

LOSSES IN THE SHADOW

In this paper I will address specific issues arising from the Supreme Court of Canada decision in *TORONTO AREA TRANSIT OPERATING AUTHORITY v. DELL HOLDINGS LIMITED* released January 30, 1997 (60 L.C.R. 81). In this decision the Supreme Court restored the award made by the Ontario Municipal Board for damages that were suffered by a developer due to delay caused by the authority's planning process.

I will first address the Court's analysis and holdings on the issue of the interpretation of the Ontario Expropriations Act which was the first of the reform statutes enacted by various jurisdictions in Canada. Second, I will review the methodology used by the owner's appraiser that the Board did not accept and the method by which the Board did arrive at its figure for compensation. Finally I will look at the issue of the potential of the "floodgates" of claims that has concerned many in the professions involved in the expropriation area.

INTERPRETATION IN A BROAD AND PURPOSIVE MANNER

The statements of the Court with respect to the interpretation of the Expropriations Act (and the applicability to similar reform statutes) are the statements that will in all likelihood be most often relied on by the claimants' counsel in the future. The Court held:

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....

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...

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."(p. 88-89)

To find the source of the Supreme Court's concern for the principles of interpretation of expropriation statutes, one need only look at the decisions of the Divisional Court and the Court of Appeal (see 55 L.C.R. 1 (Ont. C.A.), 45 L.C.R. 250 (Div. Ct.) and 43 L.C.R. 138 (O.M.B.) in this case. The concept of full and fair compensation for the claimant is as old as the legislative scheme under the reform statutes. The appeal from the Court of Appeal decision in the Dell proceedings was based on the argument that the Court of Appeal had read into the statute limitations for which there was not legislative basis, express or implied. In the appeal, the Supreme Court was provided with numerous references from the Ontario Royal Commission Inquiry into Civil Rights from 1968 (Report No. 1, Vol. 3, Chapters 65-74) and the Ontario Law Reform Commission 1967 Report on the Basis of Compensation on Expropriation which had formed the basis of the reform statute. The propositions drawn by the owner in support of its appeal were that the paramount policy consideration must be indemnity for the loss suffered by the owner and that the statute should provide a framework for the assessment of compensation which would leave sufficient flexibility to do justice in particular cases.

The compensation scheme set out in the reform statutes is to provide for headings of compensation including market value, injurious affection, disturbance damages and damages for special difficulties in relocation. This scheme is in contrast to what preceded it as the basis for compensation, where the provision was usually for "due compensation", or value to the owner, usually defined as the amount the owner would pay rather than be ejected from its land.

In the Dell decisions at the Divisional Court and Court of Appeal level there were numerous references to the lack of specific wording in the statute to support the award made by the Ontario Municipal Board. Most specifically, in the Divisional Court decision, Mr. Justice Steele's approach was "if the Legislature had intended compensation to be paid for such delay it would have said so" and "I see no reason why the Owner should be entitled to be compensated for the same period of delay merely because lands in fact were subsequently taken." (see 45 L.C.R. 250 at 254 and 255).

This is the context in which the decision of the Supreme Court should be viewed.

The principle of statutory interpretation enunciated by the Court will provide ample basis for advocacy on the part of counsel for claimants and will test the creativity of counsel for authorities. Some imaginative counsel may well argue that to interpret the statute in a broad and purposive manner means that a tribunal should make findings on issues of both fact and law in dispute between the parties in favour of the claimant, i.e. to tip the balance of probability, whenever that balance is close, to favour the claimant. In my view the

Supreme Court did not intend to remove the issue of resolving the balance of probabilities on proof of a claim by these words.

Rather the Court sought to prevent a narrow interpretation of an owner's entitlement to disturbance damages. Section 18 of the Ontario Expropriations Act provides for only a partial listing of the headings that are to be considered as disturbance damages by defining such damages as "the reasonable costs that are the natural and reasonable consequences of the expropriation, **including...**". It is now abundantly clear that so long as the owner can bring the damages within the opening words of this text, the claim will not be barred simply because the damages do not fall within the listing of damages in the words in the section following "including".

METHODOLOGY - WHAT WORKED AND WHAT DIDN'T

The methodology used by the claimant to prove the damages was to look at the net profit that was actually earned by the developer and compare it with the net profit it would have earned on the remaining lands if its lands had not been expropriated. The Crown argued that the statute did not support an award for business damages in these circumstances. Again the authority tried to limit the interpretation of the Act to those places where the phrase "business damages" is in fact used rather than allowing the owner to rely on the broad definition of disturbance damages. The cases in which businesses have been damaged by expropriations and disturbance damages are awarded as compensation are legion.

In fact, the Board does not explicitly reject the methodology, as was noted in the Divisional Court decision (see p. 253). This of course will provide much food for thought for counsel and appraisers acting for owners.

In determining how to present the owners claim, counsel for the owner might consider the alternative of simply claiming any increase in the actual costs of development (i.e. the extension of a sewer or watermain to facilitate service of the authority's public work or the inclusion of noise attenuation features required because of the public work.) While there is much that is appealing about this approach in its simplicity and directness, that approach might be attacked because it does not address the issue of whether the developer in fact be relieved of other costs such as the costs of the road that would have had to have been built through the parcel had it not been taken. In addition, this approach only addresses actual out of pocket expenditures and does not reflect the loss of interest on money invested in the project that is not realized.

In the Dell case we calculated that damages only on the remaining lands on the basis that whatever profit could have been earned on the development of the expropriated lands would have been included in the market value of the land. One might in the appropriate case also look at determining the profit on the project using the whole property if one were not satisfied for some reason that full indemnity were not achieved by the combination of the damages suffered on the remaining lands and the market value of the expropriated lands.

It should be noted that in the Dell case the authority took the position that disturbance damages could only be recovered for the expropriated parcel and not for the remaining lands. This would mean that if a portion of a farm field were expropriated and the farmer had to rearrange the access road to the remaining field, the authority would not be liable because the damage was suffered on the remaining lands, not the expropriated lands. This interpretation was not in our view consistent with the concept of indemnity and had no basis in the statute.

The Ontario Municipal Board said that it had concerns with the methodology used by Mr. Robson and that it tested the fairness of the amount calculated by him. The question for another day is whether that really was a rejection of the approach.

The reasons for the concerns were twofold, that the apartment block which was imposed on the owner because of the location of the GO station was not yet built and because the municipal levies for apartment units were disproportionately high compared to other residential forms. In the course of the hearing the Board Chair indicated some concern as to whether the methodology of the appraiser had been tested adequately by questioning the appraiser himself after the parties had had their turn and by commenting that he was doing this because of the brief cross-examination by counsel for the authority. This counsel who had some 25 years experience vigorously defended his approach in response to the Board's comments at the time. The owner was delighted to see in the decision that the Board had grasped the point that the levies for the apartments were so much higher than the other levies since that point was fundamental to the damage claim. All this says is that early in the process the Board indicated some scepticism to the methodology but in the end developed its own which satisfied itself that it had measured the damages suffered.

The method of calculation of the damages is set out in the Board decision at p. 143 in the L.C.R. report. The calculation is based on the premise that the authority could not hold up the development for 30 months and not have an impact on the owner. The Board then addressed the possible impact the delay had on the cash available to the claimant for reinvestment in his development business and the costs of carrying the lands for future

development. At the appeal level, there was much debate on which 30 months the Board was referring to which I will discuss later under the heading of pre-expropriation damages.

