COURT OF APPEAL FOR ONTARIO

CITATION: Windsor (City) v. Paciorka Leaseholds Limited, 2012 ONCA 431
DATE: 20120622
DOCKET: C54542

Doherty and LaForme JJ.A., and Turnbull J. (*ad hoc*)

BETWEEN

The Corporation of the City of Windsor

Appellant

and

Paciorka Leaseholds Limited, Bruce Paciorka, Gordon Paciorka, Elizabeth Frey, Hilda Fisher House, Carlos Rafael Macchiavello, Virginia Rosalie Macchiavello, Frieda Pope, Rachel Lydia Beattie, Sharon Lily Pope, Nancy Louise Hillman and Judy Diane Listheaghe

Respondents

Stephen F. Waque and Frank Sperduti, for the appellant

Paul Henry and Robert Lawson, for the respondents

Heard: April 4, 2012

On appeal from the decision of the Divisional Court of the Superior Court of Justice (Justice Thea P. Herman, Justice Alison Harvison Young and Justice Harriet E. Sachs (dissenting)), dated May 16, 2011, reported at 2011 ONSC 2876, dismissing an appeal from a decision of the Ontario Municipal Board dated December 14, 2009.

By the Court:

I

OVERVIEW

[1] When land in Ontario is expropriated, the *Expropriations Act*, R.S.O. 1990, c. E.26, requires the expropriating authority to pay to the owner the "market value of the land". In determining market value, no account can be taken of any increase or decrease in the value of the land attributable to the government actions that culminated in the expropriation: see *Expropriations Act*, s. 14(4)(b); *Pointe Gourde Quarrying and Transport Company, Ltd. v. Sub-Intendent of Crown Lands*, [1947] A.C. 565 (P.C.), at pp. 572-573.[1] These government actions are collectively referred to as the "expropriation scheme". In addition to compensation for the market value of expropriated property, if the expropriating authority takes only part of the owner's land, the owner is also entitled to injurious affection damages for any reduction in the market value of his or her remaining land caused by the acquisition of part of the owner's land.

[2] In the present case, the respondents' lands were subject to various governmental actions between 1983 and 2002, all designed to preserve the natural habitat in the area and protect endangered and threatened species. The

[1] Section 14(4)(b) of the Act is essentially a codification of the common law rule discussed in *Pointe Gourde* and referred to as the *Point Gourde* rule.

lands were eventually expropriated by the City of Windsor (the “City”) beginning in 2004. Not all of the respondents’ lands were expropriated.

[3] Pursuant to the *Expropriations Act*, the respondents brought claims before the Ontario Municipal Board (the “OMB” or “Board”) for the market value of the expropriated lands and for injurious affection damages in respect of the parts of the respondents’ properties that were not expropriated. It fell to the OMB to determine the market value of the expropriated land and to assess the injurious affection damages in respect of the remaining land owned by the respondents.

[4] The scope of the expropriation scheme ultimately leading to the expropriation of the respondents’ properties was the dominant issue before the OMB. On the approach taken by the Board, it was the key factor in the determination of the market value of the expropriated properties and the loss in value of the remaining properties owned by the respondents.

[5] The Board was faced with two starkly different positions as to the scope of the expropriation scheme and, hence, the proper calculation of the market value of the expropriated land. The respondents, whose lands had been expropriated, argued that the scheme began in 1983 when certain of the lands were identified as environmentally sensitive, and progressed to include the various reports, designations and plans developed between 1983 and the actual taking of the lands beginning in 2004.

[6] The City submitted that the expropriation scheme did not begin until 2002, when the City resolved to create a nature park. The City argued that contrary to the respondents' position, the various studies and designations beginning in 1983 were part of an independent process by which various levels of government were seeking to identify and protect endangered species. In particular, the City argued that the provincial government's Provincial Policy Statement in 1996 ("PPS"), issued as part of a province-wide environmental policy, impacted negatively on the value of the land for development purposes, and could not be regarded as part of the expropriation scheme. These actions, the City argued, should be taken into account in assessing market value and significantly reduced the market value.

