders otherwise". This Court's award of

costs on a tribunal appeal should follow a principled analysis: *Smith v. Nova Scotia (Human Rights Board of Inquiry)*, 2017 NSCA 27, paras. 72-87 and 92.

[237] Generally, in an expropriation case, there is a principled basis for a significant costs award to the owner. The courts and expropriation tribunals have interpreted "reasonable costs" in s. 52(2) and similar provisions of other expropriation statutes, to mean solicitor and client costs. This follows from the guiding directive of indemnity, or full compensation, established by *Dell* and like authorities: *e.g. Smith v. Alliance*, paras. 67-77; *Thoreson v. Alberta (Minister of Infrastructure)*, 2007 ABCA 272, para. 23; *Town of Mahone Bay v. Lohnes* (1983), 59 N.S.R. (2d) 65 (S.C.A.D.), para. 12.

[238] Based on this principle of indemnity, costs are treated as an element of compensation and appeal costs on a solicitor and client basis have been awarded to an expropriated owner who succeeds in the appeal court: *Hill v. Nova Scotia (Attorney General)*, [1997] 1 S.C.R. 69, para. 22, and declaratory ruling on motion, [1997] S.C.J. No. 115; *Smith v. Alliance*, para. 111; *Bishop v. Nova Scotia (Attorney General)*, 2006 NSCA 114, para. 25; *R. v. Superior Propane Inc.*, 2004 NSCA 73, para. 22; *Yarmouth*, para. 26.

[239] It is reasonable to extrapolate that principle to the appeal court level, subject to any adjustment that the Court considers to be appropriate in the circumstances of the particular appeal.

[240] An example is *A.M. Souter & Co. Ltd. v. City of Hamilton*, [1973] O.J. No. 2217 (C.A.). The Court dismissed an expropriating authority's appeal with costs and dismissed the owner's cross-appeal without costs. Section 32(2) of Ontario's *Expropriations Act* generally applied the practice of civil appeals to an expropriation appeal, and s. 33(1) said that costs at the expropriation Board level would be "the reasonable legal, appraisal and other costs actually incurred by the owner". Section 33(1) was similar to Nova Scotia's current s. 52(2). As to the quantum of costs for the expropriating authority's dismissed appeal, Kelly J.A. said:

> 6 In our opinion, there is in the Expropriations Act an expressed intention that a claimant who, involuntarily, has to resort to the procedures set down in the Act in order to secure the compensation to which he is adjudged entitled, is to have, in addition to this compensation, the reasonable legal, appraisal and other costs actually incurred by him for the purpose of determining the compensation payable and that the provisions of s. 32(2) do not derogate from that principle.

> 7 The discretion of the Court with respect to costs is not disturbed by the provisions of the statute referred to, although the principle above stated must be kept foremost in mind. In a case such as this one the Court should give effect to the principle set forth in s. 33(1) and the costs of successfully resisting the appeal taken by the municipal corporation from the award should be taxed as between solicitor and client.

[241] On the other hand, the expropriated owner has been denied costs for his unsuccessful submissions on appeal. In *A.M. Souter*, the Court dismissed the owner's cross-appeal without costs to either party. In *Johnson*, para. 213, this Court ordered that the parties bear their own costs after the Province's arguments on appeal partially succeeded. The adjustment attributable to an expropriated owner's unsuccessful submission is within the Court's discretion in the circumstances of the appeal.

[242] The calculation or taxing function, to implement the Court's ruling on appeal costs, may be performed by the Board: *e.g. Yarmouth*, para. 26.

[243] Based on the above principles, I would award costs of the appeal and cross-appeal as follows:

- For the Province's dismissed appeal, Central shall have its costs on a solicitor and client basis, *i.e.* calculated as described in s. 52(2) of the *Act*, being its "reasonable costs necessarily incurred" to resist the Province's appeal.
- For Central's dismissed cross-appeal, the parties shall bear their own costs.
- As these parties have been unable to agree on almost anything, I will not leave it there. In my view, the Province's exhaustive appeal consumed 80% of the effort in this Court, and Central's cross-appeal 20%. Consequently, the outcome is – the Province shall pay Central 80% of Central's reasonable costs necessarily incurred (*i.e.* solicitor and client costs) for the entire proceeding (appeal plus cross-appeal) in this Court.

- Any dispute respecting the calculation of appeal costs, according to the above directions, is to be resolved by the Board on the motion of either party.

Fichaud J.A.

Concurred: Saunders J.A.

Dissenting Reasons:

[244] I have read my colleague's comprehensive reasons for judgment. With respect, while I would agree with his proposed disposition of the cross-appeal, I am unable to agree on the main appeal. I would allow the appeal and quash the Board's award of business losses as disturbance damages and vary the interest on the compensation awarded.

[245] The whole premise for the claimed compensation for disturbance damages is without legal precedent and is plainly wrong in law. It amounts to this: based on a claimed comment by a government employee at a public meeting in 1998, Central was somehow precluded from developing its business as it wanted; and, by reason of the delay said to have been caused by the shadow of expropriation, it deserves compensation under the *Expropriation Act* for all profit that it would have otherwise made from 2001 to 2013 as if it had gone ahead with its business plans.

[246] The premise is wrong because there was no causal connection between Central's decision not to proceed with its plans and the expropriation that eventually occurred on May 1, 2012. Without business loss caused by the process or the fact of expropriation, there is no compensation.

[247] Before exploring these issues in detail, I will comment on the appropriate standard of review.

STANDARD OF REVIEW

[248] In my view, the standard of review is correctness not reasonableness.

[249] It is not necessary that I write a treatise on this subject, because even if the standard of review is reasonableness, the Board made an unreasonable legal error by ordering compensation for damages that were not caused by the expropriation of Central's land.

[250] The last ten years of judicial debate has, with respect, lost its focus on the key issue of legislative intent. Compensation to be paid to a landowner for the compulsory taking of land by the Crown or one of its statutory agents is entirely governed by legislation (*Sisters of Charity of Rockingham v. The King*, [1922] 2 A.C. 315). In Nova Scotia, that legislation is currently the *Expropriation Act*, R.S.N.S. 1989, c. 156. There have been amendments since 1989 that I will discuss in due course.

[251] For now, it is sufficient to say that the history of expropriation legislation in Nova Scotia, the law in existence when the current provisions were enacted, and the controlling jurisprudence of our Court permits but one answer: the legislature intended this Court to ensure that the Board did not commit legal error. The standard of review is one of correctness.

[252] There is no need to trace the complete pedigree of the legislated compensation provisions. In terms of process, the legislature chose the Courts as the arbiter of compensation that must be paid. Absent an agreement between the landowner and the Crown, a judge of the County or Supreme Court determined compensation. An appeal lay to the Supreme Court *en banc* (now the Court of Appeal) by leave if the amount exceeded $500.00 (R.S.N.S. 1923, c. 21).

[253] This basic procedure existed until the so-called modern expropriation code was introduced in Nova Scotia by the *Expropriation Act*, 1973 (S.N.S. 1973, c. 7). This *Act* set out the guiding principles to determine compensation. They remain unchanged.

[254] With respect to process, the 1973 *Act* introduced a new structure to determine compensation. It created the Expropriations Compensation Board to hear and determine compensation in the first instance. The Courts were given a major supervisory role to play. First, the Board, on its own motion or upon application by a party, could request the opinion of the Appeal Division of the Supreme Court (now the Court of Appeal).

[255] Secondly, and more relevant, there was no "privative clause" protecting the decision of the Board from judicial scrutiny. Instead, the legislature chose a broad

right of appeal to the Trial Division of the Nova Scotia Supreme Court. A party could appeal upon any question of jurisdiction, law, mixed law and fact, and fact:

> 60 (1) An appeal shall lie to the Trial Division of the Supreme Court from any order of the Board upon any question as to its jurisdiction or upon any question of law or fact or mixed law and fact upon application made within thirty days after the rendering of the decision by the Board, but on such appeal no new evidence shall be adduced except with leave of the Court and only to the extent that fresh evidence may be adduced on an appeal to the Appeal Division of the Supreme Court under the *Civil Procedure Rules*.

[256] Pursuant to the *Judicature Act*, an appeal was then available as of right to the Appeal Division (see *Park Projects v. City of Halifax* (1982), 54 N.S.R. (2d) 116 (A.D.) at para. 39).

[257] Despite the breadth of the Trial Division's appellate role, deference was accorded the Board on findings of fact. The appellant was required to demonstrate palpable and overriding error or that the Board's factual findings were "plainly wrong" (see, for example: *Burke v. Province of Nova Scotia* (1983), 57 N.S.R. (2d) 1 (T.D.); *Park Projects v. City of Halifax*, *supra*; *Reiss and Hammerling v. City of Dartmouth* (1979), 36 N.S.R. (2d) 482 (T.D.).

[258] There is not a hint that the Supreme Court owed any deference to the Board on questions of law or principle. On these questions, the appellate court was there to correct such errors (*POW Investments Limited v. Province of Nova Scotia* (1973), 5 N.S.R. (2d) 121 (N.S.S.C.A.D.); aff'd [1975] 2 S.C.R. 86). It was unheard of that the Supreme Court or the Appeal Division would uphold a decision of the Board that was tainted by legal error, reasonable or otherwise.