First, the Board determined that the developer had been delayed on getting his profit out of the land and that a one year delay was worth \$140,000. In addition, the Board calculated a cost of carrying as inventory 33 acres of land for an additional 33 months. Since the Board refers to the 33 acres, the total holding, we assume that that 33 months was pre-expropriation. The calculation however was based on the market value of the land at the date of taking and not on the basis of the original cost of the land which is what the developer would have carried for the pre-expropriation period. This calculation was appropriate because there was no mortgage on the land so the claimant was in effect prevented from earning any income on his capital. Further the shadow of the expropriation prevented the claimant from dealing with the lands and obtaining market value in an open market transaction as of the date of acquisition. This issue was never raised in the appeals.

Second, the Board looked at the apartment block of 5.5 acres for which it was satisfied there was no market and that that situation continued to the date of the hearing. The Board calculated a figure for the carrying costs to the date of hearing (clearly post expropriation damages). The Board then added in the extra servicing costs that would not have been incurred but for the scheme.

Neither of these two calculations totals \$500,000 and the Board does not add them together or it would have come to a figure very close (within less than 10%) of what Mr. Robson had calculated on the basis of the net profit comparison. If it had credited the owner with more than one year at \$140,000 the compensation calculated on that basis might have been higher.

PRE-EXPROPRIATION DAMAGES

One of the aspects of this case which has generated a lot of discussion is whether claimants are able to recover damages that are "the reasonable and natural consequences" of an expropriation when the damages are incurred before the expropriation has happened. How can consequences occur before an event? As noted above the compensation methodology utilized by the Board to test the fairness of the expert presented by the owner clearly referred to a delay period prior to title passing. Arguably the real delay was the period after the taking, being the difference in the date of approval of the plan of subdivision

in fact (1984) and the date it would have been approved if there had been no expropriation (1981).

In the appeal the owner was able to point to a number of cases in Ontario and other jurisdictions where prudence and reason dictated that the claimant take steps to protect his business, farm or residential situation by incurring costs or taking steps that later were the basis of a claim for damages. The steps were taken once the owner had a clear notice of the public project proceeding.

The governing principle was the causative link, not the temporal link, between the expropriation and the damages. There is nothing in the description of the entitlement to damages under the Ontario Act ("such reasonable costs as are the natural and reasonable consequences of the expropriation" Section 18) to tie the damages down to the post-expropriation period except the word "consequences". It is not however outside the range of human experience to take steps on the basis that an event is going to occur. "Be prepared" is something we train young people to be.

The argument against pre-expropriation damages is the uncertainty of when the claimant can start to incur costs that will later be passed on to the authority. The standards of prudence and reasonableness find their way into the reasons of the various courts that have awarded such damages and the issue of the "floodgates" was specifically addressed by the Privy Council in the case of *Director of Buildings and Lands v. Shun Fung Ironworks Ltd.*, [1995] 2 A.C. 111.

At page 126 of the reported decision, the Privy Council indicates that for fair and adequate compensation there are three conditions that must be satisfied. The first is that there must be a causal connection. The second is that the damages must not be too remote and the third is that the law expects those who claim recompense to behave reasonably.

"If a reasonable person in the position of the claimant would have taken steps to eliminate or reduce the loss and the claimant failed to do so, he cannot fairly expect to be compensated for the loss or the unreasonable part of it. Likewise, if a reasonable person in the position of the claimant would not have incurred, or would not incur, the expenditure being claimed, fairness does not require that the authority should be responsible for such expenditure. Expressed in other words, losses or expenditure incurred unreasonably cannot sensibly be said to be caused by, or be the consequence of, or be due to the resumption " (p. 126)

Reasonableness is a pervasive concept in the definition of disturbance damages under the Ontario Act so the concept stated above is perfectly applicable.

The Privy Council went on to address the issue of what it called "the shadow period". In the *Shun Fung* case the claimant got a letter from the government in November 1981 about the resumption, as expropriation is called there, and it became generally known by the first half of 1982 that the site might be acquired at some indefinite date. This resulted in a slow asphyxiation of the business as customers became unwilling to enter into long term forward contracts and by June 1982 the claimant imposed on itself a limit of 6 months to the duration of any contracts. The "shadow" lasted until January 1987.

Under the statute applicable to this case, the claimant was entitled to receive compensation in respect of loss or damage suffered by the claimant due to the resumption of land and the resumption occurs on the date that the Crown resumes title to the land. The Privy Council rejected the Crown's argument that only damages suffered after the resumption of title could be recovered. The Privy Council held that the point at which the damages should run is based on causation. It held:

Suffice it to say, everyone seeks to plan ahead, and the law would be defective if it did not recognise this. In the law causation is a tool, but no more than a tool, used by lawyers when attributing legal responsibility for a happening to a particular source. In everyday terms, loss caused by the threat of an act which later eventuates would normally be regarded as loss caused by the act just as much as loss incurred after the act has happened....It also means that compensation is not dependent on whether the acquiring authority acts speedily or tardily in carrying through the process culminating in resumption. Losses arising after the inception of the scheme will attract compensation, however short or long the shadow period provided they satisfy the criteria mentioned above.

Their Lordships have in mind that, at the outset of a shadow period, there may be no certainty that resumption will take place. As time passes and the scheme proceeds, the likelihood of resumption increases, until the Governor makes a resumption order. At that stage, but not before, there is a legal commitment. Their Lordships can see no sound reason for attempting to draw a spurious line somewhere along this penumbra of gradually darkening shadow. One of the conditions for compensation is that the loss must have been incurred reasonably. If a reasonable

person would have continued to trade normally the landowner cannot claim compensation for losses incurred by his refusal to accept any more orders. He cannot simply let his business run down, and then seek to recover compensation for his losses. The less certain the prospect of resumption, the greater will be the burden of showing that he acted reasonably in running down his business and the losses were caused by the prospect of resumption. This provides also the answer to the "floodgates" argument."(p. 138).

In the *Dell* decision, Mr. Justice Iacobucci dissented from the majority. A reading of his dissent will indicate that he did not disagree with the concept of causation but rather he did not accept the factual basis that TATO had caused the losses. As is noted in the passage of the *Shun Fung* decision, the causative link is vital to the success of the claim in the shadow period prior to the actual expropriation.

Counsel for parties in expropriation cases who are now considering claims for pre-expropriation losses should look to the issue of whether the standard of reasonableness and the causative link can be established simply on the basis of the evidence of the claimant or whether independent evidence from someone in the same or a similar business or perhaps an accountant or financial consultant familiar with the industry would be necessary. This may depend on how early in the shadow period the loss is alleged to have been suffered and how solidly the causative link can be established. If the steps taken or losses suffered are clearly of the sort that only would be undertaken if the owner would under threat of expropriation, then the obligation to provide corroborative or supporting evidence may be lessened. This will have to be resolved on a case by case basis.

LYNDA C.E. TANAKA
October 16, 1997

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Dell Holdings Ltd. v. Toronto Area Transit Operating Authority

a [Indexed as: Toronto Area Transit Operating Authority v. Dell Holdings Ltd.]

