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Ontario Energy Board
PO Box 2319
2300 Yonge St.
Toronto, ON M4P 1E4
Attn: Ms. Kirsten Walli, Board Secretary

Dear Madam Secretary:

RE: EB-2010-0023 - Application by Hydro One Networks Inc. ("HONI") for Authority to Expropriate Interest in Certain Lands
Ms. Catherine Gale Walford – Submission in response to Board Procedural Order No. 3

We are the solicitors for Ms. Catherine Gale Walford who is the property owner of Part Lot 8, Concession 5 Erin designated as Part 1 Plan 61R11059; Erin being Part of PIN 71163-0064 (LT). Ms. Walford's property will be directly affected by HONI's proposed Bruce to Milton Transmission Reinforcement Project. Further to the Board's Procedural Order No. 3 dated July 19, 2010, we are writing to provide our submissions with respect to the *Expropriations Act* issues raised by the Board.

In our view, the distinction between the terms "statutory authority" and "expropriating authority" has no significance in the context of the proceeding currently before the Board and is not an issue that the Board will need to address in its final decision in this case. Under the *Expropriations Act*, the term "statutory authority" is broad in scope and encompasses the term "expropriating authority". Every "expropriating authority" is also a "statutory authority" for the purposes of certain provisions of the *Expropriations Act*, but not every "statutory authority" is at all times an "expropriating authority". HONI, for the purposes of the expropriation process, will become both an "expropriating authority" and a "statutory authority" under the *Expropriations Act* if the Board authorizes the proposed expropriations under the *Ontario Energy Board Act*.

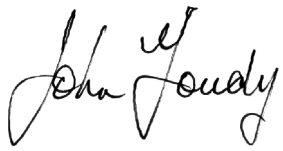
References in the *Expropriations Act* to "expropriating authority" are made whenever the provisions of the Act deal with the process of expropriation (i.e. when the "authority" is expropriating). The term "statutory authority" is used in the

provisions that are not restricted to the process of expropriation (which, it appears, deal solely with the issue of compensation). For instance, Section 30 of the *Expropriations Act* applies when there is a voluntary acquisition of land and refers not to an "expropriating authority" but to a "statutory authority", as there is no expropriation of land *per se*. Section 26 of the *Expropriations Act*, which provides for the negotiation and arbitration of compensation claims, also refers to a "statutory authority" since compensation may become payable without an expropriation (e.g. voluntary acquisition under Section 30) or after the process of expropriation is complete (e.g. damages arising from the operations of a "statutory authority"). Section 42 of the Act provides for the disposal of lands that have been expropriated, and so refers to the "expropriating authority" rather than the "statutory authority".

For the Board's reference, we have enclosed a copy of the Ontario Court of Appeal's decision in *Rotenberg* v. *York (Borough) (No. 2)* (1976), 13 O.R. (2d) 101 (C.A.), 1976 CarswellOnt 267, which involves the distinction between "expropriating authority" and "statutory authority" in the context of costs awards under what is now Section 32 of the *Expropriations Act*. The Court's decision confirms that the term "statutory authority" as used in the *Expropriations Act* at Section 32 encompasses an "expropriating authority" that is required to make an offer of compensation under Section 25 of the Act. The Court then rules that, for the purposes of Section 32, the offer made or not made by a "statutory authority" faced with a claim for injurious affection damages outside of a process of expropriation (i.e. where Section 25 does not apply) will be relevant to the application of the 85% rule in that section. It is submitted that this decision of the Court of Appeal supports the interpretation of the Act we have proposed above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Yours very truly,
COHEN HIGHLEY LLP



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1976 CarswellOnt 267, 1 C.P.C. 85, 13 O.R. (2d) 101, 9 L.C.R. 289

1976 CarswellOnt 267

Rotenberg v. York (Borough) (No. 2)

Rotenberg v. Corporation of the Borough of York

Ontario Court of Appeal

Evans, Martin JJ.A. and Lerner J. (ad hoc)

Judgment: April 23, 1976

Counsel: *R. B. Robinson, Q.C.*, for appellant.