[7] The OMB held that "the identification and designation process [that commenced in 1983] led to the expropriation. Without that process, the City would not have taken the lands." The Board elaborated as follows:

> ...at each stage of the identification and reporting process, starting in 1983, the common objective was to preserve the natural area. This imperative was repeatedly expressed in the reports commissioned by these three public partners [Essex Regional Conservation Authority the Ministry of Natural Resources, and the City] and ultimately the expropriation implemented that objective.

[8] The Board ultimately ordered the City to pay the respondents $3,771,384 for the market value of the expropriated properties and $767,000 for the loss in value of the remaining properties.

[9] The Board clearly rejected the City's position and agreed with the respondents that the expropriation scheme embraced certain government activities beginning in 1983 and culminating in the actual taking of the lands beginning in 2004. The Board was entitled to take that view of the evidence.

[10] However, the Board's finding as to the temporal scope of the scheme does not fully determine the nature and extent of the scheme for the purposes of s. 14(4)(b) of the *Expropriations Act*. Not every governmental activity after 1983 was necessarily part of the scheme. In particular, it is not clear how the Board, in determining the scope of the expropriation scheme and the market value of the expropriated lands, dealt with the potential impact of the PPS. Nor is it clear from the Board's reasons why it determined that any diminution in the value of the respondents' remaining properties attributable to the expropriation scheme as a whole, rather than any diminution attributable to the City's acquisition of the respondents' properties, was recoverable as injurious affection damages under the *Expropriations Act*.

[11] The City appealed the Board's decision to the Divisional Court. A majority in that court, applying a reasonableness standard of review, upheld the Board's

decision in its entirety. The majority determined that the Board's findings of fact as to the scope of the expropriation scheme were supported by the evidence adduced before the Board. The majority reached the same conclusion with respect to the Board's findings of fact in support of its calculation of the respondents' injurious affection damages. In keeping with the reasonableness standard of review, the majority deferred to what it characterized as factual findings within the Board's specialized expertise.

[12] In dissent, Sachs J., applying the same reasonableness standard, concluded that the Board's order could not stand. In her view, it was unreasonable for the Board to fail to take into account the possible negative effects on the market value of the land flowing from the PPS. To her, those effects flowed from the natural features of the land which made it subject to the limitations imposed by the PPS and did not flow from the expropriation scheme. Sachs J. further held that the Board had erred in its calculation of injurious affection damages by failing to distinguish between diminution in value attributable to the actual taking of property and diminution in value attributable to other government actions in respect of the property.

[13] This court granted leave to appeal from the order of the Divisional Court.

[14] We are satisfied that the appeal must be allowed, substantially for the dissenting reasons of Sachs J. As we will explain below, the Board either

ignored the PPS entirely in determining the market value of the expropriated lands or concluded that the PPS was immaterial to valuation, because it was part of the expropriation scheme or because it had no effect on the value of the lands. All three possible interpretations of the Board's decision demonstrate that the Board did not give reasonable consideration to the impact of the PPS on the market value of the expropriated lands. That failure renders the Board's ultimate determination of market value unreasonable. We also agree with Sachs J. that the Board failed in its assessment of injurious affection damages to properly limit those damages to any diminution in value of the lands caused by the City's acquisition of the respondents' other lands.

II

SUMMARY OF FACTS

[15] Most of the relevant facts are set out by the majority of the Divisional Court, at paras. 6-22 of its reasons:

> The respondents were owners of land in the Malden Planning Area in the southwest section of Windsor.
>
> The respondents are the children and grandchildren of Phillip and Barbara Frey who had owned lands in the Malden Area since the 1940s. In addition to the land they inherited, several respondents purchased additional lands in the area up until the year 2000. The Paciorka family and their wholly-owned company were the largest landowners in the Malden Area other than the City.

In 1978, the City adopted Official Plan Amendment 33 (“OPA 33”). OPA 33 established policies for residential development in the Malden Planning Area. It provided for full urban development: low, medium and high density residences with complementary neighbourhood community services and facilities, schools and roads.