Court File No. 24695

*Supreme Court of Canada, La Forest, Sopinka, Gonthier, Cory, McLachlin,
Iacobucci and Major JJ. January 30, 1997.*

b Business loss — Disturbance damages — Authority delaying expropriation for three years — Delay freezing development of entire parcel — Period of delay being part of expropriating process — Owner entitled to recover consequential losses as disturbance damages. Expropriations Act, R.S.O. 1980, c. 148, ss. 1(1)(c)(i)(B), 13(2)(c), (e), 18(1).

c Appeal — Appellate jurisdiction — Judicial review — Scope of review — Expropriation tribunal not subject to privative clause — Court having power to refer matter back or make decision tribunal could have made — Tribunal's particular expertise not in issue — No deference to be accorded tribunal's decision — Expropriations Act, R.S.O. 1980, c. 148, s. 33(2).

d Statutes — Interpretation — Intention of legislation — Statute providing for compensation for disturbance damages — To be interpreted remedially — Damages incurred post-inception of expropriation scheme but pre-taking compensable — Expropriations Act, R.S.O. 1980, c. 148, s. 13(2)(b).

e A developer owned about 40 acres of land that was ripe for development and it sought government approval for development. A transit authority recommended construction of a station on one of two sites on the developer's land and the municipality approved both. The municipality withheld approvals to develop the entire parcel while the authority determined which site it should select. The authority made its selection three years after its original recommendation and expropriated about nine acres of the developer's land. The developer sought to recover the damages it suffered in consequence of the delay under the provisions of the *Expropriations Act*, R.S.O. 1980, c. 148. The Ontario Municipal Board held that the developer was entitled to recover the damages as disturbance damages, since they were caused by the authority in contemplation of an expropriation and as an integral step in the expropriation process, and because the municipality was required to withhold approval of the proposed development in consequence. The Divisional Court allowed the authority's appeal. It held that there was no disturbance within the meaning of the Act, nor could the damages be described as injurious affection. The Ontario Court of Appeal dismissed the developer's appeal.

g On further appeal, held, Iacobucci J. dissenting, the appeal should be allowed.

Per Cory J., La Forest, Sopinka, Gonthier, McLachlin and Major JJ. concurring: The Act is a remedial statute enacted for the purpose of adequately compensating persons whose lands are taken by the state. Since it is a remedial statute, it should be interpreted broadly and liberally consistent with its purpose.

h Having regard to the purpose of the Act, there is a presumption that when land is expropriated compensation will be paid. The developer's claim for disturbance damages arose under s. 13(2)(b) of the Act, which provides that when land is expropriated the owner's compensation shall be based on the damages attributable to disturbance. The damages suffered by the developer were the natural and reasonable consequences of the expropriation, since the municipality had no choice but to refuse all approvals until the authority determined what land it

needed. Disturbance damages are not limited to losses that are referable only to land that is expropriated, but extend also to losses referable to land that is retained by the owner. In any event, the delay also affected the expropriated land. There is no reason to deny compensation for damages resulting from delay when land is expropriated, even though no compensation is payable for damages for delay when there is no expropriation. The damages arose in the course of the expropriation process and there is no reason why such damages are not compensable even though they arose before the actual expropriation. It was not necessary to determine whether the losses were also compensable as injurious affection. Further, since the board was not subject to a privative clause, s. 33(2) of the Act empowered the court to refer any matter back or to make any decision that the board could have made, and since no particular expertise of the board was involved in the case, the court was not obliged to pay deference to the board's decision.

Per Iacobucci J. dissenting: Section 18(1) of the Act defines "disturbance damages" as the "reasonable costs [that] are the natural and reasonable consequences of the expropriation". The costs incurred by the developer were not caused by the expropriation, since the pre-expropriation delay was not part of the expropriation process. In any event, the authority did not cause the delay, the municipality did, nor could the developer succeed in its claim for damages for injurious affection, a right conferred by s. 13(2)(c). The losses caused by the pre-expropriation delay were not damages resulting from "the construction or use, or both, of the works" undertaken by the expropriating authority, as required by the definition of "injurious affection" in s. 1(1)(e)(i)(D).

LaFleche v. Ministry of Transportation and Communications (1975), 8 L.C.R. 77; *Director of Buildings and Lands v. Shun Fung Ironworks Ltd.*, [1995] 2 A.C. 111, folld

Bersenas v. Minister of Transportation and Communications (1984), 31 L.C.R. 97, 6 O.A.C. 102, *Imperial Oil Ltd. v. The Queen* (1973), 35 D.L.R. (3d) 73, 4 L.C.R. 66, [1974] S.C.R. 622; *Laidlaw v. Municipality of Metropolitan Toronto* (1978), 87 D.L.R. (3d) 161, 15 L.C.R. 24, [1978] 2 S.C.R. 736, 20 N.R. 515; *The Queen in right of British Columbia v. Tener* (1985), 17 D.L.R. (4th) 1, 32 L.C.R. 340, [1985] 1 S.C.R. 632, 3 R.P.R. 291, [1985] 3 W.W.R. 673, 28 B.C.J.L.R. (2d) 241; *City of Montreal v. Daniel J. McAnulty Realty Co.*, [1923] 2 D.L.R. 409, [1923] S.C.R. 273; *Pezim v. British Columbia (Superintendent of Brokers)* (1994), 114 D.L.R. (4th) 385, [1994] 2 S.C.R. 557, 22 Admin. L.R. (2d) 1, 14 B.L.R. (2d) 217, [1994] 7 W.W.R. 1, 75 W.A.C. 1, 92 B.C.L.R. (2d) 145, 168 N.R. 321, 48 A.C.W.S. (3d) 1279, consd

Other cases referred to

Ridgeport Developments v. Metropolitan Toronto Region Conservation Authority (1976), 11 L.C.R. 148; *Hartel Holdings Co. v. City of Calgary* (1984), 8 D.L.R. (4th) 321, [1984] 1 S.C.R. 337, 25 M.P.L.R. 245, [1984] 4 W.W.R. 193, 31 Alta. L.R. (2d) 97, 53 A.R. 175, 53 N.R. 149; *Manitoba Fisheries Ltd. v. The Queen* (1978), 88 D.L.R. (3d) 462, [1979] 1 S.C.R. 101, [1978] 6 W.W.R. 496, 23 N.R. 159; *Diggon-Hibben Ltd. v. The King*, [1949] 4 D.L.R. 785, [1949] S.C.R. 712, 64 C.R.T.C. 295; *Pacific Coast Coin Exchange of Canada Ltd. v. Ontario Securities Commission* (1977), 80 D.L.R. (3d) 529, [1978] 2 S.C.R. 112, 2 B.L.R. 212, 18 N.R. 52; *Attorney-General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508; *A. M. Souter & Co. Ltd. v. City of Hamilton* (1972), 2 L.C.R. 167, 19 A.F.R. 72 [affd 5 L.C.R. 153, 1 O.R. (2d) 760]

Statutes referred to

- Expropriations Act*, R.S.O. 1980, c. 148, ss. 1(1)(e), 2, 13, 15, 18, 19, 21, 23, 33(2) —
 a now R.S.O. 1990, c. E.26, ss. 1, definition "injurious affection", 2, 13, 15, 18, 19, 21, 23, 33(2)

- APPEAL from a judgment of the Ontario Court of Appeal, 123 D.L.R. (4th) 157, 55 L.C.R. 1, 80 O.A.C. 158, 22 O.R. (2d) 733n, 54 A.C.W.S. (3d) 517, dismissing an appeal from a judgment of the
 b Divisional Court, 80 D.L.R. (4th) 112, 45 L.C.R. 250, 3 O.R. (3d) 78, 50 O.A.C. 193, 26 A.C.W.S. (3d) 689, allowing an appeal from a decision of the Ontario Municipal Board, 43 L.C.R. 138, awarding compensation for an expropriation.