H. L. Morphy and *J. Minsky, Q.C.*, for respondents.

Subject: Civil Practice and Procedure; Property

Expropriation --- Procedure for assessing compensation — Costs — Jurisdiction and power of arbitrators.

Costs — Expropriation proceedings — Absence of jurisdiction of Court of Appeal to award costs when Land Compensation Board lacked jurisdiction to do so — Jurisdiction of Land Compensation Board to award costs in absence of offer of compensation by expropriating or statutory authority — The Expropriations Act, R.S.O. 1970, c. 154, ss. 25, 30(1), 32(3)(b), 33(1), (2), as re-enacted by 1971, Vol. 2, c. 12, s. 2 — The Judicature Act, R.S.O. 1897, c. 51, s. 52 — The Judicature Act, R.S.O. 1970, c. 228, ss. 13(1), 30(1).

Claimants for compensation pursuant to The Expropriations Act alleged they had suffered injurious affection. The respondent statutory authority made no offer of compensation. The Land Compensation Board directed that compensation be paid to the claimants but this order was reversed on appeal to the Court of Appeal. The initial endorsement of the record by the Court of Appeal would have awarded costs to the successful respondent statutory authority, but, after written submissions by the parties, *held*, the Court of Appeal had no jurisdiction to award costs to the respondent because:

(1) S. 32(3)(*b*) of the Act giving the Court of Appeal authority to make any order the Board has authority to make cannot justify an order of costs in favour of a respondent statutory or expropriating authority successful in resisting any claim for compensation in a situation where the authority has made no offer of compensation in advance of arbitration proceedings, because the power to award costs under s. 33(2) is dependent upon the Board's award being less than 85% of the amount offered by the authority; an award of "nil" cannot be said to be either more or less than 85% of "nil".

(2) Semble, however, that the failure of an authority to make any offer of compensation can, in order to encour-

age the making of early settlements, be considered an offer of "nil" so as to justify the award of costs to a claimant where the Board has properly found the claimant entitled to some compensation, such compensation thus representing 85% or more of an offer of "nil" compensation within the meaning of s. 33(1).

(3) Semble, also, that an offer of minimal compensation by an authority will make it eligible for an award of costs under s. 33(2) if the Board denies any compensation.

(4) Quaere, whether an offer outside of or subsequent to an initial offer under s. 25 can be taken into account in allowing costs under s. 33.

(5) The authority of the Court of Appeal pursuant to s. 32(3) to "exercise the same powers as it exercises on an appeal from a judge of the High Court sitting without jury" involves the Court of Appeal's power to "make such further or other order as is considered just" (see s. 30(1) of The Judicature Act) and imports the Court of Appeal's power, pursuant to s. 52 of The Judicature Act, R.S.O. 1897, c. 51 which is made applicable by virtue of s. 13(1) of The Judicature Act, R.S.O. 1970, c. 228, "to make such further or other order as the case may require". But this power to make further and other orders does not allow the Court of Appeal to make an order that the trial Judge would not have had jurisdiction to make, but only to make such an order as would be just, taking into account evidence of relevant events which have occurred since the date of judgment and relevant changes in the law which are properly retrospective in nature. Thus the Court of Appeal also lacks power to make an order that the Land Compensation Board could not have made with respect to costs under s. 33 of The Expropriations Act.

(6) Provided jurisdiction to award costs exists, costs should be awarded to a successful party unless, inter alia, the point at issue is a novel point not previously decided by the Courts or a point involving the interpretation of an ambiguous statutory provision.

Annotation

With regard to the Court of Appeal's power to "make such further or other order as is considered just", see Holmested & Gale, Judicature Act, s. 30 §53.