The first phase of the development started in the late 1970s. A second phase was completed in the 1990s.

In 1983, the Essex Region Conservation Authority conducted a study in which it identified 115 acres in the north central part of the Malden Planning Area as an "Environmentally Sensitive Area". The area contained a tall grass prairie habitat with significant plant and animal species, notably the Butler’s Garter and Eastern Massassauga Rattlesnakes. The study recommended that the area be preserved.

In 1984, the Ministry of Natural Resources designated 248 acres in the north central part of Malden as an Area of Natural and Scientific Importance (“ANSI”).

In 1992, the Conservation Authority expanded the "Environmentally Sensitive Area" to 420 acres. The City identified an equivalent area as a Candidate Natural Heritage Site. These designations meant that the area was a candidate for classification as "Environmental Policy Areas". Development was not permitted prior to completion of an Environmental Evaluation Report.

In 1994, the Ministry expanded the ANSI boundary.

In 1996, the City, the Ministry and the Conservation Authority jointly commissioned an environmental evaluation report. The report was entitled the "Spring Garden Complex".

The Spring Garden Complex Report made various recommendations to ensure the long-term environmental sustainability of the area. It recommended that the area be re-designated with an "Environmental Policy Area 1 designation" in the Official

Plan. Such a designation would limit permitted uses to conservation, wildlife and habitat management and public open space.

The firm of Dillon Consulting Limited was retained to examine land use and environmental issues and to recommend amendments to existing development policy for the Malden Area. The Dillon Report was completed and available to the public in 1997. The report included a procurement strategy for 420 of the 700 acres within the Malden Area.

City Council adopted the Dillon Report in 2001. The Report became the basis for Official Plan Amendment No. 5 (“OPA 5”). OPA 5 changed the designation of 420 acres in the central portion of the Malden Area, now known as the Spring Garden Planning Area, from "Residential" to "Natural Heritage".

OPA 5 provided for a residential community encircling the ANSI, referred to as the Spring Garden Complex. The ANSI would form a visible and centrally located community park, prairie and woodlands area, in which significant biological communities would be protected and perpetuated.

The respondents and others appealed OPA 5 to the OMB. In a decision from a pre-hearing conference dated September 5, 2002, the OMB noted that the respondents were not opposed to the ANSI designation "provided they are fairly compensated either with other lands of equal value or current fair market value in cash".

By decision dated October 29, 2002, the Board approved OPA 5 with modifications. In particular, it provided that the City acquire certain lands.

> The City expropriated 267 lots owned by the respondents beginning in 2004.[2]
>
> After the expropriation, the Paciorkas continued to own 181 lots, 172 of which were located within the Spring Garden Planning Area and 9 of which were adjacent to the Area; Mrs. Frey owned 7 lots within the Spring Garden Planning Area; and the other respondents owned 4 lots east of the Spring Garden Complex.

[16] In addition to the various governmental activities described above, in 1996 the government of Ontario enacted a PPS pursuant to s. 3(1) of the *Planning Act,* R.S.O. 1990, c. P. 13, which applied to the subject lands as well as similarly environmentally sensitive lands across the province.[3] Subsection 2.3.1(b) of the PPS imposed restrictions on development of environmentally sensitive lands unless no negative impacts on the natural features could be shown. The preamble of the PPS also required that any development of land requiring *Planning Act* approval shall "have regard" to any PPS. Section 3(5) of the *Planning Act* required that land developments must "have regard" to any PPS, until 1994 when it was amended to read that land developments must "be consistent" with any PPS. This legislative scheme made it clear that any PPS was an important consideration in land development in Ontario.

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[2] The expropriations occurred in three phases. Different groups of lots were expropriated on April 7, 2004, December 28, 2005, and January 29, 2008, respectively.
[3] The PPS was amended in 1997, but no essential changes were made for the purposes of this appeal.

III

ISSUES

[17] There are four issues:

A. What is the appropriate standard of review?

B. Did the majority of the Divisional Court err in holding that the Board's treatment of the potential effect of the PPS on the market value of the expropriated lands was not unreasonable?