[259] The *Expropriation Act*, 1973 was repeated verbatim in the 1989 Revised Statutes (R.S.N.S. 1989, c. 156). Process changes were made in 1992 by the *Utility and Review Board Act*, S.N.S. 1992, c. 11. This *Act* amalgamated a number of Boards, including the Expropriations Compensation Board, into one tribunal, the Nova Scotia Utility and Review Board. The appeal provisions of the *Expropriation Act* were repealed.

[260] The new appeal structure retained the ability of the Board, with leave by either the Attorney General or the Appeal Division, to request its opinion on questions of law. The main appeal provision for all matters heard by the Board provided for an appeal as of right on any question as to the Board's jurisdiction or upon any question of law:

> Appeal
>
> 30 (1) An appeal lies to the Appeal Division of the Supreme Court from an order of the Board upon any question as to its jurisdiction or upon any question of law, upon filing with the Court a notice of appeal within thirty days after the issuance of the order.

[261] This Court has decided that the appropriate standard of review on appeals from the Board in relation to the *Expropriation Act* is correctness. In *Nova Scotia (Attorney General) v. Williams*, 1996 NSCA 134, Freeman J.A., writing for the majority, cited the relevant provisions of the *Utility and Review Board Act*:

> 17 In considering the appropriate standard of review, the following provisions of the *Utility and Review Board Act* are relevant:
>
> > 22 (1) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it.
> >
> > (2) The Board, as to all matters within its jurisdiction pursuant to this *Act*, may hear and determine all questions of law and of fact.
> >
> > 26 The finding or determination of the Board upon a question of fact within its jurisdiction is binding and conclusive.
> >
> > 30 (1) An appeal lies to the Appeal Division of the Supreme Court from an order of the Board upon any question as to its jurisdiction or upon any question of law.

[262] Justice Freeman concluded that the standard of review was patent unreasonableness on an appeal from findings of fact or mixed law and fact, but for questions of law or jurisdiction, the general rule of concurrence or correctness applied:

> 18 Therefore, 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 the same to deference due to its findings of fact alone, the standard of patent unreasonableness. …
>
> [Emphasis added]

[263] Hallett J.A. dissented, but not with respect to the standard of review.

[264] One of the leading cases on expropriation in Nova Scotia is *Nova Scotia v. Johnson*, 2005 NSCA 99 (leave denied, [2005] S.C.C.A. No. 446). Justice Oland

wrote the unanimous reasons for judgment. She canvassed the then leading authorities on standards of review. Guided by the "polar star of legislative intent" Oland J.A. considered the contextual factors, and decided that questions of law are reviewable on a standard of correctness, but to disturb questions of mixed law and fact or fact, patent unreasonableness must be established. She concluded:

> [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.

See also: *Harrison Blueberry Enterprises Ltd. v. Nova Scotia (Utility and Review Board)*, 2006 NSCA 26 at para. 6; *R. v. Superior Propane Inc.*, 2004 NSCA 73 at para. 21.

[265] I know of no decision by our Court that clearly says the standard of review on appeals from Board expropriation decisions is otherwise. Nonetheless, my colleague says *Johnson* pre-dates *Dunsmuir v. New Brunswick, supra* and the subsequent pronouncements by the Supreme Court of Canada that reasonableness is the default position on court hearings which challenge tribunal decisions.

[266] I am unable to agree that cases post *Dunsmuir* pre-determine the appropriate standard of review in this case. Recall that *Dunsmuir* was a case where the appellant challenged the adjudicator's decision by way of judicial review. The relevant statute, in the words of the Supreme Court, stated "in no uncertain terms" that "every order, award, direction, decision, declaration or ruling of ... an adjudicator is final and shall not be questioned or reviewed in any court" (para. 67). Despite the strength of this privative clause, the adjudicator's decision was reviewable on a standard of reasonableness.

[267] The majority reasons in *Dunsmuir*, written by Justices Bastarache and LeBel, direct that a reviewing Court need not engage in a standard of review analysis if the existing jurisprudence has already decided the degree of deference owed (paras. 57 and 62).

[268] As demonstrated above, this Court has already decided that the standard of review on an expropriation appeal on questions of law is correctness under s. 30 of the *UARB Act*.

[269] My colleague cites *Yarmouth (Town) v. Gateway Importers and Exporters Ltd.*, 2011 NSCA 17 and *Guysborough (District) v. PEV International Research and Development Incorporated*, 2012 NSCA 87 as cases that post-date *Dunsmuir* and the Supreme Court's enunciation of the "home and related statute" presumption of reasonableness.

[270] With respect, the law is not so clear. In *Yarmouth*, the dispute was not about legal entitlement to compensation for injurious affection but about the Board's quantification of compensation. This was clearly a question of mixed fact and law. Furthermore, the parties conceded that the reasonableness standard of review applied (paras. 1 and 4). Justice Bryson, writing for the Court, acknowledged that deference was appropriate on the issue of assessment of the appraisal evidence (para. 25).

[271] In *Guysborough*, the respondent asserted it had an interest in land that entitled it to compensation under the *Expropriation Act*. In a preliminary decision, the Board found for the respondent. Guysborough appealed. Hamilton J.A. penned the unanimous reasons that dismissed the appeal. As my colleague points out (para. 64), Justice Hamilton cited a decision of our Court that reasonableness governs a property assessment appeal and that the same standard applied (paras. 16-17). However, as it turns out, this comment was plainly *obiter*.

[272] In *Guysborough*, both parties agreed that the standard of review was correctness. Justice Hamilton expressly declined to decide the issue. She wrote:

> [18] Both parties say we ought to apply a standard of review of correctness. It is not necessary for me to determine whether the standard of correctness or reasonableness applies in this case, because I am satisfied the Board's decision is correct.

[273] My colleague has thoroughly canvassed the current use of presumptions to determine the appropriate role of an appeal court hearing a statutory appeal from a tribunal. Reliance on a presumptive standard started in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61. The tribunal's decision was challenged on judicial review. The Court concluded that deference was presumptively owed to a challenge of a tribunal's interpretation of its home or closely-connected statutes (para. 34).

[274] In *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, the Board, under the Alberta *Municipal Government Act*, decided it had the jurisdiction to increase a tax assessment on a taxpayer's appeal. On

statutory appeal to the Queen's Bench, the decision was reversed, which was upheld by the Alberta Court of Appeal. The Alberta Courts resisted the concept that a presumption guided their standard of review choice. While the presence of a statutory right of appeal may not invariably signal a correctness standard of review, it was enough to displace a presumption that reasonableness applies (2015 ABCA 85 at para. 24).

[275] After considering the contextual factors, the Alberta Court of Appeal unanimously concluded that correctness was the standard of review. On further appeal, the Supreme Court reversed by a five-four plurality.

[276] I need not analyse the extensive majority and minority reasons. Karakatsanis J. wrote for the majority. She referenced recent Supreme Court jurisprudence that applied reasonableness to statutory appeals and the applicability of administrative law principles, including a presumption of deference to tribunal decisions:

> 29 At least six recent decisions of this Court have applied a reasonableness standard on a statutory appeal from a decision of an administrative tribunal (*McLean*; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147; *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 S.C.R. 219).
>
> 30 In *Saguenay*, this Court confirmed that whenever a court reviews a decision of an administrative tribunal, the standard of review "must be determined on the basis of administrative law principles ... regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal" (para. 38, per Gascon J.; see also *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at paras. 17, 21, 27 and 36; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at paras. 2 and 21).

[277] Justice Karakatsanis acknowledged that the presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions and its consequent expertise (para. 33). However, this rationale is only part of the legislative equation. It says nothing of the legislature's choice to provide a right of appeal on questions of law and jurisdiction to a Court of Appeal.

[278] With respect, reliance on a presumption of legislative intent in favour of deference, created by the Supreme Court in 2015, spurns well-established norms of statutory interpretation (*Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 at para. 46). It is to those norms that I turn.

[279] In *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, the Supreme Court gave clear direction that the starting point for statutory interpretation is the "modern rule" espoused by Professor Driedger. Iacobucci J., for the Court, wrote:

> [21] Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, 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.

[280] Iacobucci J., again writing for the Court, in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, elaborated:

> [26] ... Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, *per* Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, *per* McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
>
> [27] The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev.* 1, at p. 6, "words, like people, take their

> colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Stoddard v. Watson*, [1993] 2 S.C.R. 1069, at p. 1079; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61, *per* Lamer C.J.)

[281] What then was the intent of the Nova Scotia Legislature when it provided for a right of appeal to the Court of Appeal on questions of law and jurisdiction? Was it to ensure that the Nova Scotia Utility and Review Board did not render decisions tainted by legal error, or was it only to correct such errors that it considered not just to be wrong, but unreasonably wrong? The answer comes from the application of well-established common law and statutory rules of interpretation.