- Bryan Finlay, Q.C., Lynda C.E. Tanaka and J. Gregory
 c Richards*, for appellant.

John D. Brownlie, Q.C., and Susan J. Hoakes, for respondent.

- [1] CORY J. (LA FOREST, SOPINKA, GONTHIER, McLACHLIN and MAJOR JJ. concurring):—The business of land development carried
 d on by Dell Holdings Limited ("Dell") was delayed for two years as a result of expropriation proceedings. The question to be resolved on this appeal is whether the substantial damages occasioned by that delay can be recovered under the *Expropriations Act*, R.S.O. 1980, c. 148 (now R.S.O. 1990, c. E.26).

e I. Factual Background

- [2] In the mid-1970s, the appellant Dell owned approximately 40
 f acres of land in the city of Mississauga for which it was seeking the necessary government approval for residential development. The respondent, Toronto Area Transit Operating Authority (the "Authority") is a Crown agency with a statutory mandate to design, establish and operate interregional transit systems.

- [3] In March of 1977, the Authority released a report recommending the construction of a new Mississauga GO Transit station
 g on one of two sites, both of which were located on the lands owned by Dell. In June of 1977, the Regional Municipality of Peel and the city of Mississauga endorsed both potential sites. While the Authority continued its studies to determine the preferred location and the precise amount of land needed, the municipality withheld all the requisite approvals to subdivide and develop
 h Dell's land. In March of 1980, the Authority decided on the site and expropriated over 9 acres of Dell's land.

[4] The parties agree that the time which the Authority took to choose the site and to determine the precise amount of land required for the GO Station did in fact delay the development of

the portion of Dell's land which was not expropriated and that Dell did indeed suffer damages as a result of the delay. The sole issue to be resolved is whether the damages are compensable under the *Expropriations Act*. a

II. The Relevant Statutory Authority

[5]

Expropriations Act, R.S.O. 1980, c. 148 b

1(1) In this Act,

(e) "injurious affection" means,

(i) where a statutory authority acquires part of the land of an owner, c

(A) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and

(B) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute, ... d

2(1) Notwithstanding any general or special Act, where land is expropriated or injurious affection is caused by a statutory authority, this Act applies. e

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, f

(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. g

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, h

(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
- a (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
- b (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.

c 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.

d III. Decisions Below

Ontario Municipal Board (1990), 43 L.C.R. 138

e [6] The Board concluded that the damages caused by the delay in the expropriation process were recoverable as disturbance damages. It reached this conclusion on the basis that they were caused by and flowed from an act of the Authority undertaken in contemplation of the expropriation and which was an integral step in the process. The Board found that the delay was directly caused by the Authority, since the municipality was required to withhold approval of Dell's proposed development until the Authority had decided which lands to acquire. As a consequence, it found that Dell was entitled to be compensated for the damages caused by the delay as if they arose from the expropriation itself.

f [7] In support of its position, the Board cited and relied upon *Bersenas v. Minister of Transportation and Communications* (1984), 81 L.C.R. 97 (Ont. Div. Ct.).

g [8] The Board carefully considered the amount of the damages that should be awarded and settled on the figure of \$500,000. That sum is not in issue. Rather, the question is whether the losses suffered by Dell are compensable.

h *Ontario Divisional Court* (1991), 3 O.R. (3d) 78, 80 D.L.R. (4th) 112, 45 L.C.R. 250

[9] The principal issue before the Divisional Court was whether the damages caused by the delay could be recovered under the category disturbance damages pursuant to s.13(2) of the Act. Steele J. concluded that there was ample evidence to support the

Board's finding that Dell was in fact delayed in developing its land because of the time required for the Authority to reach a final decision as to the land to be taken. As well, he agreed with the Board's conclusion that Dell suffered \$500,000 in damages as a result of the delay. He stated that the only question was whether the award of damages was consistent with the *Expropriations Act* and the policy which lay behind it.

[10] Steele J. observed that it is well known that planning takes time and that the process will affect property values, whether land is expropriated or not. He reasoned that if the legislature had intended that compensation be paid for such a delay it would have specifically said so. In his view, for Dell to be successful, it had to show that it was entitled to compensation for disturbance damages under s. 13(2)(b) or for injurious affection under s. 13(2)(c).

[11] Steele J. noted that there is no definition of disturbance in the Act. He looked to the examples of disturbance set out in s. 18 to assist him in interpreting the term. He expressed the opinion that the examples of disturbance damages set out in s. 18 are basically relocation costs or costs related to residences or premises. He adopted the definition of disturbance set out in *Ridgeport Developments v. Metropolitan Toronto Region Conservation Authority* (1976), 11 L.C.R. 143 (Ont.-L.C.B.), at p. 155:

"Disturbance damages as referred to in ss. 13 and 18 of the Act, are, in the opinion of the Board, the same damages as at common law, that is, all damages, costs and expenses, *apart from the market value of lands taken and damages for injurious affection*, as are directly attributable to the expropriation of lands or premises on which a business or undertaking was carried on, or proposed to be carried on, including personal or business losses resulting from the expulsion of the owner, provided they are not too remote, and are not within the exception in the latter part of s. 13, with the exception of business loss and goodwill provided for separately in s. 19."

[12] He found that no damages could be awarded at common law on the facts presented in this case. In support of this position, he cited and relied upon *Hartel Holdings Co. v. City of Calgary*, [1984] 1 S.C.R. 327, 8 D.L.R. (4th) 321 (S.C.C.). He concluded that since Dell could not have recovered at common law, it was not entitled to recover under the Act.

[13] In summary, he held that there was no disturbance within the meaning of the Act in this case as the appellant did not move or take any action either prior to or after the expropriation that would give rise to a claim for disturbance. He went on to find that damages due to delay could not be described as "injurious affection" since the damages were not caused by the construction or the use of the GO Station as required by s. 1(1)(e)(i)(B) of the *Expropriations Act*.

Ontario Court of Appeal (1995), 22 O.R. (3d) 733, 123 D.L.R. (4th) 157, 55 L.C.R. 1

- a [14] The Court of Appeal endorsed the finding that the time taken by the Authority in determining the precise location and acreage required for the GO Station delayed the development of the appellant's remaining lands, and as a result, damages were sustained. The Court of Appeal upheld the Divisional Court's finding that the damages were not compensable under the Act. It agreed with Steele J.'s interpretation of the applicable provisions of the Act, and concluded that the damages resulting from the delay did not come within the purview of disturbance damages provided by the Act.

c IV. Issues

[15]

- (1) The primary issue to be determined is whether Dell's losses occasioned by the delays are compensable under the *Expropriations Act*.
- d (2) The secondary issue to be decided is whether the Court of Appeal erred in applying the standard of correctness in its review of the decision of the Ontario Municipal Board.

e V. Analysis

- [16] At the outset, it must be emphasized that there is no question that Dell suffered damages as a result of the delay in the expropriation process and that the quantum of those damages is \$500,000. The sole question to be determined is whether those damages are compensable under the provisions of the *Expropriations Act*. It is therefore necessary to consider first the history and aim or purpose of the *Expropriations Act*.

