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File No. T964170

October 5, 2007

**VIA COURIER AND E-MAIL**

Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
27<sup>th</sup> Floor  
2300 Yonge Street  
Toronto, Ontario  
M4P 1E4

Dear Ms. Walli:

**Re: EB-2007-0692 – Enbridge Gas Distribution Expropriation Application**

Please find enclosed The City of Toronto Economic Development Corporation's ("TEDCO") written argument in electronic text-searchable Acrobat.

Kindly note that while TEDCO does not consent to the easements sought by Enbridge, it does not oppose the easements sought as per paragraph 21 of the Submission.

Ten hard copies and one electronic copy are being forwarded to the Board Secretary.

Yours truly,

**GOWLING LAFLEUR HENDERSON LLP**



Carlton D. Mathias  
Enclosure  
CDM\sb

cc: - EB-2007-0692 – Interested parties

**ONTARIO ENERGY BOARD**

**IN THE MATTER OF** the *Ontario Energy Board Act*  
1998, S.O. 1998, c.15, (Schedule B);

**AND IN THE MATTER OF** section 99(1) of the Act;

**AND IN THE MATTER OF** an Application by  
Enbridge Gas Distribution Inc. for authority to  
expropriate land for the purposes of natural gas pipeline  
to supply gas to Portland Energy Centre generating  
station in the City of Toronto.

**WRITTEN ARGUMENT OF THE CITY OF TORONTO  
ECONOMIC DEVELOPMENT CORPORATION (“TEDCO”)**

**Introduction**

1. Enbridge Gas Distribution Inc. (the “Applicant” or “Enbridge”) filed an application dated July 20, 2007, with the Ontario Energy Board (the “Board”) under section 99 of the *Ontario Energy Board Act 1998*, S.O. 1998, c. 15 (Schedule B) (the “Act”) for approval to expropriate lands for the construction of a natural gas pipeline to supply gas to the Portlands Energy Centre generating station (“PEC”) in the City of Toronto (the “Expropriation Application”).
2. Previously, on June 1, 2007 the Board issued an order (EB-2006-0305), pursuant to subsection 96(1) of the Act, granting Enbridge leave to construct approximately 6.5 kilometres of 36 inch diameter pipeline (the “North Section”) and approximately 2.9 kilometres of 20 inch diameter pipeline that would interconnect the Don Valley Line at

Enbridge's Station B regulator station and would terminate at the PEC (the "South Section") in the City of Toronto.

3. In the Expropriation Application, Enbridge seeks the approval of the Board to expropriate land needed for three permanent easements and one temporary working easement in the South Section of the pipeline on four parcels of property owned by TEDCO.
4. The Board's Notice of Application regarding the Expropriation Application was issued on August 16, 2007 (the "Notice").
5. On August 17, 2007 the Board issued Procedural Order #1, permitting intervenors to file evidence on matters relevant to the proceeding by August 31, 2007; convening a Technical Conference in Toronto to provide a forum for all parties to ask questions on Enbridge's evidence and on intervenor evidence on September 7, 2007; and scheduling an oral hearing to take place at the Board's offices in Toronto on September 14, 2007.
6. Upon the consent request of Enbridge and TEDCO, on September 7, 2007, the Board issued Procedural Order #2 adjourning the Technical Conference.
7. Upon the consent request of Enbridge and TEDCO, on September 14, 2007, the Board granted a request for an adjournment of the oral hearing, and an Order setting dates for a written hearing, should the need arise.
8. From the period after the Board's decision of June 1, 2007 referenced in paragraph 2 above, until the present time, TEDCO and Enbridge have been engaged in intensive negotiations with respect to the within Expropriation Application and more particularly, with respect to matters of compensation should an order for expropriation be issued by the Board.

**Expropriation Pursuant to the Act**

9. In *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.* (1997), 60 L.C.R. 81 (hereinafter “*Dell*”) at 88, the Supreme Court of Canada wrote that, “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.”
10. Section 99 of the Act sets out who may apply to the Board for authority to expropriate land and further provides that after a hearing, if the Board is of the opinion that the expropriation of the land is in the public interest, it may make an order authorizing the applicant to expropriate the land.
11. It is submitted that the key determinant in granting an expropriation application is the Board’s consideration of whether to do so is in the public interest.