[282] The original meaning rule directs that the words of a statute are to be construed as they would have the day after they were passed. This principle is explained by Ruth Sullivan in *Driedger on the Construction of Statutes*, 3rd ed (Toronto: Butterworths, 1994) at pp. 140-41:

> The leading Canadian case on the original meaning rule is *Perka v. R.*, in which Dickson J. wrote:
>
> > The doctrine of *contemporanea expositio* is well established in our law. "The words of a statute must be construed as they would have been the day after the statute was passed...": *Sharpe v. Wakefield*. See also Driedger, *Construction of Statutes*: "Since a statute must be considered in the light of all circumstances existing at the time of its enactment it follows logically that words must be given the meanings they had at the time of enactment, and the courts have so held"; *Maxwell on the Interpretation of Statutes*...: "The words of an Act will generally be understood in the sense which they bore when it was passed.
>
> This passage makes it clear that the original meaning rule applies in Canada…
>
> (footnotes omitted)

[283] The learned author goes on to explain:

> ***Original meaning rule distinguished from contemporanea expositio***. In *Perka*, Dickson, J. refers to the doctrine of *contemporanea expositio*, but what he actually goes on to describe is the original meaning rule. To avoid confusion, it is helpful to distinguish the two. The original meaning rule is a substantive rule

> which provides that the meaning of words used in legislation is fixed at the time of enactment and does not change, regardless of linguistic evolution or other change. The doctrine of contemporaneous exposition is a rule of evidence which provides that the best evidence of original meaning is found in judgments or other authoritative sources dating from the time the legislation was first enacted and showing how the legislation was understood by contemporary interpreters.
>
> (footnote omitted)

[284] Other leading texts echo the principle. Côté on *The Interpretation of Legislation in Canada*, 2nd ed (Cowansville, QC: Yvon Blais, 1991), describes the rule as follows (pp. 224-25):

> As a general rule, the interpreter of a law should place himself at the time of enactment. His task is to rethink the thoughts of the legislator as expressed by the terms of the enactment. It seems logical, therefore, to give the words their ordinary meaning at the time of the legislation's adoption, while taking into account, of course, the context in which they were enacted.
>
> This principle was expressed by Lord Esher in *Sharpe v. Wakefield*:
>
> > ...the words of a statute must be construed as they would have been the day after the statute was passed, unless some subsequent statute has declared that some other construction is to be adopted or has altered the previous statute.

[285] This approach is in harmony with the *Interpretation Act*, R.S.N.S. 1989, c. 235 that sets out the general principles to guide courts in the interpretative process. It provides:

> 9 (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> > (a) the occasion and necessity for the enactment;
> >
> > (b) the circumstances existing at the time it was passed;
> >
> > (c) the mischief to be remedied;
> >
> > (d) the object to be attained;
> >
> > (e) the former law, including other enactments upon the same or similar subjects;
> >
> > (f) the consequences of a particular interpretation; and
> >
> > (g) the history of legislation on the subject.

[286] With the 1992 *UARB Act*, it is not hard to conclude that the legislature wished to amalgamate the diverse tribunals that oversaw different statutory

responsibilities into one, thus simplifying the law, removing administrative duplication and expense.

[287] The right to appeal on matters decided by the former Expropriations Compensation Board was broad. It included appeals from findings of fact and mixed law and fact, and of course, questions of law and jurisdiction. The 1992 legislation restricted appeals to "any question as to its jurisdiction or upon any question of law". That change signalled deference should be the standard for findings of fact untainted by legal error.

[288] But what of an appeal on "any question of law"? As observed by Freeman J.A. in *Williams*, *supra*, at the time of this legislation change, correctness or concurrence on law or jurisdiction was the general rule. The legislature is deemed to know the current law.

[289] If the legislature intended a more deferential standard it was open to it then, as now, to say so. Just beginning was the notion that while a statutory appeal gave the right to the appellate court to disagree with the lower tribunal on issues that fall within the scope of a statutory appeal, curial deference should be given to the opinion of the lower tribunal on issues that fall squarely within its area of expertise (see for ex. *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 at paras. 31-33; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557).

[290] But long past 1992, correctness governed matters of law, including statutory interpretation where a tribunal, unprotected by a privative clause, adjudicated claims (see: *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54).

[291] The NSUARB, when deciding matters under the *Expropriation Act*, is not setting policy or pursuing objectives. It is not administrating a regulatory scheme. It adjudicates claims for compensation by owners. There is a Statement of Claim and a Reply by the expropriating authority. The Board is required to determine entitlement and then quantify compensation. These contextual factors were considered by Oland J.A. in *Re Johnson*, *supra* and appropriately led her to fix the standard of review on questions of law as correctness.

[292] When the Board is faced with competing appraisals or evidence, deference is owed to its resolution of those questions. Absent an extricable legal issue, they are inherently questions of fact or of mixed law and fact. But whether an owner is

entitled to compensation under the various statutory heads is generally a question of law.

[293] Even if entitlement must be resolved by statutory interpretation of the *Expropriation Act*, I fail to see how the legislature intended this Court to defer to the Board's possibly reasonable but erroneous interpretation or application of the law. The Board has no greater expertise in statutory interpretation in general nor in relation to the *Expropriation Act* than this Court.

[294] There are numerous examples of specific Courts having actual and institutional expertise in highly specialized areas of the law, but no deference is accorded to them on questions of law, including, of course, statutory interpretation and application of their "home statutes".

[295] Provincial Court Judges are required to interpret and apply the *Criminal Code* every day. What deference is given to their legal determinations? Zero. On questions of law, they must be correct (see: *R. v. Shepherd*, 2009 SCC 35 at paras. 18-20; *R. v. MacKenzie*, 2013 SCC 50 at para. 54; *R. v. J.(C.)*, 2011 NSCA 77 at para. 19; R. *v. Ewanchuk*, [1999] 1 S.C.R. 330 at para. 21).

[296] Tax Court Judges interpret and apply the *Income Tax Act* and related statutes daily. What deference is given to their legal determinations? Zero. On questions of law, they must be correct (see: *1392644 Ontario Inc. v. Minister of National Revenue*, 2013 FCA 85 at para. 16).

[297] Judges of the various provincial and federal Unified Family Courts interpret and apply their home statutes. A deferential standard is set for their discretionary decisions, but what deference is given to their expressions of legal principle and interpretation? Zero. On matters of law and principle, they must be correct (see: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at p. 526; *Contino v. Leonelli-Contino*, 2005 SCC 63; *N. (H.A.) v. Nova Scotia (Minister of Community Services)*, 2013 NSCA 44 at para. 32; *Johnson v. Barker*, 2017 NSCA 53 at paras. 19-20).

[298] In each of these examples, Parliament and/or the legislature has bestowed jurisdiction on the tribunals. Appellate Courts hearing appeals from these highly specialized tribunals afford no deference to statutory interpretation of their respective home statutes or articulation of and application of the law. I fail to see any rationale to say that the Nova Scotia legislature intended that this Court would defer to the Board's interpretation of the *Expropriation Act* and related legal principles.

[299] In my view, the plain meaning of the appeal provisions on matters dealing with the *Expropriation Act* require this Court to determine questions of law and jurisdiction on the standard of correctness or concurrence. This is not a situation of bygone years when courts, said to be jealous of administrative tribunals, evaded privative clauses by searching for jurisdictional error or patently unreasonable interpretations or findings.

[300] By applying concurrence or correctness, this Court is simply respecting the rule of law. That was what the Nova Scotia legislature asked us to do. With all due respect to those that hold a contrary view, it is what we are required to do.

[301] I will repeat my earlier conclusion: given the history of expropriation legislation in Nova Scotia, the law in existence when the current provisions were enacted, and the controlling jurisprudence of our Court, the legislature intended this Court to ensure that the Board did not commit legal error. The standard of review is correctness.

[302] Before leaving this subject, I want to say that I echo the comment by Karakatsanis J. that perhaps it is time for clear legislative guidance to hopefully end the seemingly endless debate about the applicable standard for judicial review and statutory rights of appeal (2016 SCC 47 at para. 35).

ERROR BY THE BOARD RE DISTURBANCE

[303] Even if the standard of review is reasonableness, the Board made an unreasonable error in law to award pre-expropriation disturbance damages for Central's claimed loss of profit, vendor discounts and incremental operating costs had it gone ahead in 2001 with its expansion plans.

[304] I agree with my colleague's comments about what is the measure for reasonableness (above, paras. [67]-[68]). The seminal definition of the appropriate approach is from *Dunsmuir*:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of

> justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[305] With respect, the Board's decision does not fall within a range of possible acceptable outcomes that are permitted by the legislation.

[306] The Board awarded Central $8.1 million plus interest on some parts of that award. The disturbance damages make up $6.7 million of the total compensation award. Central did not actually lose any money because of the expropriation, nor from being in the "shadow of expropriation". The award is based on a claimed loss of opportunity.

[307] With respect, the Board failed to properly understand the requirement that disturbance damages be legally caused by the expropriation and hence come within s. 27(3)(b)(ii) of the *Act*.

[308] The first case in Canada to award disturbance damages for losses said to have occurred prior to the actual date of expropriation was *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32. To recognize the Board's error, we must understand the facts of that case and the Ontario statutory regime.

[309] Dell was a land developer. It owned approximately 40 acres of land in Mississauga. It sought municipal approval for residential development. The Transit Authority announced it wanted to build a new GO transit station on one of two sites. Both of those sites were on Dell's lands in Mississauga that it wanted to develop. The municipality withheld from Dell all requisite approvals pending the expropriation.

[310] Three years passed before the Authority proceeded with its planned expropriation. The parties agreed that Dell suffered $500,000 in damages caused by the delay. The sole issue was whether those damages were compensable under the Ontario *Expropriation Act*. The Ontario Municipal Board found that the delay was directly caused by the Authority because the municipality was required to withhold approval until the Authority decided which lands to expropriate.