A. *History and Purpose of the Expropriations Act*

- g [17] Prior to the passage of the present Act, expropriation proceedings in Ontario had been the subject of a great deal of valid criticism and just complaints. The unfortunate state of affairs was documented in the 1968 report of the Royal Commission Inquiry into Civil Rights in Ontario (Toronto: Queen's Printer, 1968). The earlier 1967 report of the Ontario Law Reform Commission [Report of the Ontario Law Reform Commission on the Basis for Compensation on Expropriation (Toronto: The Commission, 1967)] considered the basis of compensation for expropriation and made two principal recommendations. It stated that the primary policy consideration must be the indemnification for losses
- h

suffered by the expropriated party. At page 11 of the report the position is set out in this way:

From its examination of the development of the Canadian law, the Commission has formed the opinion that some of the difficulties with assessing compensation flow from a failure to appreciate that the true basis for it is not to be found in an imaginary haggling over the price to be paid for land in a deal between two private individuals, nor the negotiation of a normal bargain in the market place, but in the fulfilment by the state of its obligation to repair the injury caused to particular individuals for the public good, and to minimize the loss, inconvenience, and disturbance to the life of its citizens to as great an extent as possible. [Emphasis added.]

[18] The second recommendation was to the effect that an expropriation statute should provide a framework for assessment of compensation which had sufficient flexibility to allow for indemnification in various circumstances. In essence it was proposed that the statute should provide a framework for the assessment of compensation which would leave sufficient flexibility to do justice (which I take to mean to provide indemnification) in particular cases.

[19] Based on the recommendations of the Royal Commission Inquiry into Civil Rights and the Law Reform Commission report on expropriation an *Expropriations Act* was passed in 1968. That Act remains in substantially the same form today. It is clearly a remedial statute enacted for the specific purpose of adequately compensating those whose lands are taken to serve the public interest.

B. Interpretation of Expropriation 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. See P.-A. Côté, *The Interpretation of Legislation in Canada*, 2nd ed. (Cowansville, Que.: Yvon Blais, 1991), at p. 402; E. Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1992), at p. 26; *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101, at pp. 109-10, 88 D.L.R. (3d) 462 (S.C.C.); *Diggon-Iliben Ltd. v. The King*, [1949] S.C.R. 712, at p. 715, [1949] 4 D.L.R. 785 (S.C.C.); and *Imperial Oil Ltd. v. The Queen*, [1974] S.C.R. 628, 35 D.L.R. (3d) 73, 4 L.C.R. 66 (S.C.C.).

[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. See *Pacific Coast Coin Exchange of Canada Ltd. v. Ontario Securities Commission*, [1978] 2 S.C.R. 112, at p. 127, 80 D.L.R. (3d) 529 (S.C.C.). In *Laidlaw v. Municipality of Metropolitan Toronto*, [1978] 2 S.C.R. 736, at p. 748, 87 D.L.R. (3d) 161, 15 L.C.R. 24 (S.C.C.), it was observed that "[a] remedial statute should not be interpreted, in the event of an ambiguity, to deprive one of common law rights unless that is the plain provision of the statute".

[22] The application of these principles has resulted in the presumption that whenever land is expropriated, compensation will be paid. This has been the consistent approach of this Court. In *The Queen in right of British Columbia v. Tener*, [1985] 1 S.C.R. 533, at p. 559, 17 D.L.R. (4th) 1, 32 L.C.R. 340 (S.C.C.), Estey J. writing for the majority, relied on a passage of Lord Atkinson in *Attorney-General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508 (H.L.), at p. 542:

... unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.

Although Wilson J. wrote a separate concurring opinion in *Tener*, she agreed with the majority on this point. Writing for herself and Dickson C.J., she stated at p. 547:

Where expropriation or injurious affection is authorized by statute the right to compensation must be found in the statute.

Where land has been taken the statute will be construed in light of a presumption in favour of compensation (see Todd, *The Law of Expropriation and Compensation in Canada*, pp. 32-33) ...

[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.

C. The Nature of Dell's Claim

[24] In order to determine whether compensation should be payable for the loss it suffered, something must be said of the nature of Dell's claim. 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. There is no question of the *bona fides* of the loss or the quantum of the

damages. Dell was in the business of acquiring and developing land. As a result of the Authority's studies recommending two possible sites for the GO Transit station, the municipality refused to grant the requisite consents for Dell to develop the land for a two year period. Should Dell be compensated for that loss?

[25] Section 13 provides the authority and grounds for awarding compensation when land is expropriated:

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.

[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.I. Boyd in *Expropriation in Canada* (Aurora, Ont.: Canada Law Book, 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. Further, it must be noted that the Ontario Municipal Board and the Divisional Court found that Dell's lands were being used as lands that were ready and appropriate for development. This finding was not in issue in the Court of Appeal. It follows that the closing words of s. 13 do not act as a bar to the recovery of disturbance damages if they can be recovered in this case.

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, supra*, Spence J., on behalf of the Court, attached particular importance to three factors; first, the legislative intent to provide indemnity

for losses suffered; *second*, that the right to disturbance damages is conferred in broad, inclusive language and, *third*, that the legislature chose to illustrate, but not to define the term "disturbance". At pages 744-45 he further observed:

... I turn to s. 18 of the *The Expropriation Act*. It will be seen that this section, in so far as it applies to the facts here present, is the further delineation of disturbance the "element of compensation" prescribed in s. 13(2)(b) which I have just quoted. It should be noted that the direction to pay is of "such reasonable costs as are natural and reasonable consequences of the expropriation including" [the underlining is my own]. It has been established that when the statute employs the word "including" or "includes" rather than "means" the definition does not purport to be complete or exhaustive and there is no exclusion of the natural ordinary meaning of the words. [Citations omitted.] Therefore, if the sum of \$16,000, the difference between the \$26,000 cost of the extension and the \$10,000 by which it increased the market value of the property, were "a reasonable cost of the natural and reasonable consequence of the expropriation", the effect of s. 18(1) would be to direct that sum to be added to the compensation whether or not it could be fitted into the words of paras. (a), (b), or (c) which follow the general words of the said s. 18(1). The appellant proved that the improvement cost \$26,000. It was the unanimous opinion of the appraisers that the expenditure of that sum only increased the market value by \$10,000. Therefore, I am of the opinion that the appellant's loss of the difference of \$16,000 was a "cost" and was the natural result of the expropriations. The appellant had spent the \$26,000. Due solely to the expropriation, she could not enjoy the fruit of that expenditure. If she could only recover the market value she would only be reimbursed to the extent of \$10,000. The balance of \$16,000 was a loss to her and a direct cost of the expropriation. I am of the view that the appellant is entitled to succeed on this interpretation of the section without the use of the questioned para. s. 18(1)(a)(ii). [Emphasis added.]

Thus it is clear that the Act should be interpreted in a broad, liberal and flexible manner in considering the damages flowing from expropriations.