**The Public Interest**

12. The Act requires consideration of the “public interest” in numerous decisions to be made by the Board though what constitutes the public interest in all of these is not the same. For example, in one instance, the Act prescribes what is to constitute the public interest where in section 96(2) the phrase “in the public interest” refers specifically to the interest of consumers with respect to prices and the reliability and quality of electricity service; in other instances the public interest is not so defined.
13. With respect to a determination of the public interest pursuant to section 99(5) of the Act, what constitutes the public interest is not prescribed by the Act.
14. In the decision of the Board in *Hydro One Networks Inc.*, Decision and Order EB-2006-0352, July 19, 2007 (hereinafter “*Hydro One Networks*”), the Board wrote:

As noted previously, section 99(5) of the Act provides that if after the hearing, the Board is of the opinion that the expropriation of the land is in the public interest, it may make an order authorizing the applicant to expropriate the land.

As was stated in its prior decisions, in forming this opinion the Board cannot rely on predetermined criteria and must consider the specific facts and circumstances of the case before it.

The Board must take into account the objects and purposes of its Act, the broad public interest, the interest of each of the parties to the application (the land owners, the Applicant and Toyota), and the obligation to serve imposed upon the Applicant by the terms of its license and section 26 of the *Electricity Act, 1998*. The Board must consider and weigh each of the competing interests in forming its opinion.

15. In *Hydro One Networks*, the Board also quoted with approval its having noted in one of its previous decisions its consideration of the phrase “the public interest” and that,

“Clearly there are no firm criteria for determining the public interest which would hold good in every situation...

The public interest is dynamic, varying from one situation to another, if only because the values described as the conflicting interests alter. It follows that the criteria by which the public interest is served may also change according to the circumstances.”

16. In the *Hydro One Networks*, the Board also cited with approval *Union Gas Ltd. v. Township of Dawn*<sup>1</sup> case wherein the Divisional Court dealt with an appeal of a Board decision made in the public interest and which in its reasons the Court stated:

“The words ‘in the public interest’ ... would seem to leave no room for doubt that it is the broad public interest that must be served.”

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<sup>1</sup> [1997] O.J. No. 2223 (Div. Ct.), para. 29

**The Circumstances of this Case**

17. The interpretation of expropriation statutes as set out in *Dell* and as quoted in paragraph 9 above applies to this case. Also, as stated by the Board in *Hydro One Networks*, in considering the grant of an expropriation order, “the best footprint is the smallest footprint.”
18. Enbridge has sought permanent and temporary easements as set out in the Expropriation Application. Though the Expropriation Application does not set out particulars with respect to Enbridge’s needs for the duration of the permanent easement, assistance in this regard can be obtained from the Transcript of the attendance of the parties and Board counsel before the presiding member, Paul Sommerville, on September 14, 2007 (the “Transcript”).
19. In the Transcript at pages 2 and 3, Enbridge counsel submitted to the Board that Enbridge has a gas delivery agreement with PEC that provides for an original 20-year term, with an option for continuous service to go to 40 years. The gas delivery agreement has a commencement date of February 1, 2008.
20. TEDCO does not consent to, but does not oppose, Enbridge’s claim for expropriation of TEDCO’s lands as described in the Expropriation Application, except to submit that any order the Board may issue granting Enbridge the permanent easements ought to provide that the duration of the permanent easements be contemporaneous with Enbridge’s gas delivery agreement obligations to PEC. The smallest footprint ought to reflect considerations of both space and time.
21. With respect to the terms of the easement sought by Enbridge over TEDCO lands, should the Board grant the expropriation order requested, TEDCO is content that the terms of the easement be in the form attached hereto as Appendix “A”, which terms do not take Enbridge by surprise.

All of which is respectfully submitted this 5th day of October, 2007.

**THE CITY OF TORONTO ECONOMIC  
DEVELOPMENT CORPORATION**

By its counsel



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**APPENDIX "A"****SCHEDULE TO EASEMENT****INTEREST/ESTATE TRANSFERRED**

1. (a) The Transferor hereby transfers, sells, grants and conveys to the Transferee, its successors and assigns, a free and unencumbered easement in, over, upon, under and/or through the lands described herein (the "Easement Lands"), to survey, lay, construct, install, operate, use, inspect, remove, renew, replace, alter, enlarge, reconstruct, repair, expand and maintain pipelines and all works, appurtenances, attachments, apparatus, appliances, markers, fixtures and equipment (collectively referred to as "Works") which the Transferee may deem necessary or convenient thereto. This Transfer of Easement shall include the right of the Transferee, its successors, assigns, servants and agents to use the surface of the Easement Lands for ingress and egress on foot and/or with vehicles, supplies, machinery and equipment at any time and from time to time.  
  