W.H.O. M

Cases considered:

Quilter v. Mapleson (1882), 9 Q.B.D. 672, 47 L.T. 561 (C.A.) — *affirmed*

Re Gillespie and City of Toronto (1892), 19 O.A.R. 713 — *affirmed*

Cout. Dig. 874 — *applied*

Re Zeta Psi Elders Association of Toronto and University of Toronto, [1967] 2 O.R. 185 (C.A.) — *considered*

Disposal Services Ltd. v. Municipality of Metropolitan Toronto — considered

Highland Creek Sand & Gravel Co. Ltd. v. Municipality of Metropolitan Toronto (1973), 4 L.C.R. 242; reversed 5 L.C.R. 91 (D.C.) — *considered*

Costelec v. City of Kitchener (1975), 8 L.C.R. 154 — *considered*

Application to vary order of Court of Appeal as to costs in injurious affection proceedings under The Expropriations Act.

The judgment of the Court was delivered by *Evans J.A.*:

1 The respondents sought leave to make submissions to the Court regarding the costs awarded in the judgment on appeal released on 6th June 1974 [4 O.R. (2d) 457, 48 D.L.R. (3d) 321, 6 L.C.R. 77], and it was arranged that submissions by counsel for both parties be made in writing. The disposition as to costs was as follows (at p. 461):

> The appeal by the corporation is allowed, the decision of the Land Compensation Board is set aside and the claim of the claimants is dismissed with costs. The cross-appeal is also dismissed but without costs.

2 The powers of the Court of Appeal on an appeal from an order of the Land Compensation Board are set out in s. 32 of The Expropriations Act, R.S.O. 1970, c. 154, as follows:

3 32. — (1) An appeal lies to the Court of Appeal from any determination or order of the Board.

> (2) The practice and procedure as to the appeal and proceedings incidental thereto are the same mutatis mutandis as upon an appeal from the High Court, except that the appeal may be taken at any time within six weeks from the day the deter mination or order was served on the parties, and the period of any vacation of the Supreme Court shall not be reckoned in computing such six weeks.
>
> (3) An appeal under subsection 1 may be made on questions of law or fact or both and the Court of Appeal,
>
> (a) may refer any matter back to the Board; or
>
> (b) may make an decision or order that the Board has power to make,
>
> and may exercise the same powers as it exercises on an appeal from a judge of the High Court sitting without a jury.
>
> (4) A judge of the Court of Appeal may extend the time for appeal for such period as he considers proper.

4 Section 33 of The Expropriations Act [am. 1971, Vol. 2, c. 12, s. 2], deals with the question of costs and provides as follows:

> 33. — (1) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Board and the amount awarded by the Board is 85 per cent, or more, of the amount offered by the statutory authority, the Board shall make an order directing the statutory authority to pay the reasonable legal, appraisal and other costs actually incurred by the owner for the purposes of determining the compensation payable, and may fix the costs in a lump sum or may order that the determination of the amount of such costs be referred to a taxing officer of the Supreme Court who shall tax and allow the costs in accordance with this subsection and the tariffs and rules prescribed under clause *d* of section 45.
>
> (2) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is

> determined by the Board and the amount awarded by the Board is less than 85 per cent of the amount offered by the statutory authority, the Board may make such order, if any, for the payment of costs as it considers appropriate, and may fix the costs in a lump sum or may order that the determination of the amount of such costs be referred to a taxing officer of the Supreme Court who shall tax and allow the costs in accordance with the order and the tariffs and rules prescribed under clause *d* of section 45 in like manner to the taxation of costs awarded on a party and party basis.

5 The respondents submit that the Land Compensation Board can only award costs as provided in s. 33, which section requires that an offer be made by the statutory authority before costs can be awarded. No offer was made in this case. The respondents further submit that by s. 32(3) (*b*) the Court of Appeal can only make an order as to costs below that the Board could have made.

6 However, the award of costs in this appeal case, quoted above, refers only to costs on the appeal.

7 In that regard the respondents submit that this is not a proper case in which to award costs on the appeal.

8 On the question of when an action should be disposed of without costs, the learned author of Orkin's Law of Costs (1968), states at pp. 25-6 that:

> An action or application may be disposed of without costs when the question involved is a new one, not previously decided by the courts; or where it involves the interpretation of a new or ambigious statute; or a new or uncertain or unsettled point of practice; or where the practice was altered by a recent English decision; or where the action is a test case. and specifically with regard to appeals, he says at p. 228:
>
> (i) *Parties not at fault*. A successful appellant has been denied costs where there were conflicting decisions in the court appealed from; or where the decision of the court below followed a previous decision which was itself overruled on appeal; or where the case involved a new or doubtful point, or the meaning of a new rule.