[311] The award of disturbance damages was reversed on appeal to the Divisional Court and the Ontario Court of Appeal. The Supreme Court reinstated the Board's award. Interestingly, the Court endorsed the standard of review on appeals from

the Board to be correctness, albeit in the face of different statutory appeal provisions.

[312] In any event, Cory J., for the majority, adopted the majority reasons of the Privy Council in *Director of Buildings and Lands v. Shun Fung Ironworks Ltd.*, [1995] 2 A.C. 111 that expropriation is a process, and disturbance damages caused are recoverable even if they were incurred prior to the date of expropriation.

[313] The relevant Ontario statutory provisions are:

> 13. (1) Where land is expropriated, the expropriating authority shall pay the owner such compensation as is determined in accordance with this Act.
>
> (2) Where the land of an owner is expropriated, the compensation payable to the owner shall be based upon,
>
> (a) the market value of the land;
>
> (b) the damages attributable to disturbance;
>
> (c) damages for injurious affection; and
>
> (d) any special difficulties in relocation,
>
> but, where the market value is based upon a use of the land other than the existing use, no compensation shall be paid under clause (b) for damages attributable to disturbance that would have been incurred by the owner in using the land for such other use.
>
> [. . .]
>
> 18. (1) The expropriating authority shall pay to an owner other than a tenant, in respect of disturbance, such reasonable costs as are the natural and reasonable consequences of the expropriation, including,
>
> (a) where the premises taken include the owner's residence,
>
> (i) an allowance to compensate for inconvenience and the cost of finding another residence of 5 per cent of the compensation payable in respect of the market value of that part of the land expropriated that is used by the owner for residential purposes, provided that such part was not being offered for sale on the date of the expropriation, and
>
> (ii) an allowance for improvements the value of which is not reflected in the market value of the land;
>
> (b) where the premises taken do not include the owner's residence, the owner's costs of finding premises to replace those expropriated, provided that the lands were not being offered for sale on the date of expropriation; and

> (c) relocation costs, including,
>
> (i) the moving costs, and
>
> (ii) the legal and survey costs and other non-recoverable expenditures incurred in acquiring other premises.
>
> 19. (1) Where a business is located on the land expropriated, the expropriating 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 expropriating authority otherwise agree, the business losses shall not be determined until the business has moved and been in operation for six months or until a three-year period has elapsed, whichever occurs first.

[314] The Supreme Court endorsed the view that the enumerated heads of compensation in s. 13 ensured "on the one hand double recovery does not occur, and on the other hand no legitimate item of claim is overlooked" (para. 26). Further, because the municipality had no alternative but to wait for the Authority to decide how much and what portion of land it required, it was the expropriation that caused the delay. Damages caused by the delay were the natural and reasonable consequences of the expropriation within s. 18 of the Ontario *Act*.

[315] There are differences between the Ontario *Act* and the *Expropriation Act* in Nova Scotia. I will set out the Nova Scotia provisions in order to provide context for the claim advanced by Central to the Board.

[316] Like the Ontario statute, our legislation specifies that the intent and purpose of the *Act* is that every person whose land is expropriated shall be compensated for such expropriation (s. 2). Part III of the *Act* sets out the duty to pay the owner compensation as is determined in accordance with the *Act* (s. 24). The *Act* defines value of land to be the amount that would have been paid for the land had it been sold in the open market by a willing seller to a willing buyer (s. 27(2)) at the time of the taking. Due compensation is to be paid for the aggregate of itemized heads:

> 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.

[317] The other relevant provisions are sections 27 and 29. They provide:

> 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.
>
> (3) Where the owner of land expropriated was in occupation of the land at the time the expropriation document was deposited in the registry of deeds and, as a result of the expropriation, it has been necessary for him to give up occupation of the land, 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 determined as set forth in subclause (i),
>
> plus the value to the owner of any element of special economic advantage to him arising out of or incidental to his occupation of the land, to the extent that no other provision is made by this clause for the inclusion thereof in determining the value of the land expropriated
>
> …
>
> 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 twelve months or until a three-year period has elapsed from the date of the expropriation, whichever occurs first.
>
> (2) Where it is not feasible for the owner of a business to relocate, there shall be included in the compensation payable an amount for the loss of the business where the compensation for the land taken is based on the existing value of the land.

CENTRAL'S CLAIM

[318] Central's land was expropriated by deposit of the expropriation documents in the Antigonish County Land Registration Office on May 1, 2012. That date is important.

[319] The parties agreed to waive the *Expropriation Act* timelines. No negotiated settlement was reached. Eventually, the Province made an offer of $260,000 for the fair market value of the lands taken and for injurious affection to a portion of the lands remaining.

[320] Central filed its claim with the Board on March 12, 2015. It claimed compensation for: the market value of lands expropriated; business disturbance, injurious affection and loss of special economic advantage for its interests in both the expropriated and remaining lands; costs, expenses and losses "arising out of or incidental to [its] disturbance", including fencing; legal, appraisal and other professional fees and disbursements; the costs of developing and operating a replacement property; an order for access to rear lands; and, prejudgment interest.

[321] Central filed an Amended Claim on June 15, 2015. In all material respects, it is the same.

[322] However, before the Board, Central abandoned its claim for costs to develop a replacement property, an access order and for loss of special economic advantage. This left the Board to resolve three basic questions: what is the market value of property taken; what amount should be awarded, if any, for injurious affection; and, what amount should be awarded for business loss and disturbance?

[323] Central's Claim set out the parameters of its business loss as follows:

> 15. The particulars of the afore described injurious affection, business disturbance and loss of special economic advantage suffered by the Claimant have been made known to the Province as early as 1998 and have been sporadically described to the Province over the ensuing years on a variety of occasions. Without restricting the generality of the foregoing, from 1998 to and including the date herein, the Claimant has carried on discussions with representatives of the Province with respect to such claims, including with Department of Transportation and Infrastructure Renewal (DOTIR) representatives Steve Chaisson and Rod MacInnis, and post-expropriation with legal counsel for the Province. At an early stage in those discussions, with no accompanying declaration under Section 3 of the *Public Highways Act*, **Steve Chaisson** on behalf of the Province advised the Claimant's President Stephen Smith that the Claimant would not be permitted to further expand its business onto the lands which were being considered for expropriation.

[Emphasis added]

[324] As I will detail later, the bolded reference to Steve Chaisson is a typographical error—it should read Mr. Bushell.

[325] The Province consistently disputed that Central had actual plans to build a new store and distribution centre at the Lower South River property. There is no need to review the conflicting evidence on this point. The Board did so and found as a fact that Central did have such expansion plans. It concluded:

> [722] The Board finds that Central's plans were not remote or speculative.
>
> [723] Consequently, the Board is satisfied, on a balance of probabilities, that Central planned a new retail store to open at Lower South River in 2000, to be followed by a distribution centre, and would have proceeded with this expansion, but for the expropriation, or more precisely, the shadow of expropriation.

[326] It cannot be disputed that the Board found as a fact that Central planned to open a new store and then a distribution centre at Lower South River. There is an evidentiary foundation for that finding. It is therefore not a determination that amounts to legal error and is beyond our purview.

[327] The Board's reasoning on causation followed shortly thereafter:

> [738] The Board has, in this Decision, found that Central did have such plans. The Board agrees that the plans could not be implemented as a result of the expropriation. Therefore, the requirement of causation has been met.

[328] To award compensation on this basis confuses cause and effect with legal causation. Furthermore, there is absolutely no evidence that whatever Central wanted to do with its lands, it could not have gone ahead. As noted by my colleague, a finding that is without evidence is legal error (see *International Association of Fire Fighters Local 268*, *supra*). It is arbitrary and perforce, an unreasonable error in law.

[329] In other words, Central may well have altered its plans because of the potential expropriation, which later materialized, but the Province is not legally responsible for Central's decision, nor for the claimed foregone profits it says it would have earned had it gone ahead with its expansion plans in 2001. This is what the Province argued before the Board, but it failed to understand this point. Some further details will assist to illustrate.

[330] As set out above, Central plead that Provincial employee, Steve Chaisson, told Central's President, Stephen Smith, that Central would not be permitted to further expand its business onto lands being considered for expropriation. The same claim was repeated in its Amended Claim.

[331] However, at the Board hearing, Mr. Smith advanced no evidence that he was told by Steve Chaisson, Rod MacInnes, Graydon Bushell, or by any Provincial employee that Central could not proceed with its business plans in the key period of 1998-2000. I will review the Provincial employees' evidence later. First, Mr. Smith's.

[332] Stephen Smith is a sophisticated landowner and businessman. His background and business success are detailed in the Board's decision. Mr. Smith described how he wanted to build a bigger store at Lower South River and a distribution centre. He needed to persuade the Municipality to extend water services to his land.

[333] It was around this time that he went to a widely-attended public meeting on May 30, 1998. At this meeting, the Provincial Department of Transportation and Infrastructure described the three possible routes to twin Highway 104. One of those options would have no impact on his lands located at Lower South River, the other two would cut his lands into two remnants, which could greatly impact Central's ability to expand and grow at that location.