(b) The term of this Easement shall be limited to a term of forty-one (41) years commencing on the date of the registration of this Easement.
2. The Transferor grants to the Transferee the right and licence to occupy that part of PIN 1385-0156 (LT) designated as Part 7, Plan 66R-23128 during the term of one (1) year from the date of the registration of this Easement for the purpose of working area during the installation of the pipeline and Works and staging of construction.
3. The Transferee shall pay to the Transferor the sum of ● dollars (\$●) as soon as reasonably possible after the registration of this Easement.
4. The Transferee shall have the right at any time and from time to time to remove any boulder or rock and to sever, fell, remove or control the growth of any roots, trees, stumps, brush or other vegetation on or under the Easement Lands.
5. The rights of the Transferee herein shall be of the same force and effect as a covenant running with the Easement Lands and shall be appurtenant to the lands and premises described in this Schedule as the Transferee's Lands.
6. The Transferee shall have the right to assign or transfer its rights hereunder in whole or in part.



7. This Transfer shall extend to, be binding upon and enure to the benefit of the estate trustees, successors and assigns of the parties hereto. If the Transferor are not the sole owners of the said lands, this Transfer shall bind the Transferors to the full extent of their interest therein and shall also extend to any after-acquired interest but all monies payable or paid to the Transferor hereunder shall be paid to the Transferors only in the proportion that their interest in the said lands bears to the entire interest therein. The Transferor hereby agrees that all provisions herein are reasonable and valid and if any provision herein is determined to be unenforceable, in whole or in part, it shall be severable from all other provisions and shall not affect or impair the validity of all other provisions.
8. The Transferor shall have the right to use and enjoy the surface of the Easement Lands except that such use and enjoyment shall not interfere with the rights of the Transferee hereunder. Without limiting the generality of the foregoing, the Transferor shall not, without the prior written consent of the Transferee, place or erect on the Easement Lands any building, structure or fence and shall not excavate, alter the grading, drill, install thereon any pit, well, foundation and/or pavement which will obstruct or prevent the exercise and enjoyment by the Transferee of its rights hereunder.
9. Notwithstanding any rule of law or equity, any Works constructed by the Transferee shall be deemed to be the property of the Transferee even though the same may have become annexed or affixed to the Easement Lands.
10. The Transferee shall at its own expense as soon as reasonably possible after the construction of any Works or other exercise of its rights hereunder, remove all surplus sub-soil and debris from the Easement Lands and restore them to their former state so far as is reasonably practicable.
11. The Transferor covenants that:
  - (a) it has the right to convey the rights hereby transferred to the Transferee;
  - (b) the Transferee shall have quiet enjoyment of the rights hereby transferred;
  - (c) the Transferor or its successors and assigns will execute such further assurances and do such other acts (at the Transferee's expense) as may be reasonably required to vest in the Transferee, the rights hereby transferred; and
  - (d) the Transferor has not done, omitted or permitted anything whereby the Easement Lands is or may be encumbered (except as the records of the land registry office disclose).
12. If the Transferee encounters any toxic, hazardous, dangerous, noxious or waste substances or contaminants (collectively the "Hazardous substances") in undertaking any work on the Easement Lands, it shall give notice to the Transferor. If the Transferor so

elects by giving notice to the Transferee within 20 business days after the Transferee giving such notice, the Transferor may terminate this agreement. In such event, the Transferee shall forthwith vacate the Easement Lands. The Transferee shall not bring any Hazardous Substances on the Easement Lands. Without limiting its liability if it breaches the foregoing sentence, in acquiring its interests in the Easement Lands pursuant to this Easement, the Transferee shall be deemed not to acquire the care or control of the Easement Lands or any component thereof.

13. The Transferee assumes all liability and obligation for any and all loss, damage or injury (including death) to persons or property (collectively, the "Losses" and individually, a "Loss") that would not have happened but for an act or omission of a third party, that enters into the transferee's land with its knowledge and consent, anything done or omitted to be done by the Transferee, its subcontractors, servants, employees, temporary employees, contractors and licensees (collectively, "Transferee Party") thereunder. The Transferee shall at all times indemnify and save harmless Transferor and its officers, directors and shareholders and each of their successors and assigns from and against all such Losses and all actions, suits, proceedings, costs, charges, damages, expenses, claims or demands arising therefrom or connected therewith; provided that Transferee shall not be required to indemnify Transferor under this paragraph to the extent to which such Losses are caused by an act of negligence of Transferor or Transferor's agents or servants.
14. Upon the Transferee ceasing to use the easement, it shall forthwith remove any registration of the easement from title and otherwise decommission and otherwise remove the Works from the Transferor's Lands and restore them to their former state so far as is reasonably practical.
15. The Transferee shall comply with all laws in exercising its rights hereunder.
16. If the Transferor determines from time to time to redevelop its lands including or adjacent to any Easement Lands which requires the relocation of the Transferee's Works and the following conditions have been satisfied, the Transferee shall surrender this easement and cut off, decommission and abandon the Transferee's Works:
  - (a) The Transferor shall have obtained site plan approval and all other necessary approvals and amendments to the zoning by-law and official plan for its proposed redevelopment;
  - (b) The Transferor shall have transferred, or shall have caused to be transferred, to the Transferee at no expense to the Transferee in respect of the legal costs of registration, an easement in a form acceptable to the Transferee, acting reasonably on other lands to enable the Transferee to connect its Works (the "Replacement Easement") such that they operate independent of those situate on the Easement Lands;