9 We are of the view that the question involved here was not sufficiently new, nor the statute ambiguous, as to justify a departure from the general rule that costs follow the event.

10 Although we have disposed of the specific question raised on this application, having regard to the diversity of views recently expressed on the issue by the Board, we feel it is appropriate that we express our views on the issues raised by the parties as to the jurisdiction of both the Board and of the Court of Appeal relative to costs.

11 Under s. 32(3), the Court of Appeal may refer a matter back to the Board, it may make any decision or order that the Board has power to make, and it may exercise the same powers as on an appeal from a Judge of the High Court sitting without a jury. The question that arises is whether the third of these powers allows the Court to make an order as to costs that the Board could not have made.

12 The power of the Board to award costs is set out in s. 33 of the Act, supra. The appellant concedes that the section contemplates an offer by the statutory authority to the claimant before an award of costs can be made. However, the Land Compensation Board has gone both ways on the question, awarding costs where no offer has been made, and refusing to order costs in these circumstances. See: *Disposal Services Ltd. v. Municipality of Metropolitan Toronto; Highland Creek Sand & Gravel Co. Ltd. v. Municipality of Metropolitan Toronto* (1973), 4 L.C.R. 242, reversed on the issue of costs 5 L.C.R. 91 (D.C.); *Roux v. County of Peel (No. 2)* (1973), 4

L.C.R. 289; *Four Thousand Yonge St. v. Municipality of Metropolitan Toronto* (1972), 2 L.C.R. 191, affirmed 3 L.C.R. 299 (Ont. C.A.); *Cosburn Properties Ltd. v. Municipality of Metropolitan Toronto* (1972), 3 L.C.R. 342; *Costelec v. City of Kitchener* (1975), 8 L.C.R. 154; *Ruddell v. Union Gas Co. Ltd.* (1974), 6 L.C.R. 81.

13 The appellant submits that there was a legislative oversight in the drafting of the Act, in that there is no provision for an award of costs against an unsuccessful claimant where the claim is for damages for injurious affection and no offer is made by the authority.

14 The relevant sections are 21, 22 and ss. 24-26 of the Act. Section 21 provides that an owner shall be compensated for loss or damage caused by injurious affection. Section 22 provides for the making of a claim for injurious affection. Section 24 allows a "statutory authority" to make an agreement with a claimant with respect to any claim. Section 25 provides that where no agreement is made, an "expropriating authority" shall, within a prescribed time limit, serve upon the owner an offer of compensation. Section 26 provides that where there has been no agreement, and in the case of injurious affection, s. 22 has been complied with, and in the case of expropriation, s. 25 has been complied with, then the parties may enter upon negotiations or arbitration of the dispute.

15 "Injurious affection" is defined in s. 1 (1)(*e*) as follows:

> (e) 'injurious affection' means,
>
> (i) where a statutory authority acquires part of the land of an owner,
>
> 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,
>
> (ii) where the statutory authority does not acquire part of the land of an owner,
>
> a. such reduction in the market value of the land of the owner, and
>
> b. such personal and business damages,
>
> resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute,
>
> and for the purposes of this clause, part of the lands of an owner shall be deemed to have been acquired where the owner from whom lands are acquired retains lands contiguous to those acquired or retains lands of which the use is enhanced by unified ownership with those acquired.

16 "Statutory authority" is defined in s. 1 (1)(*m*) as follows:

> (m) 'statutory authority' means the Crown or any person empowered by statute to expropriate land or cause injurious effection.

17 "Expropriating authority" is defined in s. 1 (1)(*d*) as follows:

(d) 'expropriating authority' means the Crown or any person empowered by statute to expropriate land.