E. Are the Damages the Natural And Reasonable Consequences of the Expropriation?

[28] If damages are to be awarded they must be the natural and reasonable consequence of the expropriation. The Authority argued before the Ontario Municipal Board, though not before this Court, that the delay was occasioned not by the expropriation but by the municipality's decision to delay the necessary approvals for Dell's proposed development. I cannot agree with that submission. 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 was impossible for the municipality to consider a development

whose borders were undefined and whose size was yet to be determined. The municipality had no alternative but to wait until the Authority decided how much and what portion of the land it required for the GO Station. 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 consequences of the expropriation. a

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?* b

[29] The Authority contended that disturbance 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. This was appropriate in legislation whose aim was to provide reasonable compensation for the losses flowing from the act of expropriation. It is both unnecessary and unfair to read the limitation suggested by the Authority into the provisions of the Act. c d e f

[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. In that case, a strip of land was expropriated through the centre of a dairy farm. When the farmer attempted to continue his operations on the remaining lands he found that it was no longer profitable. The court concluded that in addition to the market value of the strip of land expropriated, LaFleche was entitled to \$15,000 in disturbance damages. Obviously, this award was not limited to damages suffered on the expropriated land but related primarily to the farming business operated on the remaining lands. At page 85 of that case, Donnelly J. on behalf of the court stated: g h

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.

a 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 for all aspects of disturbance damages provided the damage incurred is not too remote and is the natural and reasonable consequence of the expropriation. [Emphasis added.]

This is, I think, the appropriate approach to take to disturbance damages.

b [31] In any event, I do not believe that damages suffered in the case at bar relate only to the remaining lands. Dell was of course seeking to develop the entire parcel of land. Nothing could be done with any of the land until the Authority decided which portion to expropriate for the GO Station. There is no doubt that this constituted an interference with Dell's ability to use any of its land for development purposes. The resulting loss clearly comes within the definition of a business disturbance. Obviously, once the decision was made by the Authority as to the extent and the borders of the land it was going to expropriate, Dell's land development business was necessarily restricted to the remaining lands. It is true the losses flowing from the delay are related to the increased cost of developing the parcel of land remaining after the expropriation. However, 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. It follows that I cannot accept the contention that the damages relate only to the remaining land and not to the expropriated land. This is too fine a distinction to draw in the application of a remedial statute.

f G. *Should There Be Compensation Payable for Damages Resulting for Delays When There Is Expropriation of Land. When No Such Compensation Is Payable When There Is No Expropriation?*

g [32] The Court of Appeal adopted the view of the Divisional Court that since no damages are payable in situations where rezoning and planning considerations cause a delay in circumstances where no land is taken it followed that the legislature could not have intended that damages should be payable for expropriation delay where land is in fact taken. With the greatest respect I cannot accept this position as being correct.

h [33] The whole purpose of the *Expropriations Act* is to provide full and fair compensation to the person whose land is expropriated. It is the taking of the land which triggers and gives rise to the right to compensation. An owner whose land is caught up in a

zoning or planning process but not expropriated must simply accept in the public interest any loss that accrues from delay. There is neither a statutory requirement nor a policy reason for employing a similar approach to compensation for losses accruing from delay when land is expropriated and for losses accruing from delay in the planning approval process when land is not taken. Both statutory and judicial approaches to compensation are, as might be expected, very different in these two situations.

[34] The difference in judicial treatment is described by Wilson J. in *Tener, supra*, at pp. 547-48, where she wrote:

Where land has been taken the statute will be construed in light of a presumption in favour of compensation [citation omitted] but no such presumption exists in the case of injurious affection where no land has been taken. [Citation omitted.] In such a case the right to compensation has been severely circumscribed by the courts . . .

That this distinction is fundamental has been recognized by this Court since at least its decision in *City of Montreal v. Daniel J. McAnulty Realty Co.*, [1923] S.C.R. 273, at p. 283, [1923] 2 D.L.R. 409 (S.C.C.) where Duff J. observed:

It is true that this article [i.e. the provision mandating compensation] itself makes no provision apparently for compensation to persons whose lands are not taken but who nevertheless suffer injury in their business or property by reason of the execution of a municipal work; but that can afford no sound reason for declining to give effect to the principle embodied in the article of the code according to the measure defined by the article of the charter. [Emphasis added.]

See generally, J.-D. Archambault, "Les troubles de jouissance et les atteintes aux droits d'autrui résultant de travaux publics non fautifs" (1990), 21 R.G.D. 5, at pp. 94-99.

[35] The Privy Council recently has reiterated the fundamental difference between these two situations. In *Director of Buildings and Lands v. Shun Fung Ironworks Ltd.*, [1995] 2 A.C. 111 (P.C.), at pp. 138-39, Lord Nicholls of Birkenhead said:

Of course, many schemes involving resumption or compulsory acquisition do not come to fruition. Meanwhile properties may be unsaleable, and no compensation will ever be payable unless special "blight" provisions apply . . . The existence of this type of loss, for which the landowner may be without remedy if resumption does not take place, is not a sound reason, when resumption does take place, for drawing the compensation boundary in such a way as to exclude all pre-resumption loss. [Emphasis added.]

It should be noted that the term "resumption" used in the reasons is synonymous with the term expropriation.

[36] It is as well significant that the Act itself makes a clear distinction between those situations in which compensation is paid where no land is taken and compensation paid where land is in fact

- taken. Where land is taken, compensation is primarily provided for in ss. 13, 15, 18, 19, 23 and in the definitions in s. 1(1)(e)(i). The circumstances in which compensation is to be paid where no land is taken are provided for in s. 21 and in s. 1(1)(e)(ii). There is no provision for recovery for disturbance damages where no land is taken. Injurious affection damages can be recovered both where the land is taken and where land is not taken but the tests to be met are very different. Where land is taken, the damages may relate to construction *and* the use of the works but where no land is taken the damages are limited to those flowing from the construction of the works even if the use also causes damages. There is therefore a clear foundation for concluding that there is a very real and significant difference between awarding compensation in those situations where land is expropriated from those where it is not. It follows that damages for disturbance can appropriately be awarded in situations where there has been an expropriation even though no damages for disturbance will be awarded in situations where there has not been an expropriation.

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, supra*, 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. 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. The causal approach to damages under the *Expropriations Act* was endorsed by the majority of this Court in *Imperial Oil, supra*, where the Crown ordered the claimant to remove its pipes from its right of way in order to permit dredging and the construction of dock facilities. Although there was no expropriation of the claimant's land, it sought damages for injurious affection. The trial judge held that no compensation was payable because the dredging and construction work was undertaken after the pipe lines had been removed. The majority of this Court reversed that decision stating at pp. 632-33:

It was because of the decision to proceed with these public works that the pipes had to be moved and lowered and the fact that this was done before the public works were constructed in my view affords no ground for proceeding on the assumption that the injurious affection which was undoubtedly suffered by the suppliant was not occasioned "by the construction of any public work".

[39] Similarly in *Bersenias, supra*, a tobacco farmer sold part of his tobacco quota before the actual expropriation of his land but after he had been told that he would have to vacate his premises by a specified date. It was very properly held that the fact the sale of the tobacco quota preceded the expropriation did not prevent the farmer from recovering as disturbance damages the losses he suffered as a result of that sale. The Divisional Court put its position in these words (at p. 113):

There can be no doubt that Mr. Bersenias took the step he did by reason of the expropriation. Disturbance of the business is not only to be viewed as occurring after formal notice of expropriation is served. The expropriation having in fact occurred in law when the notice was served ought also to be viewed as encompassing the acts of the parties in contemplation of it, including the information furnished by the ministry, the negotiations, the forecast of completion, the assurance of the minister that it would in fact be formalized.

