# CASE LAW UPDATE 2019

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*Tim Quirk – Ministry of Attorney General*

# *58663 Newfoundland and Labrodor ltd. v. Kippens (Town)*

2018 NLSC 223

## Strict Interpretation of Expropriation Statutes?

- Long running fight between developer and town.
- Town denied initial development application. Appeal board directed town to reconsider. Town again denies application.
- Meanwhile, road extension constructed. Town uses turnaround at end of road until 2nd denial when developer put gate over the lane.
- Town moved to expropriate road. To do so town required approval from Provincial ministry.
- Judicial review challenge brought by developer against Province (approval) and town (ultra vires).
- Standard of Review is reasonableness

# *Kippens*


- Company, quoting Todd, argued that interpretation of Expropriation Legislation should favour the owner:

  The exercise of the power of expropriation interferes drastically with private property rights and therefore the courts generally construe expropriation statues strictly and in favour of the individual whose rights are affected. Moreover, as Rand J. said in *Diggon-Hibben Ltd. v. R.*,

  > A compensation statue should not be approached with the attitude that Parliament intended an individual to be victimized in loss because of the accident that his land rather than his neighbour's should be required for public purposes.

- However, statutory interpretation has evolved and strict interpretation now out of favour. Court quoted decisions from across the country in support of "modern purposive approach"

# *Kippens*


- *Lynch v. St. John's (City)* 2016 NLCA 35

  31. As noted by the majority of this Court in *Archean Resources Ltd.* at para. 15, the SCC has adopted as its "modern rule" of statutory interpretation the statement in Driedger:

  > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

- *Leiriao c. Val-Belair (Ville)* 1991 3 SCR 349

  30. I consider that s. 570 *C.T.A.* allows municipalities to expropriate for purposes of a land reserve, as this interpretation is most consistent with the scheme of the legislation and intent of the legislature, and gives s. 29.4 *C.T.A.* its full meaning.

# *Kippens*


- *Martell v. Halifax (Regional Municipality)* 2015 NSCA 101

  23. Is there support for the Appellant's "well-recognized precept"? There is historically, but it appears to be challenged and not universally applied in modern times. There is ample authority for the view that such a restrictive approach to by-law interpretation has been superseded by the modern purposive approach.

- *Tuteckyj v. Winnipeg (City)* 2012 MBCA 100

  54. Given these developments in the law, it is clear that the strict compliance approach to statutory interpretation regarding the power of public entities, including municipalities, over private property that was in effect at the time of the decision in *Riopelle* has been replaced by the Supreme Court of Canada's adoption of the broad and purposive approach in *United Taxi Drivers' Fellowship and Shell Canada Products Ltd. v. Vancouver (City)*

# *Kippens*

- But by way of contrast see: *Norenger Development (Canada)* – 2016 BCCA 118

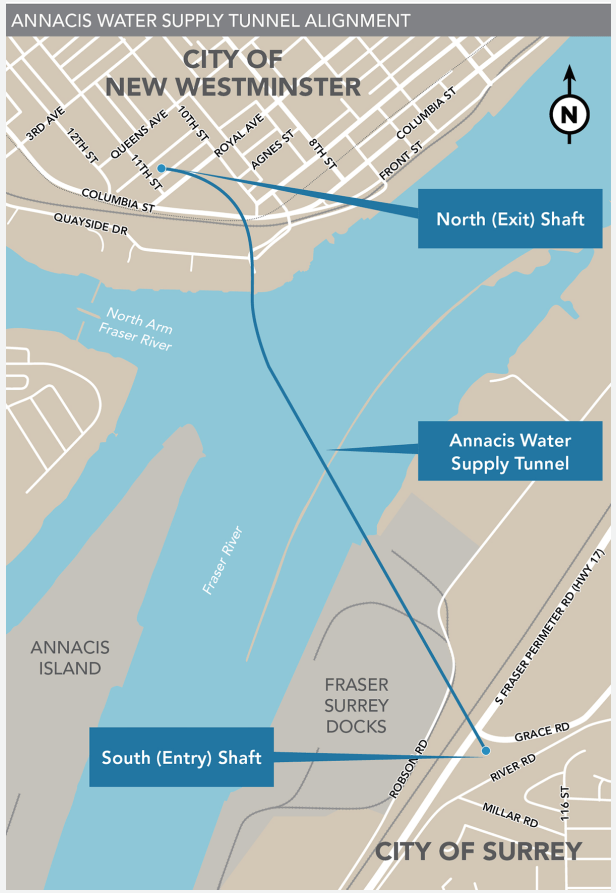
  - 60 Support for this approach is grounded in the presumption that the legislature does not intend to abolish, limit or otherwise interfere with the rights of subjects. … It is a general rule of statutory interpretation that legislation which curtails rights must be strictly construed.