18 The result is that where the claim is for injurious affection only, the Act contemplates that where no agreement is reached, the dispute will go directly to negotiation or arbitration, and the statutory authority is not obliged nor empowered to make an offer of compensation. It is only an expropriating authority under s. 25 which has that power. However, it should be noted that under s. 25 (4), it is not mandatory upon the expropriating authority to make an offer within the time limited, as the only penlty provided is that interest will be allowed to the claimant on the unpaid portion of the compensation. Therefore, there could also be "no offer" in an expropriation situation.

19 However, in s. 33, where an offer is contemplated in order that costs be awarded, the language of the Act is "the amount offered by the *statutory authority*" (The italics are mine). The recent amendment to s. 33 specifically added to that section, inter alia, the amount to which an owner is entitled *upon a claim for injurious affection*.

20 Rules 9 and 10 of the Rules of Practice and Procedure of the Land Compensation Board, R.R.O. 1970, Reg. 286 provide as follows:

9. A respondent may, at any time before the Board's determination of the arbitration, file with the registrar under a sealed cover a statement of the amount of the offer of compensation made by it to the claimant under section 25 of the Act, exclusive of any amount in respect of costs, and such statement shall not be opened by the Board until after the amount to which the claimant is entitled is determined by the Board.

10. Except as provided in Rule 9, neither the claimant nor the respondent shall state in any notice of arbitration, statement of claim or reply or otherwise in any document filed with the Board the amount of any offer of compensation or of any payment by the respondent to the claimant under section 25 of the Act or otherwise.

21 "Respondent" is defined [R. 1 (*e*)] as "a statutory authority that has served or that has been served with a notice of arbitration under the Act."

22 These rules substantiate the view that the only offer contemplated under the Act is the one made under s. 25. On that view, where there is a claim for injurious affection only, no offer can be made.

23 In view of the apparent conflict in the legislation, it becomes arguable that the offer referred to in s. 33 is not confined to an offer under s. 25. This was the position taken by the Board in *Cosburn Properties Ltd. v. Municipality of Metropolitan Toronto*, supra. The situation in that case was complicated by the fact that the expropriation had taken place several years earlier, before the passage of the present Act, s. 33 of which was made to apply by s. 46, whereas s. 25 was not. The Board held (at p. 355) that there was "no authority for regarding the offer referred to in s. 33 as synonymous with the offer required to be served under s. 25," and acted upon an offer not in the terms of s. 25 in order to be able to make an award of costs under s. 33. This case was followed in *Ruddell v. Union Gas Co. Ltd.*, supra.

24 The *Cosburn* case was distinguished in *Jakubowski v. Minister of Transportation & Communications* (1973), 6 L.C.R. 29. There, the authority had made an offer which was in compliance with s. 25, and a subsequent one which was not, and asked the Board to consider the subsequent offer in order to determine its award

of costs under s. 33. The Board confined the *Cosburn* case to its extraordinary facts, saying that s. 33 contemplates only one offer, which must necessarily refer to the one provided for in s. 25 as no other section provides for an offer. The Board had before it such an offer and held that it could be concerned only with that offer. An appeal to the Court of Appeal was dismissed on consent [(1975), 9 L.C.R. 235].

25 In *Costelec v. City of Kitchener*, supra the Board was asked to determine the value of an option to purchase land owned by the claimant. The Board held that the option had no market value as its purchase price exceeded the market value of the land. No offer had been made to the optionees. The Board was of the view that neither s. 33 (1) nor s. 33 (2) applied because there was no offer and no award and therefore the circumstances did not fit within these subsections.

26 In his dissenting opinion, Mr. Middleton (at p. 165) preferred to follow the reasoning of the Board in *Disposal Services Ltd. v. Municipality of Metropolitan Toronto*, supra, that "nil" is equal to 85% of "nil" and therefore the claimant is entitled to his costs. He was of the view that an owner should be entitled to have his compensation determined and therefore is entitled to the costs of an appraiser and part of a day's hearing, even if the result is that his interest has no market value. He was critical of the fact that no provision is made in the Act for costs on interlocutory matters.