[40] In the case at bar, the Divisional Court considered the *Bersenias* decision and stated that although the case was decided correctly on its facts it should not be taken to stand for the principle that all acts of either party prior to expropriation can give rise to an award for damages for all business losses. The Divisional Court may have considered the damages in *Bersenias* were compensable on the basis that the action was taken in order to mitigate the damages. It is true that parties do have a duty to mitigate and that all steps taken in order to mitigate the damages will be compensable in expropriation cases.

[41] However, in this case, the Divisional Court decided that Dell took no action to mitigate its damages; rather it was simply delayed in developing its land. It concluded that there was no disturbance within the meaning of the Act. I cannot accept this position. Dell simply could not take any action which would mitigate its loss in the development of its properties. The company had purchased the lands for development. It was in the process of seeking the necessary approval for their development when the Authority expressed its interest in a portion of Dell's land. The result was that its lands were frozen for more than two years while the Authority considered how much and what portion of the land should be taken. There was nothing Dell could do but to wait for the Authority's decision before it could get on with its business of land development.

[42] 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*.

[43] Shun Fung operated a mill business in Hong Kong. In November of 1981, the governmental authority advised Shun Fung that it was planning a project which would require the expropriation of its lands. This information became generally known by the middle of 1982, but the land was not actually taken until July 1986. As a result of the pending expropriation, Shun Fung was unable to secure long-term contracts because customers were concerned that the expropriation would go ahead and the business would be shut down. The claimant 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 the *Point Gourde* principle: *Point Gourde Quarrying and Transport Co. Ltd. v. Sub-Intendant of Crown Lands*, [1947] A.C. 565. A landowner cannot claim compensation to the extent that the value of his land is increased by the very scheme of which the resumption forms an integral part. That 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. 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 are attributable to the scheme. If the threat of resumption drives away customers who need long term assurance of supply, on resumption no compensation would be payable for this loss of profits. Future losses of profits would be recoverable, but not the losses already incurred.

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. [Italics in original; emphasis added.]

[44] He 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. This involves giving the concept of causal connection an extended meaning, wide enough to embrace all such losses. To qualify for compensation a loss suffered post-resumption must satisfy the three conditions of being causally connected, not too remote, and not a loss which a reasonable person would have avoided. A loss sustained post-scheme and pre-resumption will not fail for lack of causal connection by reason only that the loss arose before resumption, provided it arose in anticipation of resumption and because of the threat which resumption presented.

It was therefore concluded that Shun Fung should be awarded compensation for the loss of profits during the "shadow period" before the expropriation.

[45] I am in complete agreement with those reasons. The situation described in that case is very similar to the one at bar.

- a Dell suffered damages because its development business was curtailed for more than two years while the Authority determined which portion of its land was needed for the GO Station. The increased costs of Dell's development business during the waiting period between the announcement of potential expropriation and the actual taking of the land were caused by the expropriation. For the reasons set out above they are in my view compensable as
- b disturbance damages pursuant to s. 13(2)(b) of the *Expropriations Act*. This conclusion is sufficient to deal with this appeal. However two other matters were raised which should be mentioned.

J. *Are the Losses Compensable as Injurious Affection?*

- c [46] In light of the conclusion that the losses are compensable as disturbance damages it is not necessary to consider the alternative ground for recovery put forward by the appellant that the losses might be recovered under the heading of injurious affection.

K. *Degree of Deference Owed to the Ontario Municipal Board*

- d [47] It was the contention of the appellant that the courts below erred in holding that the standard of review which should be applied to the decisions of the Ontario Municipal Board was one of correctness. That is to say that it had to be correct. I have concluded that the decision of the Board was correct. It is therefore not necessary to deal with the issue of the standard of
- e deference owed to decisions of the Board, yet something should be said regarding the appellant's submission. The principles governing the appropriate standard of review by appellate courts of various tribunals are ably set out by Iacobucci J. in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at pp. 589-90, 114 D.L.R. (4th) 385 (S.C.C.), in these words:

- f There exist various standards of review with respect to the myriad of administrative agencies that exist in our country. The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. In answering this
- g question, the courts have looked at various factors. Included in the analysis is an examination of the tribunal's role or function. Also crucial is whether or not the agency's decisions are protected by a privative clause. Finally, of fundamental importance, is whether or not the question goes to the jurisdiction of the tribunal involved.

- h [48] There is no effective privative clause applicable to the decisions of the Board. Rather s. 33(2) of the *Expropriations Act* provides that there is an appeal as of right to the Divisional Court "on questions of law or fact or both and the Divisional Court (a) may refer any matter back to the Board; or (b) may make any decision or order the Board has power to make". Thus, not only is

there no privative clause but a very wide power of appeal is granted. Nor is there any aspect of particular expertise involved in this decision. I would agree with the conclusion of the Court of Appeal that no particular deference should be accorded to a decision of the Board. That is to say the decision of the Board must be correct. However it was, as I have found, correct.

VI. Disposition

[49] I would allow the appeal and restore the award of \$500,000 for disturbance damages made by the Ontario Municipal Board pursuant to s. 13(2)(b) of the *Expropriations Act*. The orders of the Divisional Court and Court of Appeal should be set aside and the award of the Ontario Municipal Board restored. The appellant should have its costs of these proceedings throughout.

[50] IACOBUCCHI (dissenting):—I have read the lucid reasons written by my colleague, Cory J., and, with respect, find myself unable to concur in his result. In my opinion, neither the wording of the legislation in question nor the applicable case law supports Dell's claim for disturbance damages in this case. With regard to Dell's claim, presented in the alternative, for damages resulting from injurious affection, in my opinion, the clear wording of the legislation precludes an award for such damages.

1. Disturbance Damages

[51] By virtue of s. 13(1) and (2) of the *Expropriations Act*, R.S.O. 1980, c. 148 (hereinafter the "Act"), when a governmental authority expropriates property, it must compensate the landowner. This compensation must include, among other things, "damages attributable to disturbance". Section 18(1) of the Act defines disturbance damages as those "reasonable costs [which] are the natural and reasonable consequences of the expropriation". In other words, subject to considerations of remoteness, so long as the expropriation causes the loss, the landowner has a right to compensation in the form of disturbance damages. Accordingly, Dell's claim for damages in this case turns on whether or not the expropriation did, in fact, cause the loss.

[52] In my view, the appellant's claim fails to overcome this crucial hurdle; I do not agree with Dell's argument that the taking of its land gave rise to the loss in question. This brings me to a brief review of the factual background to this appeal and the relevant jurisprudence.

[53] In the mid-1970s, Dell bought approximately 40 acres of land in Mississauga, with an eye to redeveloping the property as a residential "subdivision". In May of 1977, the Toronto Area

Transit Operating Authority (hereinafter the "Transit Authority") asked the city of Mississauga to endorse its plan for a GO Station to be constructed somewhere on Dell's property. The Transit Authority did not determine the exact boundaries of the needed land until March of 1980. During this three-year period, the city of Mississauga refused to consider Dell's redevelopment proposal.

[54] As a result of this "delay", Dell incurred greater expenses in developing its Mississauga property than it would have, had the redevelopment plan proceeded as originally scheduled. Dell now seeks to recover these increased costs as disturbance damages.