# *Tanex Industries v. GVWD*
## *2019 BCSC 74*

## *Contamination and Advance Payment Deductions*

- GVWD sought to acquire property from Tanex, but withheld estimate of remediation costs from advance payment.
- Market value $2,750,000.
- $500,0000 withheld for contamination (low end of estimates)
- Tanex challenged authority to make deduction.
- No determination that property contaminated, Tanex claimed no contamination.
- S. 32. The market value of an estate or interest in land is the amount that would have been paid for it if it had been sold at the date of expropriation in the open market by a willing seller to a willing buyer.

# *Tanex Industries v. GVWD 2019 BCSC 74*




- 4 arguments from Tanex
  - Deducting contamination unfairly strips owner of right to remediate and enjoy value uptick
  - Expropriation means Tanex loses its right to seek recovery of remediation costs from others under *EMA*
  - These two rights (which have value) are part of the "bundle of rights" that is being expropriated
  - The expropriation may leave Tanex liable to recovery by third parties under *EMA*.
- Tanex relies on *Dell* (in a very broad sense) and *Caven* in asking the Court to construe *Act* in favour of owner
- GVWD says the argument seeks to reinstate "value to owner" contrary to *Expropriation Act*

# *Tanex*


- The Court finds that the discussion in *Dell* and *Caven* relate to disturbance damages and not market value.

  I do not read the Court's discussion of fairness in *Dell Holdings* to support the position taken by Tanex on this application. The approach to be taken is mandated by the legislature of this province in the clear and plain provisions of the *Expropriation Act*.

- The Court focuses on "meaning of market value in the *Expropriation Act".*

  the amount that would have been paid for it if it had been sold at the date of expropriation in the open market by a willing seller to a willing buyer.

- Market value determined by appraisal evidence and turns on highest and best use.

# *Tanex*

*See also: Jansen Industries 2010 Ltd v. Victory Motors* 2019 BCSC 1621

- Two references to *Nguyen*: Costs of achieving HBU can be considered:

  48 A property's highest and best use may not necessarily be the use at the time of expropriation. If it is not, then the costs to elevate its use to that point can be taken into account in a compensation award.

- Contamination costs are like development costs*:*

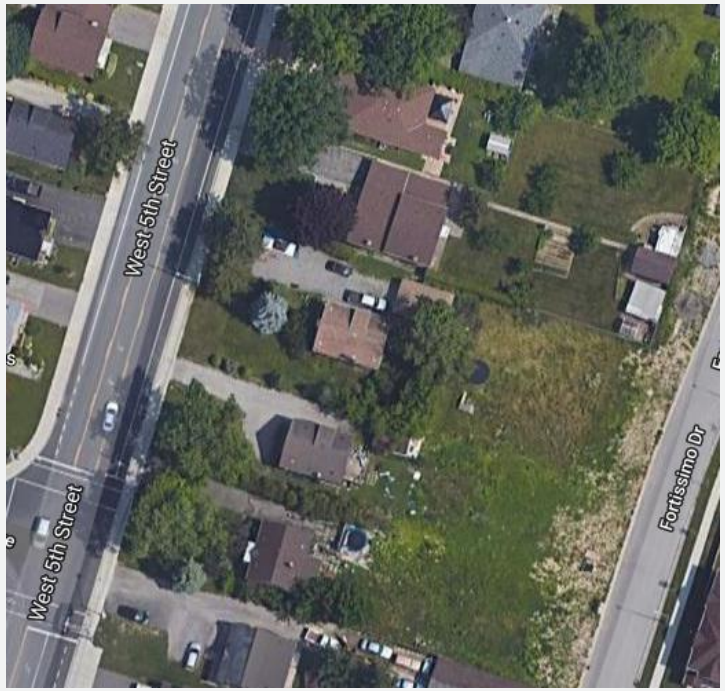
  51 if there are significant redevelopment costs necessary to establish the property's highest and best use, those costs should be taken into account and subtracted from any compensation award…

  52 I see no difference in principle or logic to the approach to be taken concerning remediation costs. Applying the holding in *Nguyen* to this case, I conclude that it is always open for the trial judge to deduct remediation costs where appropriate.