27 The result is that the concept of an "offer" (which term is not defined in the Act) can be regarded in one of two ways:

28 (1) as the "offer" referred to in s. 25, made exclusively by an expropriating authority; or

29 (2) as any offer made by an authority in order to reach an agreement with an owner/claimant.

30 Whether any offer is made is solely within the discretion of the authority, except in the situation where a statutory authority is not empowered to make a s. 25 "offer" to a claimant for injurious affection only.

31 The question whether if there was no offer under s. 25, but another offer, could such an offer be acted upon for the purposes of s. 33, does not arise specifically in this case because there was no offer at all before the Board. (See Morden J., Law Society Special Lectures (1970), p. 225 at 277; and *Harvey v. Minister of Highways for British Columbia* (1974), 6 L.C.R. 113 at 118 (B.C. C.A.)).

32 On the facts of this case, the question is whether no offer at all can be considered an offer of "nil" for the purposes of s. 33, thereby making room in some cases for an award of costs where there is solely a claim for injurious affection, or where the authority has failed to make an offer on an expropriation.

33 In our view, it can. The purpose of the Act is to encourage settlement of claims at as early a stage as possible. Where an authority makes no offer to a claimant, and subsequently the Land Compensation Board makes an award in favour of the claimant, it is clear that that amount is 85% or more of the "offer" and costs must go to the claimant. (This was the disposition of the Board in the present case.)

34 However, where the Board confirms the authority by deciding that the claimant is entitled to no compensation, it cannot logically be said that an award of "nil" amounts to 85% or more of "nil" nor to less than 85% of "nil" under subs. (2).

35 The result is that where an authority makes no offer it knows that it can never receive an award of costs in its favour, and as well it runs the risk of having an award of costs made against it if the Board disagrees with

its assessment.

36 On the other hand, if the authority makes a minimal offer in order to retain the opportunity of having an award of costs made to it, and the Board allows no compensation to the claimant, then it is reasonable that the Board be able to award costs to the authority, because in such a case it would have been the claimant who was acting in an unreasonable manner. However, in making such award, the Board should also have regard to such factors as the timing of the offer by the Board and to all the equities of the situation.

37 The further question is whether s. 32(3) allows the Court of Appeal to make an order as to costs that the Board could not have made.

38 The jurisdiction of the Court of Appeal is set out in s. 13 (1) of The Judicature Act, R.S.O. 1970, c. 228 as amended, as that part of the jurisdiction of the Supreme Court that on 31st December 1912 was exercised by the Court of Appeal and Divisional Courts of the High Court. That jurisdiction is set out in the 1897 version of The Judicature Act, c. 51, ss. 49-56. Section 52 provided:

> 52. The Court of Appeal shall have power to dismiss an appeal, or give any judgment and make any decree or order which ought to have been made, and to direct the issue of any process, or the taking of any proceedings in the Court below, or to award restitution and payment of costs, or to make such further or other order as the case may require.

39 The words "or to make such further or other order as the case may require", were interpreted in the case of *Quilter v. Mapleson* (1882), 9 Q.B.D. 672, 47 L.T. 561. According to the English Rules of Practice, all appeals were to be by way of re-hearing. In that case the Court was discussing the effect of a piece of retrospective legislation passed between the date of the judgment at trial and the appeal. Jessel M.R. there stated [L.T.]:

> Rule 5 of Order LVIII provides that 'the Court of Appeal shall have power to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require.' That rule was very carefully framed, and was intended to give the Appeal Court power to make a further order than that which might have been given in the court below, and to make such an order as ought properly to be made in the Court of Appeal according to the state of circumstances existing at the time of the re-hearing. I am of the opinion that the appellant is entitled to relief against the forfeiture.