C. Did the majority of the Divisional Court err in law in holding that the Board did not err in taking into account the entire expropriation scheme in assessing damages for injurious affection?

D. Did the Divisional Court err in holding that the Board acted within its discretion in awarding interest on its award from a date prior to the date of the expropriations?

IV

ANALYSIS

A. STANDARD OF REVIEW

[18] Both the majority in the Divisional Court and Sachs J. in dissent assessed the Board's determination of which of the various government actions formed part of the expropriation scheme by applying a reasonableness standard of review. We agree that reasonableness is the appropriate standard. The determination of which of the various government actions form part of the expropriation scheme is a factual one that engages squarely the OMB's specialized expertise in applying the relevant legal principles under the

Expropriations Act. The high degree of deference built into the reasonableness standard is fully warranted: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 53-54.

[19] The question of whether the Board properly assessed injurious affection damages potentially raises more than one issue. The appropriate standard of review may vary from issue to issue. The City's submissions focus on the contention that the Board failed to apply the measure of damages contemplated by the definition of injurious affection found in the *Expropriations Act*. This argument raises a question of law, and more specifically a question of statutory interpretation. Legal questions are generally reviewed on a correctness standard. However, a more deferential standard of reasonableness may be applied where an administrative tribunal is interpreting a statute closely connected to its core function and with which the tribunal has a particular familiarity or expertise: see *Dunsmuir*, at paras. 51-54; *Smith v. Alliance Pipeline Ltd.*, [2011] 1 S.C.R. 160, at paras. 22-40.

[20] We need not decide which standard of review is appropriate. In our view, the Board's approach to injurious affection damages is contrary to the plain language of the *Expropriations Act*, as interpreted by this court. That approach is both wrong in law and unreasonable. It cannot withstand appellate review even using the more deferential standard of reasonableness.

[21] The third issue raised on the appeal, the date from which interest should run on the Board's award, falls squarely within the Board's discretion and is reviewable on a reasonableness standard.

B. MARKET VALUE

[22] A person whose land is expropriated is entitled to receive fair market value for his or her land. In determining market value, s. 14 of the *Expropriations Act* requires the OMB to eliminate any increase or decrease in the value of the property arising from the expropriation or its imminence. In other words, it is the OMB's task to determine the scope of the expropriation scheme, and the highest and best use for the expropriated lands absent the effects of that scheme.

[23] The OMB held that the expropriation scheme included the identification and designation process that commenced in 1983:

> The evidence is that [the City of Windsor, the Ministry of Natural Resources, and the Essex Regional Conservation Authority] worked in concert over an extended period of time, to establish, preserve and protect the Spring Garden Complex...
>
> ...
>
> ...at each stage of the identification and reporting process, starting in 1983, the common objective was to preserve the natural area. This imperative was repeatedly expressed in the reports commissioned by these three public partners and ultimately the expropriation implemented that objective.
>
> ...

> The Board finds that the scheme in all its aspects, including the planning documents, which the Board finds to be part of the scheme, is to be disregarded from its inception in 1983, in determining compensation under s. 14 of the Act.

[24] The majority in the Divisional Court deferred to the Board's decision, indicating that the Board had fully appreciated the evidence about the PPS. The majority declined to interfere with the Board's decision. It did not, however, articulate how the Board had actually dealt with the PPS in its assessment of market value.

[25] The majority's silence reflects the Board's reasons. Those reasons do not indicate how the Board treated the PPS. Sachs J. focussed on the Board's failure to make reference to the PPS at paras. 127 and 129 of her dissent:

> In its decision, the Board mentions the PPS in its summary of the City's position before it. However, in its analysis, no mention is made of the PPS and no consideration is given to how its existence would have affected the probability of the lands being fully developed as a residential development.
>
> ...
>
> The Board accepted the claimant's position as to what constituted the "scheme" and found that the City, the Minister of Natural Resources ("MNR") and the Essex Region Conservation Authority ("ERCA") had "worked in concert over an extended period of time, to establish, preserve and protect the Spring Garden Complex": Board's Reasons at 23. Further, the Board found that these "scheme" activities started in 1983 and included: the designation by the ERCA in 1983 of a large part of the lands as an Environmentally Significant Area; the

> designation by the MNR in 1984 of approximately the same area as an Area of Natural and Scientific Interest; the designation by the City in 1994 of part of the area as a heritage site; and, the 1996 preparation of The Spring Garden Complex Evaluation Report. The recital does not mention the PPS. [Emphasis added.]