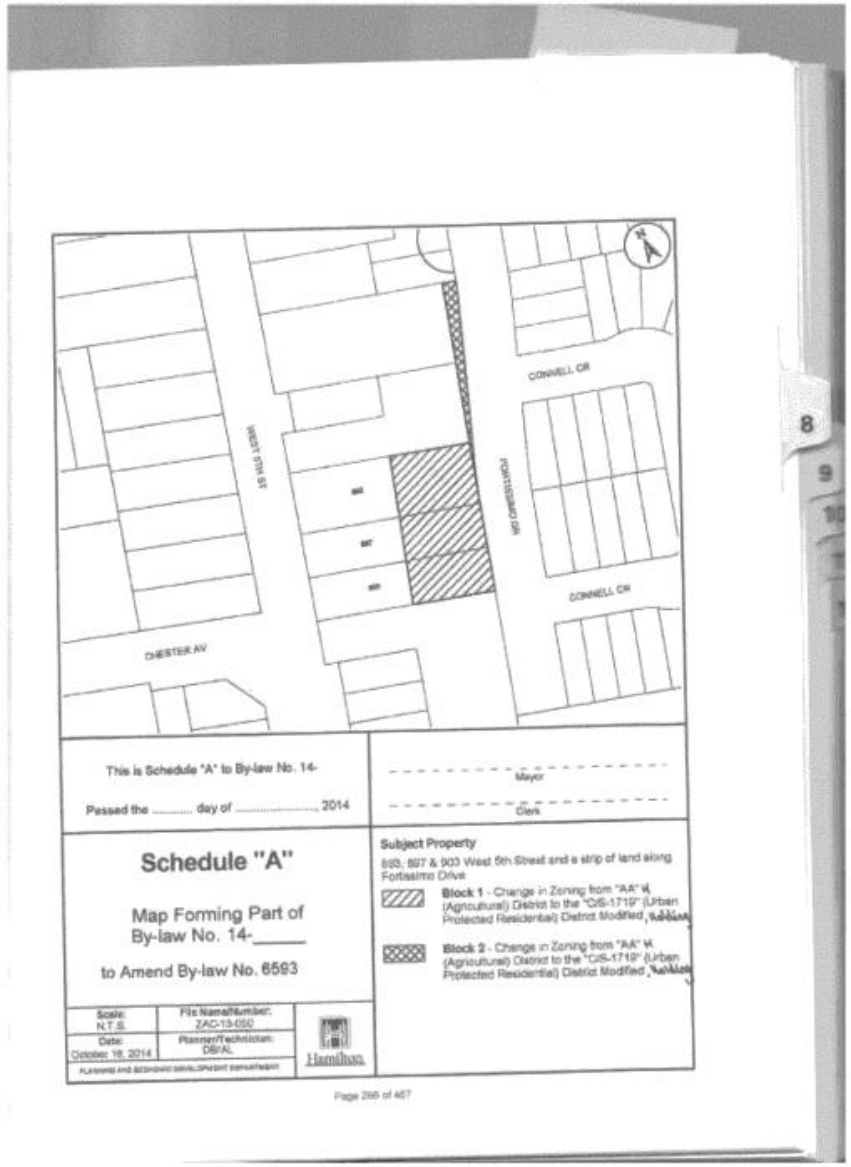
- *Environmental Management Act*
  - Not clear Tanex lost that right. If it did, and if that right is worth money, then Tanex can pursue in compensation action.