[55] As noted above, the Act's definition of disturbance damages requires Dell to show that the increased costs of development are the "natural and reasonable consequences of the expropriation". In my opinion, Dell's causation argument fails for two reasons. First, I do not agree with the appellant's submission that the three-year delay constituted a part of the expropriation "process". Second, even if the delay was a part of the process, the Transit Authority's delay did not cause Dell's loss; the zoning authority did. Nothing in the Transit Authority's conduct forced the city of Mississauga to postpone consideration of Dell's rezoning application; the city made a choice to defer its decision until the Transit Authority had settled its GO Station plans. This choice by the city effectively breaks the chain of causation between the expropriation "process" and Dell's loss. I should like to elaborate on these two reasons.

[56] In order to recover disturbance damages, a party must show that those costs represent the natural and reasonable consequences of the expropriation. Normally, "expropriation" refers to the actual taking of a person's land. See, for example, the definition given in *Black's Law Dictionary*, 6th ed. (1990). However, in this case, it was not the taking itself which caused the loss. On the contrary, from Dell's point of view, the expropriating act could not occur soon enough. The source of Dell's complaint is not, therefore, the taking of its land, but rather the time which the Transit Authority took to decide exactly which piece of land to expropriate. Therefore, on its face, Dell's loss would not seem to fall within the definition of disturbance damages specified in s. 18(1) of the Act.

[57] In an effort to bring itself within the scope of s. 18(1), the appellant argued before this Court that the pre-expropriation delay formed part of the expropriation "process" or "scheme". Once the delay period is recognized as part of the "expropriation process", then any loss caused by the delay is, by extension, caused by the expropriation itself. However, I do not agree with

this characterization of the delay period and do not read the case law as supporting the appellant's argument.

[58] It is true that certain cases have spoken of expropriation as a "process". See, for example, the decision of Duff J. in *City of Montreal v. Daniel J. McAnulty Realty Co.*, [1923] S.C.R. 273, [1923] 2 D.L.R. 409 (S.C.C.). However, when Duff J. used the term "process", he was not referring to all of the steps leading up to the expropriation itself. Rather, "expropriation process" encompassed only the actual taking plus the use to which the expropriated land would be put, namely, the building of a sewage plant. The Court adopted this somewhat expansive definition of expropriation in order to measure properly the value, to the owner, of the expropriated land. Contrary to the argument put forward by the appellant, the word "process", as used in *McAnulty*, did not refer to any action undertaken in the pre-expropriation period, but rather to events occurring *after* the taking of the land, i.e., the building of a sewage plant.

[59] Accordingly, I do not see how the period leading up to the taking of land falls within the meaning of the term "expropriation" as it is used in s. 18(1) of the *Expropriations Act*. Therefore, any loss caused by the passing of time prior to the actual expropriation does not qualify as disturbance damage.

[60] Furthermore, even accepting the appellant's argument that the period leading up to the actual expropriation forms part of the "expropriation process", this lapse of time did not, in fact, cause the loss which forms the basis of the present claim. Specifically, Dell suffered its loss not as a result of expropriation, but rather as a result of a zoning decision or lack thereof.

[61] Between 1977 and 1980, the city of Mississauga would not consider Dell's development proposals until the Transit Authority had reached a final decision on the land to be expropriated. This refusal to proceed with the development plan, while undeniably influenced by the "expropriation process", was not determined by it. The city still had the power to rezone all of Dell's land, but it chose not to do so. While this may have been a prudent choice, it was, nonetheless, a choice made by the city. Therefore, in my opinion, the delay in development did not flow inexorably from the Transit Authority's slow progress in choosing a location for the GO Station. Accordingly, given that the delay in reaching an expropriation decision did not, in fact, cause the delay in rezoning, then the expropriation delay also did not cause Dell's loss within the meaning of "disturbance damages" as found in s. 18(1) of the Act.

[62] I should emphasize that this is not a case where the property expropriated had some special value to the landowner, a

a value which would not be reflected in the land's market price. Dell had not sunk any investment into its property which the expropriation rendered useless. Or, at least, that is not the nature of the claim in issue. The damages claimed do not, in any way, reflect a decrease in the value either of the expropriated land or of the remaining land — losses which would fall under the rubric of disturbance damages.

b [63] Although I am not aware of any Canadian case which has awarded disturbance damages for losses incurred as a result of pre expropriation delay, the appellant points to the recent Privy Council decision in *Director of Buildings and Lands v. Shun Fung Ironworks Ltd.*, [1995] 2 A.C. 111 (P.C.). In *Shun Fung*, the c landowner lost profits when its trading partners, made nervous by rumours of a potential expropriation, refused to enter into long-term contracts — contracts which provided the bulk of the company's revenues. In the five years between the first rumours and the formal order, the inability to enter into long-term d contracts reduced the business' profits by approximately \$18,000,000. Under the heading of disturbance damages, the Privy Council awarded compensation for these lost profits.

[64] I need not express an opinion as to whether one can draw a persuasive analogy between *Shun Fung* and the present case e because I do not, with respect, agree with the result reached by the Privy Council. I prefer the result and reasoning reached by the Ontario Land Compensation Board in *A. M. Souter & Co. v. City of Hamilton* (1972), 2 L.C.R. 167. In that case, the plaintiff owned a five-storey commercial building in Hamilton. In the mid-1960s, the f city commissioned a report which recommended extensive redevelopment of the downtown area, an area which included the plaintiff's property. For reasons unrelated to the proposed renewal project, the plaintiff could not find a tenant for its building and, accordingly, sought permission to redevelop the g property. Because of the "urban renewal area" designation, permission was denied by the zoning authority and the building sat empty for three years until the city issued its formal notice of expropriation. The landowner claimed disturbance damages to cover the rental income lost during this period. Rejecting this h claim, the Board held, correctly, in my opinion, that the loss was the result not of the expropriation but rather of the designation of the area as one of proposed urban renewal and that, accordingly, the loss was not compensable under the heading of disturbance damages. Similarly, in the instant appeal, the pre-expropriation delay did not cause the loss, rather the refusal to rezone did so.

[65] I should also add that an acceptance of Dell's argument would lead to difficulties in future cases. For example, in many cases, the exact commencement of the "delay period" may be unclear. Does the delay period begin to run only when the governmental authority makes a firm, public statement about plans to expropriate? Or when the government begins to study potential sites for expropriation? Or when rumours begin to circulate? Given these questions, one would think that, had the legislature intended to compensate for a loss arising from a delay period, it would have clearly provided for such compensation.

[66] Finally, even accepting that certain policy considerations may weigh in favour of the government bearing the cost of pre-expropriation delay, I am reluctant to weigh policy more heavily than the clear language of the statute and the existing expropriation jurisprudence.

2. Injurious Affection

[67] The right to claim damages for injurious affection stems from s. 13(2)(c), which states:

13(2) Where the land of an owner is expropriated, the compensation payable to the owner shall be based upon,

(c) the damages for injurious affection;

[68] The Act defines "injurious affection" in s. 1(1)(e) as follows:

(e) "injurious affection" means,

(i) where a statutory authority acquires part of the land of an owner,

(B) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute.

On this question, I agree with the conclusion reached by the Court of Appeal:

The business losses caused by the pre-expropriation delays are not damages resulting from "the construction or use, or both, of the works" under part B of s. 1(1)(e)(i) ...

((1995), 22 O.R. (3d) 733, at p. 735, 123 D.L.R. (4th) 157, 55 L.C.R. 1.)

[69] For all of these reasons, I would dismiss Dell's appeal with costs.