[334] Mr. Smith described approaching Graydon Bushell, who he knew through family connections. He says he told Mr. Bushell of his concerns. Mr. Smith said Mr. Bushell was nice and said the route was not settled—the land is yours and you can do with it what you want, but if you improve it with buildings, you will not be compensated if it is expropriated:

> **MR. SMITH**: Yes, I do. And he -- you know, he -- you know, he was being nice but he said this wasn't settled but he said that if -- you know, it could be changed and, you know, this is very preliminary.
>
> But he also told me that now that you know about this and you see this corridor, that anything you do on your land in the corridor, where the corridor was, you can do it. I said -- well, I actually said to him, "What if I just go and build on there, you know?" And he said, you know, "We don't own the land you do, you can. We haven't expropriated it. But anything you do from now on you would not be compensated for it." So in other words he said, "If you go put a building on that land or expand your yard in that land, the cost to replace that you will not be compensated for because now you know about the path."

[335] Mr. Smith later repeated that the Province never told him what to do:

> **MR. MacINTOSH**: When you were at that meeting in May 30th and they encouraged feedback like Kevin White's letter.
>
> Did they ever say, "You must list each and every project you have in mind that will be impacted by this"?
>
> **MR. SMITH**: No. No. They said that if they -- if something happens, you will be -- you know, we're going to compensate you fairly for, you know -- I said, "Well, we don't want this [to] happen." You know, this is -- but you know, they never told us what to do. They didn't, you know -- and believe me, I had no idea of the process. You know, I just had -- I just was going through the process of hoping that this wouldn't happen.

[336] On cross-examination, Mr. Smith confirmed that he only had contact with three provincial employees, Messrs. Bushell, MacInnes and Chaisson. Of these three, only Mr. Bushell discussed with him expropriation process, and only in the first meeting in 1998:

> MR. SMITH: They didn't tell me anything about the expropriation, except Mr. Bushell. Mr. Bushell told me in that first meeting. I questioned him. I said, "Holy gosh, look, that's going -- that's going right behind us," because that doesn't even show the -- the swamp and the highway.
>
> He explained that to me and I said -- and I said to him right there, "Okay what -- you know, I have plans. What if I -- what if I just go build over this?" He said, "Well, if you do" -- he told me that, I mean you're -- "you know about this now." And he didn't say shadow expropriation, he just said if you know -- "You know about this now and everybody knows about this, so if -- now if you do any developing on that land, then you won't be compensated for it." So I -- that was the end of my plans right there. And I clearly remember that.
>
> Now, perfect wording to that? I can't tell you, but he certainly didn't say you're in the shadow of expropriation, because I would have probably kind of figured that out.

[337] There were no meetings with Provincial officials, no Departmental correspondence to Central or to any landowner that prohibited development on any of the corridors that might be expropriated.

[338] In May 2001, the Committee struck to study the options announced its selection of the Blue Route—one of two possible routes that would bisect Central's lands. Several assessments and studies confirmed that the Blue Route was the safest of the three. As one Department official put it, in light of the safety studies, an alignment other than the Blue Route would be very difficult to defend.

[339] But the Province could not proceed with expropriation until an Environmental Assessment was done. This was not complete until August 6, 2005. It passed.

[340] Mr. Smith said that he knew that the Blue Route was still not "solid" as it was subject to Environmental Assessment. Despite his claim that landowners on the proposed corridor could not develop, he noticed his neighbour putting in a huge trailer park in 2002 on the very Blue Route—and the Province then acted quickly to acquire his neighbour's land because "they [the Province] would be on the hook".

[341] This trailer park development was repeatedly referred to by Mr. Smith and by Central's counsel throughout the hearing. The development was apparently owned by a Mr. Arsenault. Central's counsel suggested that Mr. Arsenault received very favourable terms from the Province for the trailer park lands, whereas Central received no purchase offer and was forced into the expropriation process.

[342] When Mr. Smith saw the trailers being removed from his neighbour's land in 2003, he decided that he had to act. Central bought a lot on Market Street in Antigonish and built a 52,000 sq. foot store which opened in May 2005. He closed the retail store in Lower South River and turned it into a Distribution Centre and truss mill.

[343] In September 2005, Central engaged legal counsel (not Mr. MacIntosh) about a potential expropriation claim. Mr. Smith sought the advice of the firm that had represented Mr. Arsenault—a firm acknowledged to be experienced in expropriation issues. Internal notes and counsel's detailed opinions were in evidence before the Board. They make no mention of any impediment to Central's expansion plans due to the comments made by Mr. Bushell on May 30, 1998.

[344] What did the Provincial witnesses say about the notion that Central was somehow precluded from pursuit of its plans? Mr. Bushell retired in 2005. He had been the Manager of Acquisitions and Disposals. He testified that there were 3-400 people at the May 30, 1998 meeting. He had no recollection of speaking with Mr. Smith at that meeting. Mr. Bushell was not cross-examined on the advice he supposedly gave to Mr. Smith.

[345] Michael Croft is a Professional Engineer. At the relevant times, he was responsible for the overall management of the new Highway 104 alignment. He

attended the May 30, 1998 public meeting. He had no contact with Mr. Smith whatsoever.

[346] Mr. Croft explained the four phases of route location, environmental assessment, detailed design and field survey and land purchase. They do not usually purchase properties prior to environmental assessment unless absolutely necessary because they may have to move the route.

[347] The Department wanted to know of any development plans so they can keep costs down. For that reason, they had written to the municipality to request notification of development plans. They received no response that Central had development plans. Mr. Croft ended his involvement in the project in 2001. With respect to telling landowners what they could or could not do with their properties, Mr. Croft was emphatic: no such advice came from him:

> MR. CROFT: All I can advise as the -- in my position as the engineer in charge of planning for the project, I wouldn't have advised any landowner as far as what they should or shouldn't do with regards to filing plans for development.
>
> …
>
> MR. CROFT: I wouldn't have told them that they should put development plans in. I wouldn't have told them that they shouldn't put development plans in. My job was basically to provide information to the landowners on the alignment options and how they may or may not impact somebody's property. But as far as what they did with their properties regarding development, I didn't provide any advice.

[348] Steven Chaisson was a right of way officer (acquisition and disposal) with the Department from 1993 to 2010. He first became involved in the 104 project in 2007. He met with Mr. Smith about the pending expropriation of other lands (Trunk 7) on which Mr. Smith wanted to build condominiums, and in relation to the expropriation of the lands at Lower South River.

[349] Mr. Chaisson acknowledged that Mr. Smith brought up Central's current desire to expand its business on the Lower South River lands. That is why discussions ensued about the Province perhaps building a tunnel under the 104 so Central could access the severed lands. He had no discussion with Mr. Smith about any aborted plans dating from 1999 or 2000.

[350] Mr. Chaisson denied any knowledge that the owners on the corridor had been told in 1998 that their properties were under the "shadow of expropriation".

[351] At some point in 2008, or later, he may have said to Mr. Smith as they were looking out his office window that it would be hard for him to expand his business to the south, as that is where the alignment was going through:

> MR. MacINTOSH: So you're trying to tell us there, what, that you never told Mr. Smith he couldn't expand or he could expand? What did you tell -- Let's start again; what did you try to explain to Mr. Smith about what he could do with his lands?
>
> MR. CHAISSON: What I recall is I possibly could have said, "You can't expand on the -- you can't expand your business there because the alignment's going through there."

[352] What was said to Mr. Smith in 2008 was irrelevant to the claim for disturbance damages said to have been caused by Central's delay in building a new store and distribution centre in 2001. Furthermore, during the hearing of this appeal, counsel for Central acknowledged that the reference in its pleadings to Mr. Chaisson was a typographical error—it should read Mr. Bushell (see para. [324] above).

[353] The Board accepted Mr. Smith's evidence that Mr. Bushell had told him in 1998 that, although he could not tell him what to do with his lands, he would not be compensated on any subsequent capital improvements to the corridor lands. Such advice was wrong. That is not the law.

[354] There is no doubt that capital improvements made to lands after expropriation attract no additional compensation. It is indisputable—the value as of the date of expropriation governs (*R. v. Thompson* (1916), 18 Ex. C.R. 23; *R. v. Lynch's Ltd.* (1920), 20 Ex. C.R. 158). This rule can sometimes work to the advantage of a landowner as in *R. v. Clarke* (1896), 5 Ex. C.R. 64, where the authority expropriated in 1885, but the owner remained in possession. In 1889, a fire destroyed many of the buildings on the land, but the authority had to compensate the owner the value as of 1885. Or as in *Drache v. Winnipeg (City)* (1970), 13 D.L.R. (3d) 368 (Man. C.A.) where the authority was required to pay the owner the value as of the date of expropriation unabated by fire insurance proceeds paid to the owner (see also: *Manitoba v. Paletta*, [1985] M.J. No. 115 (C.A.), (1985), 19 D.L.R. (4th) 143).

[355] The Nova Scotia *Expropriation Act* specifically directs that the value of the land expropriated shall be the value at the time the expropriation documents are deposited at the Registry of Deeds office:

> 25 (1) The rules set forth in this Part shall be applied in determining the value of land expropriated.
>
> (2) The value of land expropriated shall be the value of that land at the time the expropriation documents are deposited at the office of the registrar of deeds.

[356] Recall that the deposit date was May 1, 2012. There can be no other date of valuation. Whatever capital improvements Central did to its land would be compensated for as of the deposit date.

[357] Compensation for a compulsory taking by an expropriation is entirely determined by statute. Sections 24-33 of the *Act* constitute a code to determine the amount of compensation (see: *Bank of Nova Scotia v. Nova Scotia* (1977), 22 N.S.R. (2d) 568 (C.A.) at para. 68). Compensation is the aggregate of the market value of the land, the disturbance damages caused by the expropriation, damages for injurious affection caused by the expropriation, and the value of any special economic advantage (s. 26).