# *112581⁴ v. Hamilton*

*2019 CarswellOnt 3616*




- Appeal of Ontario Municipal Board decision
- Question of Contribution
- Subject property is small wedge shaped parcel with long road frontage on Fortissimo. Remnant from former surplus school site. Claimant acquired for $74k
- Claimant and neighbors had agreement to combine Wedge with rear of neighbors lots for 5 lot subdivision
- Rear severances had no street frontage, but much larger than Wedge
- Settlement between City and claimant so City could facilitate consolidation of Subject
- Is the Wedge valued on "per sq ft" basis, or on basis of contribution to utility of subdivision?




- Claimant's appraiser: $740,000 "The value of any component of a property is measured by how much it adds to the market value by reason of its presence, or detracts from market value by its absence"
  - Rear Lots need the Wedge and the Wedge needs the Rear Lots, so they are valued equally (50/50 split)
  - All adjustments "subjective"
- City's appraiser: $470,000
  - Got the zoning wrong (Agricultural v. Development), but used more diverse comparables
  - Wedge should be value on straight pro-rata basis
  - $21.26 / sq. ft., Wedge is 2,110 sq ft = $45,000 + 25% share of developer's profit $25,000 = $70,000

# *112581⁴ v. Hamilton*

*2019 CarswellOnt 3616*

## Why doesn't the "Scheme" rule apply?

- Tribunal: $615,000
  - Frontage, access and zoning give Wedge higher value
- 94 As Mr. Griesbaum testified, they both need each other equally. Without one there can be no development proposal. Each parcel brings a missing element to the development proposal which forms the highest and best use of the Subject Lands.
- 95 In these unique circumstances the Tribunal finds that the principle of contribution does apply and the Tribunal will share the value equally between the two parcels which results in a value of $307,500.00 to the Subject Lands, which the Tribunal finds to be the market value for the Subject Lands, in these unique circumstances.