[26] As outlined above, there are three possible interpretations of the Board's treatment of the PPS. It may have regarded the PPS as part of the expropriation scheme; it may have regarded the PPS as independent of the expropriation scheme, but as having no effect on the market value of the expropriated lands; or it may have failed entirely to consider the PPS in its analysis. The first interpretation – that the PPS was part of the expropriation scheme – is perhaps the least likely. In this court, counsel for the respondents conceded that the PPS, part of a province-wide legislative scheme, was not part of the expropriation scheme.

[27] Nevertheless, if the Board did consider the PPS to be part of the expropriation scheme, that conclusion finds no support in the evidence. In this vein, we adopt the reasons of Sachs J., at paras. 130-132 of her dissent:

> In *West Hill Redevelopment Co. v. Ontario* (1998), 64 L.C.R. 81 (O.M.B.), aff'd (1999), 67 L.C.R. 252 (Ont. Div. Ct.), the Board discusses the question of whether a "land use" instrument passed by one public authority should be taken into account in fixing market value in an expropriation affected by a different public authority. In doing so, the Board, at 147, adopts the following principles set out in *Jewish Community Centre of Edmonton Trust v. The Queen* (1983), 27 L.C.R. 333

(Alta. L.C.B.) rev'd on other grounds (1984), 30 L.C.R. 97 (Alta. C.A.) at 360-61:

> In the board's opinion the underlying principle established in each of those cases, which is relevant in the present case, is that there must be a causal connection between the imposition of land use restriction and the expropriation which subsequently occurs. That is to say if the "land use by-law, land use classification or analogous enactment" is made for the purpose and "with a view to the development under which the land is expropriated" then pursuant to s. 45(e) it must be ignored in the valuation process. If, on the other hand, the evidence establishes that the "land use by-law, land use classification or analogous enactment" was imposed independently and unconnected with "the development under which the land is expropriated" then such land use or classification must be considered in the valuation process.

The PPS was issued under the authority of the *Planning Act* to provide "policy direction on matters of provincial interest related to land use planning and development": PPS at Preamble. The PPS applies across the province and was not directed at the Expropriated Lands. It was passed independently of, and without any connection to, the specific development for which the land was expropriated. The fact that the Expropriated Lands are covered by the PPS is due to a recognition by the Province that province wide protection is necessary for its natural heritage resources. As put in the Preamble:

> The Province's resources – its agricultural land base, mineral resources, **natural heritage resources**, water supply and cultural heritage resources – provide economic, environmental and social benefits. The wise use and protection of

> these resources over the long term is a key provincial interest. [Emphasis added by Sachs J.]
>
> Given the fact that the PPS was not passed with a view to the development for which the land was expropriated, it cannot be considered to be part of the "scheme" that should be disregarded for the purpose of the market value assessment. Thus, even without the scheme, the Expropriated Lands, which do contain natural heritage features, would have been subject to the PPS. The Board was required to deal with what effect this would have had on the development potential of the lands in question. However, it did not do so. It ignored both the natural features of the Expropriated Lands and that land with those features was protected under the PPS, regardless of the "scheme." In taking this approach, the Board arrived at a conclusion as to market value that cannot be justified on the basis of the facts and the law. [Emphasis added.]