- (c) The Transferee shall have installed in the Replacement Easement, its Works and made them operational; and
- (d) The Transferor shall have paid to the Transferee 50% of the total costs of the Transferee in effecting this relocation of its Works.

TRANSFEEE'S LANDS (DOMINANT TENEMENT)

PIN 64057-0029 (LT)

PT TWP LT 92, THLD, AS IN AA90798 SIT & TIW AA90798; WELLAND

PIN 04161-0019 (LT)

PT LT 6 CON 6RF GLOUCESTER PART 1,4R-10265 & PART 2,5R-5963; GLOUCESTER

PIN 03 187-0004 (LT)

PT W112 LT 30 CON 2 MARKHAM AS IN MA49406; RICHMOND HILL

**Dell Holdings Ltd. v. Toronto Area Transit Operating Authority**

[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.*

**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)(e)(i)(B), 13(2)(b), (c), 18(1).**

**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).**

**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).**

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.

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. 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)(B).

*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. 623; *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. 533, 3 R.P.R. 291, [1985] 3 W.W.R. 673, 28 B.C.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. 143; *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.P.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) —  
 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 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 Richards*, for appellant.

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

[1] CORY J. (LA FOREST, SOPINKA, GONTHIER, MCLACHLIN and MAJOR JJ. concurring):—The business of land development carried 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).

**I. Factual Background**

[2] In the mid-1970s, the appellant Dell owned approximately 40 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 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 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

*f* 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.

*g* [7] In support of its position, the Board cited and relied upon *Bersenas v. Minister of Transportation and Communications* (1984), 31 L.C.R. 97 (Ont. Div. Ct.).

[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. 337, 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  
*b* 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  
*d* *Expropriations Act*.
- (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  
*f* 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  
*h* 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

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-Hibben 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. 623, 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.J. 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.

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

[29] The Authority contended that disturbances damages are only available if they arise in relation to the expropriated land itself and not to any adjoining land which the owner retained after the expropriation. I cannot accept that position. There is nothing in the words of the section to indicate that there should be such a restriction imposed on those disturbance damages which can accurately be described as the natural and reasonable consequences of an expropriation. If it is a reasonable and natural consequence of the expropriation that the owner experiences losses with regard to the remaining land then this, just as much as losses relating solely to the expropriated land, must come within the definition of disturbance damages. If it had wished to do so, the legislature could have limited disturbance damages to the expropriated land. However it chose to enact an open-ended and flexible definition. 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.

[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:

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
- a 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
  - b 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
  - c 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.
  - d

#### H. *The Process of Expropriation*

- e [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
- f 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
- g 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?*

- h [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 *Bersenas, 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. Bersenas 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 *Bersenas* 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 *Bersenas* 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-Intendent 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 these reasons. The situation described in that case is very similar to the one at bar.

a Dell suffered damages because its development business was  
 b curtailed for more than two years while the Authority determined  
 c which portion of its land was needed for the GO Station. The  
 d increased costs of Dell's development business during the waiting  
 e period between the announcement of potential expropriation and  
 f the actual taking of the land were caused by the expropriation.  
 g For the reasons set out above they are in my view compensable as  
 h 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  
 d disturbance damages it is not necessary to consider the alter-  
 e native ground for recovery put forward by the appellant that the  
 f 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  
 e erred in holding that the standard of review which should be  
 f applied to the decisions of the Ontario Municipal Board was one of  
 g correctness. That is to say that it had to be correct. I have  
 h concluded that the decision of the Board was correct. It is  
 therefore not necessary to deal with the issue of the standard of  
 deference owed to decisions of the Board, yet something should be  
 said regarding the appellant's submission. The principles govern-  
 ing 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:

g 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  
 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] IACOBUCCI (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

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.

[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 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 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 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 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 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 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.