# *Nova Scotia v. S&D Smith Central Supplies*

## 2019 NSCA 22

900+ Paragraph Board Decision

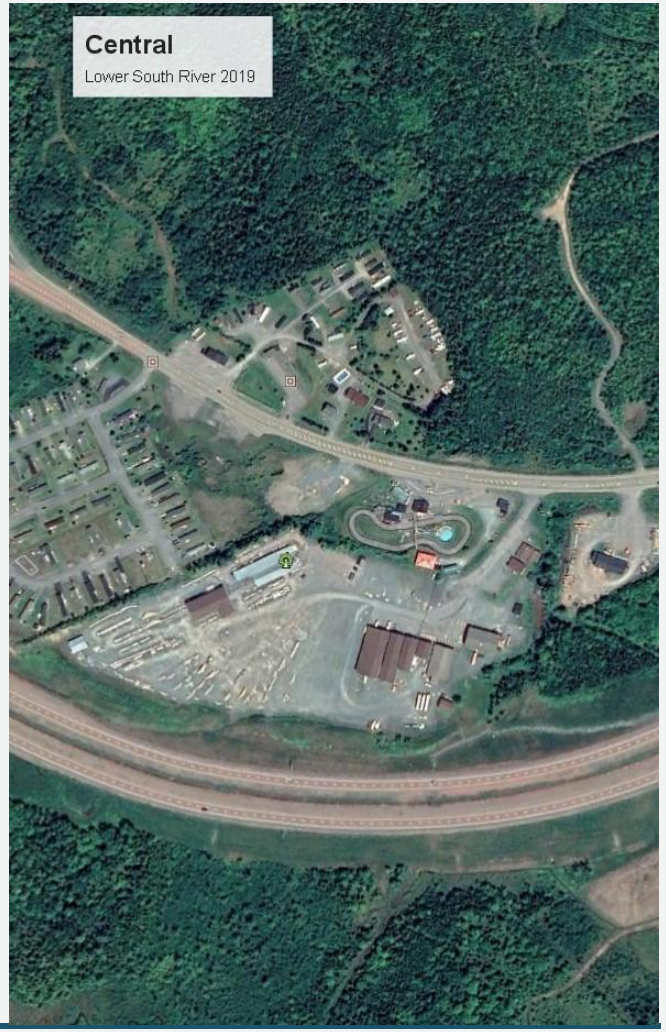
420 Paragraph Appeal

- Central ran a hardware business. Province twinned and relocated HWY 1 through one of its properties.
- Central claimed $12.2 M, Province $820k – $4.69M
- NS Review Board awarded $8.18M ($6.7 M in disturbance damages). Province and Central appealed.
- NSCA (with dissent) upholds the award and dismisses appeal and cross-appeal.
- 1998 Province advises Central of possible expropriation. Agent told Central "if you build on the likely take, no compensation". Central claimed the announcement disrupted it's planed development of the parcel. Expropriation not filed until 2012.
- Board found Central "in occupation" and that disturbance started with "shadow of expropriation" by 2001 leading to large award. Future business losses "too uncertain".
- Appeal centered around whether "pre-expropriation" damages were compensable and whether disturbance payable on partial take.

# *Central*


- Nova Scotia *Expropriation Act*
  - 26(b) **the reasonable costs, expenses and losses arising out of or incidental to the owner's disturbance as hereinafter set forth;**
  - 27 (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)… market value [highest and best use]… ; and
    - (b) the aggregate of
      - (i)Market value based on current use; and
      - (ii) costs, expenses and losses arising out of or incidental to the owner's disturbance

# Central




- Nova Scotia's primary argument was that "occupation" in s. 27(3) meant "actual occupation" and advanced 5 arguments in support
  - 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;
  - The board's awards of market value and disturbance compensation offend the formula in s. 27(3).

# *Central*

## "Occupation" per NSCA

- [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.
- [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.

# *Central*

## Disturbance damages on partial take

- In *Johnson* (2005 NSCA 99) the 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 by NSCA]
- Province in this case relied heavily on this proposition before the board to contend that none of the business disturbance damages were compensable, irrespective of the other issues raised (predating the expropriation, not causally related, not in occupation).

# *Central*

## Disturbance damages on partial take pt.2

- NSCA in *Central* though distinguishes *Johnson*

1. *Dell* rejects this idea
2. Nothing in the *Act* bars recovery of proven loss
3. To accept would mean authority could take all but a "bite-sized parcel" and avoid paying disturbance
4. *Court* in *Johnson* was talking about the "usual" case of business relocation, and anyway comment was in *obiter.*

Therefore:

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.

# Central

- One further point of note, in interpreting the *Nova Scotia Expropriation Act* the board, citing *Dell*, held that the "object to be obtained" is "full compensation".
- The NSCA said this interpretation is "consistent" with s. 2(1) of the *Act*
  - It is the intent and purpose of the Act that every person whose land is expropriated shall be compensated for such expropriation
- Does this go beyond what the courts in BC have said? No "purpose" section in BC.
  - **30** (1) Every owner of land that is expropriated is entitled to compensation, to be determined in accordance with this Act.

# *Central*

# The Dissent

Loss of opportunity does not equate to compensable disturbance

- Justice Beveridge would have allowed the appeal, quashed the business losses and altered the interest.
- 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.

# *Central*

# The Dissent

- 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 *IAFF, Local 268 v. Adekayode* [2016 CarswellNS 61 (N.S. C.A.)], *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.

# *Atlantic Mining*
## 2019 NSCA 14


- [1] An owner who is displaced by an expropriation must be paid the property's market value as well as something for his 'disturbance'. This case is about that 'something'.
- Oakley, a one handed former pipe fitter, purchased Subject Property in 1997, built a house. Gold mine expropriated in 2012. Eventually settled market value at $305,000. Only disturbance damages before the board.
- Utility Review Board awarded statutory maximum 15% of market value for disturbance: delay (2004-2012), negotiating time, registry fees, personal moving time, etc
- 2 issues before Court of Appeal
  - Standard of Review
  - Was it "reasonable" to award damages for non-pecuniary losses?

# *Atlantic Mining*

## NSCA poking the SCC bear

- Standard of Review
  - SCC in *Capilano:* Statutory appeal doesn't mean correctness standard applies.
  - NSCA retort: [12] If the legislature created a statutory appeal process then interpretation of statute should be "correctness"
  - [13] Respectfully, the reasons of the majority in *Capliano* [SCC] for such an indulgent standard of review as reasonableness, are unconvincing.
  - [13] Just because a tribunal might be area experts on the facts is no reason to blindly apply reasonableness to their analysis of the law
  - [13] "That is especially so where presumed expertise may be more generous than the limited resources of some tribunals may justify."