[28] The second possible interpretation of the Board's reasons – that the PPS was not part of the expropriation scheme, but had no effect on the market value of the expropriated lands – is also unsupportable on the record. The relevant evidence is summarized by Sachs J., at paras. 127-28 of her dissent:

> ...in coming to its conclusion as to the market value of the lands, the Board accepted the opinion of the claimants' appraiser, David Atlin. Mr. Atlin made it clear that his opinion proceeded on the assumption that the natural area and the critical habitat for endangered species did not exist.
>
> One of the experts relied on in Mr. Atlin's opinion as to market value was Robert Feldgaier of Altus Group. When Mr. Feldgaier was asked about the prospect of development in a natural heritage area, as well as an identified flood plain, he replied that he had not examined any of these restraints on development. Mr.

> Atlin also relied on two other experts, Mr. Butler and Mr. Tanner. Both admitted on cross-examination that the PPS would create significant problems for the development of the lands. [Emphasis added.]

[29] This evidence cannot reasonably support the proposition that the PPS had no effect on the market value of the expropriated lands. The witnesses for the respondents did not consider the potential impact of the PPS on market value. Even those witnesses, however, indicated that the PPS would indeed have a negative impact on the lands' potential for commercial development. The lands' value lay in that potential. There is nothing in the Board's reasons that provides any insight into how, on this evidence, the Board could conclude that the PPS, while outside the scope of the expropriation scheme, had no effect on market value.

[30] The third possibility – that the Board failed to consider the PPS at all in its analysis – would also render the Board's decision unreasonable. The Board was obligated to consider all of the governmental activities in delineating the scope of the expropriation scheme. As Sachs J. said, at para. 137 of her dissent, the PPS was a reality that could not be ignored in assessing market value:

> ...with or without the expropriation, the claimants would have had to deal with the fact that their land contained natural features that were the subject of a PPS that limited development on land with those features. Any properly advised purchaser would know of these limitations and would have taken them into account in assessing the price that they would have paid for the land. These were the market realities that faced the

> claimants absent the expropriation. However, by virtue of the award in question, these realities were disregarded and the claimants were able to receive compensation for their land as if the realities never existed. This is to be contrasted with other people in the province with land that contains natural heritage features who have had to develop their land taking into account the requirements of the PPS. This is an unjustifiable and therefore, unreasonable, result.

[31] On any of the three possible interpretations of the Board's reasons, its treatment of the PPS is unreasonable. The majority in the Divisional Court erred in law in deferring to the Board's decision in the face of the Board's unreasonable treatment of the potential impact of the PPS on the market value of the respondents' expropriated lands.

C. INJURIOUS AFFECTION DAMAGES

[32] As outlined above, the respondents owned other properties that they claimed were part of the same land assembly as the expropriated properties. We do not understand the City to contest this point. The respondents maintained that the value of their remaining properties was reduced by the expropriation of the related properties. They claimed damages for injurious affection under s. 13(2)(c) of the Act. The relevant part of the definition of injurious affection in s. 1(1) of the Act reads:

> "injurious affection" means,
>
> > (a) where a statutory authority acquires part of the land of an owner

> (i) the reduction in market value thereby caused to the remaining land of the owner by the acquisition ...

[33] The City submits that in calculating injurious affection damages to the respondents' remaining lands, the Board improperly measured that loss by reference to the decrease in value caused by the entirety of the expropriation scheme and not, as required by the section, by reference only to loss caused by the actual acquisition of the respondents' properties by the City.

[34] The majority of the Divisional Court, at paras. 88, and Sachs J., at para. 147, agreed that under the applicable definition, damages for injurious affection must be caused by the actual acquisition of the other properties owned by the respondents. Unlike assessment under s. 14(4)(b) of the *Act* of the market value of property actually expropriated, the implications on market value of the wider expropriation scheme are not relevant in assessing injurious affection damages.

[35] The majority found, at para. 89, that while the Board may have blurred the distinction between market value assessment and diminution in value for the purposes of assessing injurious affection damages, it ultimately found a causal connection between the diminution in value and the act of expropriation. The majority took this as a finding of fact supported by the evidence and declined to interfere with the Board's assessment.