[358] Sections 27 to 32 contain specific provisions that detail how these are to be calculated. Section 33 lists four factors that cannot affect the calculation of the value of the land at the time the documents are deposited. None of them are applicable, but for completeness I will quote the provision:

> **33** In determining the value of land expropriated, no account shall be taken of
>
> (a) any anticipated or actual use by the expropriating authority of the land at any time after the depositing of the expropriation document in the registry of deeds;
>
> (b) any value established or claimed to be established by or by reference to any transaction or agreement involving the sale, lease or other disposition of the interest or any part thereof, where such transaction or agreement was entered into after the deposit of the expropriation document in the registry of deeds;
>
> (c) any increase or decrease in the value of the land resulting from the anticipation of expropriation by the expropriating authority or from any knowledge or expectation, prior to the expropriation, of the purpose for which the land was expropriated; or
>
> (d) any increase in the value of the land resulting from its having been put to a use that was contrary to law.

[359] The reality of the statutory imperative to claim compensation as of the date of expropriation explains entirely the consistent evidence from the Provincial employees: that they wanted to know about any developments so they could act

and thereby keep costs to the taxpayer down; and, their quick action to acquire Mr. Smith's neighbour's property (the trailer park development by Mr. Arsenault) when the development started to go ahead.

[360] Indeed, Mr. Smith acknowledged that he "theoretically" could have gone ahead and been fully compensated. This exchange illustrates:

> MR. MacINTOSH: And with the mobile park one that was done somewhere around 2002, was there a significant business loss payment compensation paid as part of that?
>
> MR. SMITH: There was. And I did also address that with Mr. Chaisson, you know, because I didn't know the figures, but there was always, you know, the word in -- on the street; and I knew George, but George never gave me the figures of what the deal was.
>
> MR. MacINTOSH: M'hm.
>
> MR. SMITH: Not to this day, even though at one time -- I wasn't as close to him today. He is a car salesman who I know fairly well and he has never told me his figures. And -- but in learning, I was quite surprised that the Province paid him even though he was fully in the shadow -- my understanding of the shadow expropriation, from what I'd been told by Mr. Graydon Bushell. Mr. Bushell said if you do anything on that land you're not going to get compensated for your infrastructure that you build there, as of this meeting.
>
> MR. MacINTOSH: That's the May 30th, '98 meeting?
>
> MR. SMITH: Yes. Now, Mr. Arsenault, well after that meeting, as can be witnessed, the land wasn't even re-zoned until 1998. We have letters to that or -- 1998 or 1999 he built a great big park up there and in his deal he was fully compensated for all his costs**. I -- and, you know, theoretically if I had just gone ahead I would have been compensated for everything**.
>
> [Emphasis added]

[361] How is it then that an offhand comment at a public meeting three years before the Blue route was even selected can amount to a legal cause of business losses for 12 years within s. 27(3)(b)(ii) when Mr. Smith himself acknowledged that he could have gone ahead?

[362] Counsel for Central repeatedly told the Board that Mr. Bushell's view, as described by Mr. Smith, was wrong—Central was misled. These rebuttal submissions demonstrate:

> [116] The Claimant does not intend to provide the lengthy list of culpable conduct by the Respondent that resulted in a delay in determining compensation.

> **Such conduct commenced initially with Graydon Bushell when he wrongfully misled Steve Smith by convincing him that he could not proceed with business expansion because of the imminent highway expansion.**
>
> (p. 7925)
>
> …
>
> The Respondent inquires why nothing was done in 1999 regarding expansion. That same question has been asked and answered innumerable times through the hearing: by May 30, 1998, the Province had directed Central not to expand further. Rather than ignoring the Province like Arsenault [the trailer park development] or running to legal advice like others might do, Steve Smith adopted a responsible corporate attitude and complied with the directive. Nothing was done in 1999 because the Province had directed Central to do nothing." (A.B. p. 8051)
>
> [Emphasis added]

[363] Of course, there was no "directive" by the Province. The Board did not, nor could it, make any such finding. It merely referenced a cause and effect. There was a possibility in 1998 of expropriation. Mr. Smith sought no legal advice. He decided not to proceed with his business expansion plans.

[364] At the hearing of this appeal, the flawed Bushell advice was explored with counsel for Central. Initially, Mr. MacIntosh agreed that he had submitted to the Board that the Bushell advice was wrong in law, and perhaps even amounted to negligent misrepresentation. Later in the hearing, Mr. MacIntosh returned to his "too easy agreement" and offered that it was an interesting question, and he could add nothing further.

[365] To me, it is more than an interesting question. The off-hand patently incorrect comment cannot translate into a legal cause of 12 years of forgone profit as disturbance damages under s. 27(3)(b)(ii) of the *Act*.

[366] To qualify as disturbance damages under s. 27(3)(b)(ii), the owner must have incurred "costs, expenses and losses arising out of or incidental to the owner's disturbance". None of the Board's award for disturbance damages is based on any outlay of money by Central for "costs, expenses and losses arising out of or incidental to the owner's disturbance…", but rather on more money it says it would have made had it gone ahead with its expansion plans in 2001. Nowhere in the Board's lengthy and detailed reasons does it even address how Central's claim for the additional money it says it would have earned comes within s. 27(3)(b)(ii).

[367] The Board's award of $6.7 million in disturbance damages is based entirely on the concept that a landowner can suffer compensable harm from being in the "shadow of expropriation". *Dell Holdings*, *supra*, established this principle in Canada.

[368] The appellant argues that there are important differences in wording between the Ontario and Nova Scotia *Expropriation Acts* that preclude an award for costs, expenses or losses prior to the date of expropriation. The difference in language does not justify a discordant approach. The award in *Dell* for disturbance damage caused prior to expropriation was by no means unique. The possibility of an award for pre-expropriation disturbance damage has long been recognized under comparable legislation in Scotland, England and Hong Kong on the basis that compensation for disturbance depends on a causal, not a strictly temporal connection (see: *Venables v. Dept. of Agriculture for Scotland*, [1932] S.C. 573; *Aberdeen City District Council v. Sim*, [1982] 2 E.G.L.R. 22; *Prasad and another v. Wolverhampton Borough Council*, [1983] 2 All E.R. 140 (C.A.); *Director of Buildings and Lands v. Shun Fung Ironworks Ltd.*, *supra*).

[369] In my respectful view, disturbance damages can be awarded in Nova Scotia pursuant to s. 27(3) of the *Act* for losses that were incurred prior to the date of expropriation. However, the principle in *Dell Holdings* had no application to this case. The Board incorrectly and unreasonably thought otherwise. I will explain by a return to *Dell*.

[370] In *Dell*, the landowner was a developer. It was in the business of buying and developing lands. It was precluded from doing business. Its inventory was frozen. The expropriation process caused them an agreed loss of $.5 million. The Supreme Court found that such a loss was a "natural and probable consequence" of the expropriation and hence recoverable as disturbance damage.

[371] Central was not in the business of land development. It operated building supply stores at various locations, one of them on lands that they owned at Lower South River. The announced possible expropriation of corridor lands in May 1998 did not freeze their land or their business. They could still do whatever they wanted with either.

[372] At the highest, Mr. Smith says he was told by Mr. Bushell that if they did proceed with capital improvements, there would be no compensation for them. Based on that plainly erroneous advice, Mr. Smith says he delayed his expansion plans. If Central was wronged by reliance on that comment, as they say they were,

they can or could have pursued whatever common law recourse may be available to them, but any such putative loss cannot come within a compensable award for business disturbance under s. 27(3) the *Expropriation Act*.

[373] It is insufficient for the Board to merely find that but for the erroneous Bushell advice, Central would have built its flagship store and Distribution Centre at Lower South River in 2001, and therefore its claimed reduction of profits it might have earned are disturbance damages caused by the shadow of expropriation. This equates to a damage award for a wrong caused by a breach of contract or a tort.

[374] Central was not "wronged" by the expropriation authority. It acted lawfully within the parameters of the *Expropriation Act*. Different considerations may apply if a taking is done otherwise than by statute, but here it was. Hence, Central is entitled to compensation under the *Act*, not for an award that puts it back in the same position it would have been but for the fact of the expropriation.

[375] Professor Eric Todd, in his seminal work, *The Law of Expropriation and Compensation in Canada*, 2nd ed (Scarborough, ON: Butterworths, 1992), refers to the important principle that disturbance damages must be caused directly by the expropriation:

> The Canada, Manitoba and Nova Scotia Acts refer to "the costs, expenses and losses arising out of or incidental to the owner's disturbance." The Ontario, New Brunswick and Alberta Acts provide for "such reasonable costs as are the natural and reasonable consequences of the expropriation." The British Columbia Act refers to "reasonable costs, expenses and financial losses that are directly attributable to the disturbance caused … by the expropriation."
>
> These are merely statutory affirmations of the general "common law" principle that disturbance damage is only recoverable if it is "direct and consequential upon the dispossession."
>
> (p. 303, footnotes omitted)

[376] And that disturbance damages are not analogous to the law of contract (that seeks to put the wronged party in the same position). He explains:

> Disturbance damages are not analogous to the law of damages in contract. The claimant and the expropriating authority do not have a relationship in law such as exists between parties to a contract. Consequently, a land developer who is compensated for the market value of the expropriated land is not entitled to additional compensation for the loss of profit that might have been realized from a

> development which, but the for expropriation, might have taken place. In such a case the claim for loss of profits which "might have been" is too remote.
>
> (pp. 305-306, footnote omitted)

[377] The authorities amply demonstrate that to attract compensation, the business losses must have been legally caused by the expropriation and not be too remote (see for example: *Associated Building Credits Ltd. v. British Columbia (Minister of Transportation and Highways)*, 2007 BCCA 546; *Gadzala v. Toronto (City)* (2006), 211 O.A.C. 29 (Div. Ct.) at paras. 114-116; *747926 Ontario Ltd. v. Upper Grand District School Board* (2001), 150 O.A.C. 297 (C.A.); *Director of Buildings and Lands v. Shun Fung Ironworks Ltd.*, *supra*; and, of course, *Dell Holdings*, *supra*).