# *Atlantic Mining*

## Are non-pecuniary losses now available?

## Not so fast.

15% award becomes 2%

- [17] No Canadian court or tribunal has interpreted disturbance 'losses' as non-pecuniary. But in this case the Board did so.
- [21] Unhindered by inconvenient authority or contextual analysis, the Board applied an 'ordinary meaning' interpretation to 'losses', which became 'virtually limitless', distinguished jurisprudence elsewhere because of claimed material wording differences in the legislation, dismissed respected academic authority as dated, and relied upon inapplicable Supreme Court precedent and an Ontario Law Reform Commission Report.
- [63] … the interests protected by expropriation legislation are proprietory, not personal. They relate to ownership and enjoyment of use of that ownership. Similarly, the compensation paid for that loss relates to ownership and enjoyment of property. The claimant comes to the Court as a property owner, not an accident victim.

# *Bowolin v. BCTFA*
## 2018 BCCA 411


- Facts & Background:
  - After negotiations broke down BCTFA expropriated portion of Bowolin's property for 4-laning
  - Bowolin had a Mines Act permit for gravel extraction
  - Advance payment based on appraisal report including comparables with aggregate potential, but no line item for gravel
  - Bowolin  sought judicial review contended failure to compensate for gravel means the advance payment is deficient and expropriation "nullity"
  - Supreme court agreed, set aside vesting notice, expropriation notice and advance payment.  Supreme court decision fundamentally altered requirements to expropriate

# *Bowolin*

- Key Facts for the Court of Appeal
  - Appraiser knew about gravel on the property. Knew about gravel operation, and knew about *Mines Act* permit.
  - When BCTFA decided on the advance payment it had:
    - Original appraisal at 120k
    - Bowolins' appraisal letter
    - Second Appraisal at 144k
    - The "Expropriation Approval Request" indicating that additional value for gravel is double compensation
- Second appraisal contained important language for both sides
  - "resource value inherently imbedded in the … value"
  - "cannot comment on" … "any intrinsic value of gravel"

# *We said*
# *He said*
# *They said*

## *Issue 1: The Adequate Alternate Remedy*

- BCTFA argued that dispute was about compensation and so, following *Strickland*, compensation action was "adequate alternate remedy" to Judicial Review.
- Supreme Court held:
  - There can be no immunity for the expropriating authority from judicial review on whether the Act has been followed.
  - Positive duty on authority to assess "real value of the land"
  - [10] …unlike in *Strickland*, here we are talking about a decision related to an advance payment which in and of itself is a decision.

# *We said*
# *He said*
# *They said*

## *Issue 1: The Adequate Alternate Remedy*

- The Court of Appeal Said
  - Judge below held:
    - *Strickland* didn't involve a decision-maker so it doesn't apply here
    - Deferring to legislative scheme for resolution of quantum would shield decision maker and create immunity.
  - Per BCCA, both of these conclusions are in error.
  - *Strickland* applies to "decisions of decision-makers"
  - [27] Judge simply erred in principle in confining his considerations to the proposition that not to engage in judicial review would shield the decision-maker. A judicial review is an enquiry into the decision challenged, not into the decision-maker.
  - [28] Had the judge [applied *Strickland]*, it would have been apparent that the dispute … is fully resolvable … under the comprehensive compensation scheme.

# *We said*
# *He said*
# *They said*

*Issue 1(a):*
*Es tu gravel?*

- BCTFA argued that valuation of gravel was imbedded in the value of the land, particularly since this wasn't a commercial mining operation, and the comparable included properties with similar "aggregate potential".
- Bowolin argued that compensation action not adequate to resolve this issue because failing to value the known gravel is equivalent to *Oceanside*
- Judge said:

  [8] It is not good enough for the government agency or, in this case, the officer to simply decide the value and make that determination themselves.

  [12] There is no report which says the gravel has no value. There is just a bold determination that despite it having value in the past, it has no value now.

  [15] I am satisfied that the decision of this officer … must include not only the lands, but the value of the gravel.