[36] Sachs J., at paras. 148-149 of her dissent, found that the Board's failure to distinguish between its approach to market value assessment under s. 14(4)(b)

and its approach to the assessment of injurious affection damages resulted in a fundamentally flawed assessment of those damages.

[37] We come to the same conclusion as did Sachs J. and would adopt her analysis at para. 149 of her dissent:

> The acquisition occurred with the approval of OPA 5 [2002]. Before the acquisition, the remaining lands were surrounding lands that were subject to the PPS and subject to several designations: ANSI, environmentally sensitive area and cultural natural heritage site candidate. The questions that were not addressed by the Board were what effect these facts would have had on the market value of the remaining lands in the "before taking" scenario and whether that was any different than the effect on the market value in the "after taking" scenario. Even on the "before taking" scenario, there might well have been a limited possibility to develop the lands that were taken. The only viable development option for the remaining lands might have been to build a residential community around the lands that were ultimately taken. This is arguably the same position that the remaining lands are now in when it comes to development.

[38] A review of the entirety of the Board's reasons demonstrates that it treated the entire expropriation scheme as crucial to both market value under s. 14(4)(b) and to the calculation of loss in value of the remaining lands for the purposes of the injurious affection claim under s. 13(2)(c). At the outset of its reasons, the Board characterized the issue raised by the injurious affection claim in these terms:

> Whether there is loss or damage to the claimants' remaining lands in the Spring Garden planning area, as a result of the "scheme". [Emphasis added.]

[39] The Board's reference to the "scheme", the same term used in describing the issues raised in respect of the market value of the actually expropriated property, demonstrates that the Board did not appreciate that injurious affection damages were limited to the diminution in value caused by the acquisition of the property and did not include any decrease in value caused by other aspects of the broader expropriation scheme of which the actual acquisition of the respondents' property was but a part.

[40] The Board's failure to draw any distinction between the impact of the broader expropriation scheme and the expropriation itself is also evident in its treatment of the evidence. The Board relied on the evidence of Mr. Atlin in quantifying the damages awardable for injurious affection. His assessment was based on what he saw as the loss in market value to the remaining properties resulting from the expropriation scheme as a whole which, on his approach, began in 1983. Mr. Atlin did not draw a distinction between the expropriation scheme as a whole and the acquisition of the respondents' properties beginning in 2004 when assessing injurious affection damages.

[41] We observe that the Board's first error, the failure to properly consider the effect of the PPS on the market value of the expropriated lands, also tainted its assessment of the injurious affection damages. As the PPS was not part of the

expropriation scheme, much less part of the actual acquisition of the respondents' lands, any negative impact caused to the value of the respondents' remaining lands by the existence of the PPS could not be recovered as injurious affection damages. The existence of the PPS is one, but not necessarily the only factor, independent of the actual acquisition of the property, that could have adversely affected the value of the respondents' remaining lands.

[42] The Board erred in law in interpreting the *Expropriations Act* as awarding injurious affection damages for any loss in value of the remaining properties attributable to the expropriation scheme. The Board's interpretation of the Act is, in our view, an unreasonable one. In assessing injurious affection damages, the Board should have focussed exclusively on damages caused to the respondents' remaining properties by the City's acquisition of the related lands. The majority in the Divisional Court erred in law in deferring to the Board's unreasonable assessment.

D. THE CALCULATION OF INTEREST

[43] It is common ground that the Board had a discretion in deciding the date from which interest on its award should run. Our determination of the other issues, however, dictates that a new hearing must be held. Consequently, we need not address this ground of appeal.

V

CONCLUSION

[44] We would allow the appeal, set aside the order of the Divisional Court and the order of the OMB and direct a new hearing before a differently constituted panel of the Board. Counsel may, if necessary, make written submissions as to costs of no more than five pages in length. The appellant's costs submissions shall be served and filed within 30 days of the release of this judgment, and the respondents' submissions shall be served and filed within 15 days thereafter.

RELEASED: "DD" "JUN 22 2012"

"Doherty J.A."
"H.S. LaForme J.A."
"Turnbull J. (*ad hoc*) "