[378] Central's decisions to delay construction of its store and distribution centre and subsequent development of the Market Street store and distribution centre at Lower South River may well have been reasonable business decisions made by a responsible corporate citizen. But the expropriating authority is not responsible for Central's theoretical profits it may have made had it gone ahead with its business plans in 1998.

[379] My colleague suggests at para. [155] a line of reasoning for Central's decision not to proceed with its claimed plans for a new retail store and distribution centre. The problem is this: Central did not plead that rationale; Central led no evidence to that effect; Central did not argue that position to the Board; and, the Board made no such findings. Instead, Mr. Smith's sole rationale was his purported reliance on Mr. Bushell's comment that if it proceeded with any capital improvements, it would not be compensated.

[380] Further, at para. [157] my colleague writes that I propose Central could recover the market value of improvements at the date of expropriation but its only recourse to recover consequential disturbance-type damages would be to sue in tort for negligent misrepresentation. With respect, I say no such thing. I also certainly do not suggest that Mr. Bushell's comment amounted to an actionable negligent misrepresentation.

[381] Central was fully entitled to claim market value as of the date of expropriation and for costs, expenses and losses arising out of or incidental to the owner's disturbance. As I have explained elsewhere, Central's claim was not for any costs, expenses or losses arising out of or incidental to its disturbance but was

for more money it says it would have earned had they gone ahead with their planned expansion and there had been no expropriation.

[382] The fundamental problem is that the Board appeared to find: Mr. Bushell's comment was wrong; Mr. Smith was reasonable to rely on it; the Province was somehow liable; and, then award damages to Central to put it back in the same position it would have been in had there been no subsequent expropriation. The Board has no jurisdiction to award damages on that basis, and as I have endeavoured to explain, that is just what it did under the guise of disturbance damages.

[383] Central deliberately made no claim for development or moving costs to its new store on Market Street and abandoned any claim of special economic advantage under s. 27(3) of the *Act*.

[384] I would therefore allow the appeal from the order of the Board that the Attorney General pay disturbance damages for "business losses" by way of lost profit of $6,739,281.00.

[385] I agree with my colleague that the Board did not commit any reversible error with respect to the award of: $615,375 as the fair market value of the land expropriated; $788,841 for the injurious affection award to the southern remnant; and, $37,000 for fencing.

INTEREST

[386] With respect, I am unable to agree with my colleague's proposed disposition of this ground of appeal. There is no legal justification to award 10% interest on the compensation awards of fair market value and injurious affection to the southern remnant from 2001. It smacks of double compensation and is unsupported by the *Act*.

[387] The evidence about delay post expropriation was murky at best. The parties agreed to waive the statutory timelines and obligations. Correspondence from counsel before the Board acknowledged Central's delay in completing their valuations and appraisals.

[388] In any event, assessment of that evidence was for the Board, and it found delay attributable to the appellant. That finding empowered the Board with a

discretion under s. 53(4) to increase a landowner's interest award from 6% up to 12%.

[389] I also see no basis that would permit interference with the Board's selection of 10% as the appropriate interest rate.

[390] However, I respectfully disagree that the Board was correct or reasonable to order interest on the compensation award for market value and injurious affection prior to the date of expropriation. I say this for two reasons: first, the Board erred in its interpretation of the *Act*; secondly, even if it had the power to award interest prior to the date of expropriation, it was legally wrong and unreasonable to fix the start date as of May 1, 2001. I will address each of these points in turn.

Interpretation of the Act

[391] With respect, the interpretation of the *Act* adopted by the Board was not only incorrect, it was unreasonable. My colleague has appropriately referred to the guidance set out by the Supreme Court in *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, where Moldaver J., for the majority wrote:

> [38] It will not always be the case that a particular provision permits multiple reasonable interpretations. **Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable - no degree of deference can justify its acceptance**; see, e.g., *Dunsmuir*, at para. 75; *Mowat*, at para. 34. In those cases, the "range of reasonable outcomes" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 4) will necessarily be limited to a single reasonable interpretation - and the administrative decision maker must adopt it.
>
> [Emphasis added]

[392] I will now turn to the ordinary tools of statutory interpretation.

[393] As described earlier, the modern rule of statutory interpretation requires 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 the legislature (*Rizzo Shoes*, *supra* and its progeny). There are many complementary rules: each word in an enactment, if possible, is to be given meaning, and an interpretation must be one that respects the overall scheme of the enactment, including how the provisions of the *Act* work together.

[394] *Driedger On the Construction of Statutes*, *supra*, introduced the topic "The Act as a Whole" with the following fundamental principles:

> ***The governing principle*.** In *A.G. v. Prince Ernest Augustus of Hanover*, Viscount Simonds wrote:
>
> > … the elementary rule must be observed that no one should profess to understand any part of a statute or of any other document before he has read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous.
>
> The importance of looking to the Act as a whole was also emphasized by Lord Herschell in *Colquhoun v. Brooks*:
>
> > It is beyond dispute … that we are entitled and indeed bound when constructing the terms of any provision found in a statute to consider any other parts of the Act which throw light upon the intention of the legislature and which may serve to shew that the particular provision ought not to be construed as it would be if considered alone and part from the rest of the Act.
>
> In *Greenshields v. The Queen* Locke J. wrote:
>
> > The broad general rule for the construction of statutes is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest.
>
> Each provision or part of a provision must be read both in its immediate context and in the context of the Act as a whole. When words are read in their immediate context, the reader forms an impression of their meaning. This meaning may be vague or precise, clear or ambiguous. Any impressions based on immediate context must be supplemented by considering the rest of the Act, including both other provisions of the Act and its various structural components.
>
> (pp. 245-246, footnotes omitted)

[395] In the latest edition of this seminal work, *Sullivan on the Construction of Statutes*, 6th ed (Markham: Butterworths, 2014), Ms. Sullivan refers to the presumption of coherence to be virtually irrebuttable (p. 338). She describes it as follows:

> §11.2 ***Governing principle***. It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal.

> §11.3 The presumption of coherence is also expressed as a presumption against internal conflict. It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other. […]
>
> (p. 337)

[396] With these principles in mind, what does s. 53 of the *Act* provide? It directs that the power to award interest on an award for market value and injurious affection is *subject to* the provisions of sections 13 and 15 of the *Act*. For convenience, I will reproduce the section as it appears in the legislation:

> **Interest on outstanding compensation**
>
> 53 (1) **Subject to Sections 13 and 15**, the owner of lands expropriated is entitled to be paid interest on the portion of the market value of his interest in the land and on the portion of any allowance for injurious affection to which he is entitled, **outstanding from time to time**, at the rate of six per cent a year calculated from the date the owner ceases to reside on or make productive use of the lands.
>
> [Emphasis added]

[397] No compensation is ever payable to an owner for lands taken under the *Act* unless expropriation occurs (s. 24). Furthermore, the value of the land expropriated is as of the date the expropriation documents are deposited (s. 25). This reality has long been recognized, even in cases where the owner may be subject to a loss by pre-expropriation events (*Dell Holdings*, *supra* at para. 36).

[398] The heading for s. 53 clearly suggests that the entitlement of an interest award is for compensation that is "outstanding". Furthermore, the actual words in s. 53 direct that an award of interest is only in relation to any portion of the market value or allowance for injurious affection that is "outstanding from time to time". There can be no compensation award outstanding until the fact of expropriation occurs, which in this case was May 1, 2012. That is the earliest date any compensation can be said to be outstanding.

[399] The power to award interest on outstanding amounts is made subject to sections 13 and 15. Those sections impose on the expropriating authority a duty to make offers of compensation within so many days after deposit of the expropriation document. Failure to do so does not invalidate the expropriation, but interest on any unpaid portion of the compensation payable to the owner shall be calculated from the date of the deposit of the expropriation document in the registry of deeds.