# *We said*
# *He said*
# *They said*

*Issue 1(a):*
*Es tu gravel?*

- Court of appeal said
  - Appraiser did not fail to incorporate the gravel issue
  - No dispute that BCTFA based payment on that appraisal.
  - [30] "The presence of gravel is reflected in the property comparisons that provided the data for the appraisal and, knowing this, it seems to me it was not unreasonable for the BCTFA to consider that a separate amount of compensation would amount to double recovery for the gravel."
  - Given *Strickland,* Judge erred in principles applicable to judicial review and should not have engaged in JR.

(The BCCA could have stopped here, but they elected to address the other issues)

# *We said*
# *He said*
# *They said*

*Issue 2:*
*You want the facts?!*

- BCTFA argued that the combined effect of the two appraisal reports provided evidence on the value of the gravel, since report 2 explicitly considered "aggregate potential" and resulted in a $20k increase.
- Judge said
  - [13] "Here, one branch of the Crown (sic) offers the parties $400,000 for their interest in land based on appraised value plus other values including gravel. Then, with this information in hand, the officer of the [BCTFA] made an advance payment for only the appraised value. No explanation is provided other than the representations from counsel that the gravel is of no value and is included in the appraised valued provided, which clearly it is not."

# *We said*
# *He said*
# *They said*

*Issue 2:*
*You can't handle the facts!*

- Court of appeal said
  - Reasons for judgement reflect a material and obvious misapprehension of the facts
  - [32] "The judge found that the BCTFA considered the gravel had no value and therefore made an advance payment that did not compensate for gravel. This is simply contrary to the reports I have already referred to, and the submissions of counsel on the judicial review hearing which are in the record before us."
  - [33] "The information available to the BCTFA recognized value in the gravel and reflected it in the market value attributed to the property, using the comparative approach. Whether the recognition was sufficient is a matter for a compensation hearing."

# *We said*
# *He said*
# *They said*

## *Issue 3: Camp Van Kam & Bowolin*

- BCTFA argued that *Van Kam & Camp Developments* previously settled the requirements for a valid expropriation.  Expropriation Notice and Approval.
- Bowolin argued that certain interests (gravel) require the authority to obtain additional reports in order to proceed with an expropriation
- Judge said:

  [18] I direct that BCTFA make an advance payment, if they choose to reactivate this matter, based on a determination of the reasonable value of the land and a reasonable value of the volume of mineable gravel on the portions of the property that is subject to the expropriation notice.

  [19] I further require that the officer be required to base their determination on an expert report, be it the petitioners' or their own, which must be served with any subsequent notice of advance payment.

# *We said*
# *He said*
# *They said*

## *Issue 3: Camp Van Kam & Bowolin*

- Court of Appeal Said
  - [36] "There is nothing in the *Act* imposing a requirement to obtain additional expert evidence once there is an appraisal from an independent source valuing the property taken. To import the requirement discussed by the judge is to usurp the role of the officer, and build into the interpretation of the *Act* a provision that is not there.
  - [37] "… the Judge moved well outside the proper role of the court on judicial review in addressing the desirability of further expert reports."

*Atco v. Pratch*

*Davis v. HMTQ*

*Di Blasi v. York*

*Elite Mortgage v. Derewenko*

*Mata v. Hydro Que*

# *Atco v. Pratch* 2019 ABQB 466

## Pattern of Dealing

- Pratch (& relative) owned 8 parcels bisected by Atco's new 144 kv transmission line.
- Parties agreed on market value and general disturbance.
- Atco appeals injurious affection at 5-7.5% based on impact to development opportunity as inconsistent with pattern of dealing
- *Livingston v. Siebens Oil & Gas Ltd.*
  - [W]here there are such a number of deals established so that it may be said that a pattern has been established by negotiations between the landowners and oil companies in a district, then the Board should only depart from such compensation with the most cogent reasons. I think it should be accepted that no matter how expert outsiders are that the oil companies and landowners have the better judgment as to what compensation should be paid in their own interests.