[400] Section 13 is as follows, with the relevant portion emphasized:

> **Offer to registered owner if no agreement**
>
> 13 (1) In this Section, "registered owner" means a known registered owner.
>
> (2) Where no agreement as to compensation has been made with the owner, the expropriating authority shall, within ninety days after the deposit of the expropriation document under Section 11 and before taking possession of the land, serve upon the registered owner
>
> (a) a true copy of the expropriation documents;
>
> (b) an offer of an amount in full compensation for his interest; and
>
> (c) where the registered owner is not a tenant, a statement of the total compensation being offered for all interests in the land, excepting compensation for business loss for which the determination is postponed under subsection (1) of Section 29.
>
> (3) The expropriating authority shall base its offer of compensation made under subsection (2) upon a report appraising the market value of the lands being taken and damages for injurious affection, and shall serve a copy of the appraisal report upon the owner at the time the offer is made.
>
> (4) The expropriating authority may, within the period mentioned in subsection (2) and before taking possession of the land, upon giving at least two days notice to the registered owner, apply to a judge for an order extending any time referred to in subsection (2), and a judge may in his order authorize the statutory authority to take possession of the land before the expiration of the extended time for serving the offer or statement under clause (a) of subsection (2) upon such conditions as may be specified in the order.
>
> (5) If any registered owner is not served with the offer required to be served on him under subsection (2) within the time limited by subsection (2) or by an order of a judge under subsection (4) or by agreement, the failure does not invalidate the expropriation **but interest upon the unpaid portion of any compensation payable to such registered owner shall be calculated from the date of the deposit in the registry of deeds of the expropriation document**.
>
> [Emphasis added]

[401] Section 15 contains a similar provision with respect to making an offer of compensation after deposit of the expropriating document to persons who are not registered owners:

> **Offer to other owners**
>
> 15 (1) Where the owner is a person other than those described in Sections 13 and 14 and no agreement as to compensation has been made, the expropriating authority shall, within one hundred and eighty days after the deposit of the

> expropriation document under Section 11, make, to each person who is entitled to compensation under this Act in respect of land expropriated to which the expropriation document relates, an offer in writing of compensation in an amount estimated by the expropriating authority to be equal to the compensation to which that person is then entitled in respect of his interest therein.
>
> (2) An offer of compensation made to a person under this Section in respect of land expropriated shall be based on a written appraisal of the value of such interest, and a copy of the appraisal shall be sent to such person at the time of the making of the offer.
>
> (3) Failure to comply with subsection (1) does not invalidate the expropriation **but interest upon the unpaid portion of any compensation payable to the owner shall be calculated from the date of the deposit in the registry of deeds of the expropriation document**.
>
> [Emphasis added]

[402] So, failure to comply with a statutory offer triggers a mandatory interest order back to the date of deposit. But s. 53(1) refers to interest on any "outstanding amount" for market value and injurious affection at the rate of 6% from "the date the owner ceases to reside on or make productive use of the lands". How can these words be read harmoniously with the scheme of the *Act*?

[403] The answer is straightforward. Interest is meant to compensate an owner for the loss of the use of his capital asset. The value of that loss is calculated, at the earliest, as of the date of deposit of the expropriation document. That is because deposit vests title in the expropriating authority (s. 11), but it does not deprive the owner of the use of his land. He may or may not continue to reside on or use it.

[404] This reality is reflected in numerous provisions of the *Act* that physical possession or use of the land remains for some time with the owner, although the land or its use can be required by the Attorney General (s. 11(7)) or by court order (s. 13(4)).

[405] Subject to those provisions, it appears that the earliest the authority can gain possession is between three and six months after deposit:

> **Possession of land after offer served**
>
> 18 (1) Where land that has been expropriated is vested in an expropriating authority and the expropriating authority has served the registered owner with an offer in accordance with Section 13, the expropriating authority, subject to any agreement to the contrary and if no application is made under subsection (4) of Section 13, shall take possession of the land on the date specified in the notice.

> (2) Subject to subsection (4) of Section 13, the date for possession shall be at least three months after the date of the serving of the offer required by Section 13

[406] The interplay between these provisions is explained by the Supreme Court of Canada in *Judson v. Governors of University of Toronto*, [1972] S.C.R. 553.

[407] The only reasonable interpretation of s. 53(1) is that the earliest date interest can be awarded is from the date of deposit of the expropriation document. If the authority fails in its statutory duty to appraise and make a timely compensation offer, then interest is mandatory from that date. If the authority is responsible for any delay in *determining* compensation, the rate can be increased pursuant to s. 53(4), but only from the date the owner ceased to reside on or make productive use of the lands.

[408] In this case, the Board attempted no statutory interpretation of s. 53. It went no further in its analysis than reliance on a decision from the Ontario Municipal Board in *Boyd v. Ontario (Ministry of Transportation)*, [1995] O.M.B.D. No. 783, which in turn relied on the decision of the Ontario Court of Appeal in *Partition Holdings Ltd. v. Ontario (Minister of Transportation and Communications)*, *supra*, discussed earlier by my colleague.

[409] To state the obvious: we are not bound by the majority decision of the Ontario Court of Appeal in *Partition Holdings*, but I do not brush it aside on that account. While there are obvious similarities between the Ontario and Nova Scotia interest provisions, there are clear differences in the legislative schemes which make the reasoning of the majority easily distinguishable.

[410] In Ontario, notice must be given to an owner of an intent to expropriate. No such provision exists in Nova Scotia. Neither is there any opportunity in Nova Scotia for an owner to choose a date prior to expropriation to fix compensation. However, s. 10 of the Ontario *Act* gave to the owner the option to choose the date of the notice of hearing to object to the expropriation, the date of plan registration or the date of service of the notice of expropriation. Cory J.A. referred to these provisions and reasoned:

> 22 **It can be seen that the owner has three choices as to the date upon which the compensation is to be fixed and assessed. The date upon which an owner receives the notice of hearing before the inquiry officer would, of necessity, precede the date of expropriation**. In fact, there are instances where the notice of hearing long preceded the date of expropriation: see, for example, *St. Catharines Crushed Stone Ltd. v. City of St. Catharines* (1975), 15 L.C.R. 363. In that case, the notice of hearing and the termination of the productive use of the

> land preceded the date of expropriation by a little over a year. **In such a situation, if the appellant's interpretation of the Act were correct and interest were only payable from the date of expropriation, it would deprive a landowner choosing the earlier date for fixing compensation from receiving interest on that compensation for over a year. This would make the choice of dates for fixing compensation a trap and a delusion for the landowner and make a mockery of the clear intent of the Act.**
>
> [1986] O.J. No. 1032 [Emphasis added]

[411] As already mentioned, there is no such option in the Nova Scotia *Act*. There is but one date available to fix compensation in Nova Scotia, the date of deposit. That is the earliest date to require interest to be paid, since that is the earliest date that compensation is fixed as owing.

[412] Furthermore, the interpretation favoured by Cory J.A. makes no reference to the actual words of the provision that speak of an award of interest on the amount "outstanding from time to time". These words must mean something. According to the interpretation adopted by the Board, they do not. With respect, I agree with the reasons of Thorson J.A., in particular as they apply to our legislative scheme.

Unreasonable to fix May 1, 2001 as the commencement date

[413] Although I need not address this in light of the above, even if the Board had the jurisdiction to fix a date earlier than the date of expropriation it erred in law by unreasonably back-dating the commencement date to May 1, 2001.

[414] I say this for two reasons. The Board accepted that Central used the land taken and the southern remnant as of May 2012. Central erected a greenhouse on a corner of the taking, and the Board found that the entire area of the taking was occupied (paras. 655, 669). It is illogical and arbitrary to accept that Central continued to use and occupy the land for 11 more years but require the expropriating authority to pay interest on $1,404,216.00 at the rate of 10% per year from May 1, 2001.

[415] The Board seemed well aware that interest is to be awarded from the date that the owner ceased to reside on or make productive use of the lands. Obviously Central did not cease to reside on the lands. The Board actually made no finding that Central ceased to make "productive use" of the lands taken. The complete reasons of the Board are as follows:

> [860] The submissions on behalf of Central are that the shadow of expropriation fell in May 1998. The Board has, earlier in this Decision, accepted that the loss period began on January 31, 2001. The environmental approval was not granted until August 29, 2005.
>
> [861] The Province made no submissions on when interest should begin to run.
>
> [862] **The Board concludes that when Central decided to accelerate the plans for the Sydney store it had determined it would not be prudent to develop the Lower South River property any further. According to the evidence of the Claimant, that occurred in May, 2001. Therefore, the Board finds that interest should accrue from May 1, 2001.**
>
> [Emphasis added]

[416] As described earlier, Central was in no way prevented or precluded from proceeding with its business plans. Had it done so, the Province would have been spurred into action to purchase or expropriate. Central's decision to proceed with the expansion of the Sydney store does not equate to the cessation, by reason of expropriation, of the productive use of the lands that were eventually taken at Lower South River.

[417] Secondly, the commencement date is flawed as it clearly amounts to overcompensation. The fair market value and injurious affection were valued as of 2012. It cannot get that valuation and interest on it for 11 years.

[418] I would vary the interest award by ordering interest at 10% on the award of market value and the allowance for injurious affection from the date of expropriation of May 1, 2012.

CROSS-APPEAL

[419] In light of my conclusion that no award of business loss as disturbance damages is appropriate, perforce, I would dismiss Central's cross-appeal that the award should extend beyond January 31, 2013.

COSTS

[420] Central has lost its cross-appeal in which it sought to increase the compensation award by $3.35 million, while the appellant has been largely successful by elimination of a compensation award for disturbance damages of $6.7 million and removal of the requirement to pay 10% interest on a roughly $1.4 million award for over ten years.

[421] Ordinarily costs follow success. I see no reason to depart from that principle in these circumstances. I would therefore award costs, on a party and party basis, to the Attorney General on its appeal but would not order costs against the respondent on the cross-appeal.

Beveridge J.A.