# *Davis v. Manitoba* 2019 MBCA 78

## Likes alike unalikes unalike likes unalike

- Davis and neighbour both had property acquired for road to inland port outside Winnipeg. Both used joint appraisal in negotiations with Manitoba
- Neighbor's hearing proceeded first. LVAC awarded $50,000 / acre with HBU as "commercial/industrial"
- Then Davis goes to hearing, but new Government appoints new members to LVAC Manitoba calls two additional planning experts
- LVAC determines HBU as "speculative holding" and awards $27,000 / acre.
- Query
  - Is the LVAC "bound" by previous finding?
- MBCA: While "consistency" is important, primary basis for valuation is evidence relevant to particular parcels.

# Di Blasi v. York

## 2019 CanLII 18919

## The importance of being earnest

- Several takings for road widening. Owner claimed $700k and relied on appraisal. Appraisal in turn relied on planning report (which opined that legal non-conforming use was HBU).
- However, planner not called to give evidence and planning report tossed. Appraiser failed to state that planning report was extraordinary assumption. Appraiser's comps then based on incorrect HBU.
- 82 In cross-examination Mr. Di Blasi's use of the Subject Lands was immediately put into question.
- 83 He was taken to Exhibit 22, Tab 47, where he had been charged with the use of the Subject Lands contrary to the permitted uses on a property zoned Natural Linkage - Oak Ridges Moraine. He had pled not guilty. He had been found guilty and was fined $3,000.00.

# *Elite Mortgage Corp v. Derewenko* 2019 BCCA 125

## The limits of judicial notice

- Court ordered sale of Derewnko's property in Mission.
- Facts:
  - August 21, 2018 – Owner's appraisal at $750,000
  - August 29, 2018 – Bank "drive by" appraisal $690 – 725,000
  - 2018 Tax Assessment (July 2017) $423,700
  - December 12, 2018 listed at $474,900
  - December 20, 2018 offer accepted at $443,000
  - Elite applies for approval of sale at $443,000. At the hearing 3 sealed bids, highest at $515,000.
  - By this time, new Bank "walk through" appraisal at $500,000, "3-5% drop over past eight months"
  - Derewenko challenged the offers alleging insufficient marketing efforts.

- Supreme Court Judgement
  - "… it is a more dated appraisal [750k], which we have to give some considerable weight to because I'm entitled, I think, to take judicial notice of the fact that this is a very fluid market that we're dealing with now. There are almost daily reports in the press now about the bubble bursting or being about to burst or major corrections in real estate prices being evident. That was reflected to my knowledge throughout the Lowe Mainland in reports of the average assessed values by the BC Assessment Authority, which came out in – as of January 1st this year, which showed patters in decline."

Court of Appeal

- Cannot take judicial notice in face of opposing facts.
  - 3-5% market decline vs "bubble bursting"
- Judicial notice only to fill "evidentiary lacuna"
- Facts that "cannot reasonably be disputed"
- "If there is any doubt whatever" evidence is required
- Lower mainland is a big market
- "Broad impressions of the real estate market cannot be taken as determinative of the market trend in a specific local market."
- "There is no reason that a trend in crowded urban Vancouver will be experienced in the more rural settings of the eastern Fraser Valley"

# *Mata v. Hydro Quebec*

## Expansion of pre-existing utility SRWs

## SCC hearing December 10, 2019

- Hydro Quebec had "servitudes" from 1970s over properties of various owners for transmission line
  - Servitude: a qualified beneficial interest severed or fragmented from the ownership of an inferior property (*servient estate*) and attached to a superior property (*dominant estate*). Ie: SRW
- Hydro Quebec then sought to install new, higher power "Chamouchouane-Bout-de-Ille" line over existing servitudes
- First level of court found: Hydro Quebec holds "real" servitudes; the servitudes allow the new line; they weren't extinguished by any "aggravation"; and they weren't lost due to failure to comply with statutory timelines.

# *Hydro Quebec*

## Any civil law experts in the audience?

- Court of Appeal allowed the appeal
  - Servitudes were obtained explicitly for the original project, not open ended.
  - Two kinds of servitude, "conventional" and "established by law". Those established by law are narrower.
- "The 1972 Order in Council, the notices of expropriation and the acts of servitude limit the expropriations to what is necessary for the construction, operation and maintenance of the [original line]."
- The existing rights aren't extinguished, but can't accommodate the new use.
- Hydro Quebec needs to obtain new rights for the new line.