40 The *Quilter v. Mapleson* case was distinguished by the Supreme Court of Canada in *Boulevard Heights, Ltd. v. Veilleux* (1915), 52 S.C.R. 185, 9 W.W.R. 742, 26 D.L.R. 333, on the basis that an appeal to the Supreme Court is not by way of re-hearing and therefore that Court is limited in its jurisdiction to giving the judgment which the Court appealed from could have given. There were no words in the Supreme Court Act, R.S.C. 1906, c. 139 corresponding to those in O. 58, R. 2 which enabled the Court of Appeal to "make any further or other order as the case may require".

41 However, the *Quilter* case was followed and applied in the Ontario Court of Appeal decision in *Re Gillespie and City of Toronto* (1892), 19 O.A.R. 713, affirmed Cout. Dig. 874, on the basis that that concluding phrase was present in The Judicature Act of Ontario. No mention was made of the "re-hearing" concept.

42 However, in The Supreme Court Practice (1973), Vol. 1, Part 1, the editor attempts to explain the concept of re-hearing as it is used to define the jurisdiction of the Court of Appeal in England. By O. 59, R. 3,

all appeals to the Court of Appeal are by way of re-hearing, as they were at the time of the *Quilter v. Mapleson* case. The editor explains that the re-hearing is not a trial de novo but rather a re-hearing on "the documents" allowing the Court to go beyond the points raised in the Notice of Appeal, and to receive fresh evidence if necessary or on special grounds. This concept is also expressive of the jurisdiction of the Ontario Court of Appeal under The Judicature Act, R.S.O. 1970, c. 228, (see ss. 13(1), 30(1)) and the Rules of Practice (see R. 234 [am. O. Reg. 106/75, s. 23]).

43 It is clear from the passage quoted from *Quilter v. Mapleson*, supra, that the intent of the final phrase of the section (now s. 30(1) "may make such further or other order as is considered just") is that the Court on appeal may take into account and deal with events which have transpired since the date of judgment including relevant changes in the law or in the circumstances. Lord Gorell, in *Attorney General v. Birmingham, Tame & Rea District Drainage Board*, [1912] A.C. 788 at 802, explained the effect of the section in the following way:

> In my opinion the Court of Appeal was entitled to make such order as the judge could have made if the case had been heard by him at the date on which the appeal was heard.

44 This case involved a change in circumstances which rendered the perpetual injunction granted at trial unnecessary. However, the statement of Lord Gorell should probably be read with the qualification that any change in the law after trial can only be given effect to if it is, by its terms, to have a retrospective application.

45 In any case, it is our view that the intent of the final phrase of the former s. 52 of The Judicature Act, 1897 (Ont.), c. 51 (now R.S.O. 1970, c. 228, s. 30(1)) is not to allow the Court of Appeal to make an order that the trial Judge would not have had the jurisdiction to make, but only to make such order as is just, having regard to whatever new law or evidence may in the circumstances be relevant and allowable (*Ready v. Ready*, [1950] O.R. 834, [1951] 1 D.L.R. 336 (C.A.); *Shell Oil Co. of Canada v. Park*, [1950] O.W.N. 433 (C.A.).)

46 If it were otherwise, parties could appeal in the hope of being able to secure a result that could not be secured at trial. This is not the purpose of an appeal process.

47 The powers set out in s. 32(3) of The Expropriations Act were recommended by the McRuer Report. In Report No. 1, Vol. 3 at p. 1063/4, the report states that the Court of Appeal should have the power to make any judgment or order that the tribunal could have made and should be clothed with power to exercise the same power it exercises on an appeal from a Judge of the High Court sitting without a jury. The report notes that the Court of Appeal is more likely to interfere with a verdict of a trial Judge on a different view of the evidence, than that of a jury, and also says that "if it is intended ... that the Court of Appeal should have all the powers of the arbitral tribunal, this should be clearly stated in the Act". The report did not recommend that the Court be given jurisdiction to do that which the tribunal did not have the power to do.

48 I also refer to the decision of this Court in *Re Zeta Psi Elders Association of Toronto and University of Toronto*, [1967] 2 O.R. 185 at 192, under The Expropriation Procedures Act, 1962-63 (Ont.), c. 43, where it was stated that the combined effect of that Act and The Judicature Act (at p. 192) "Permits this Court on appeal to it to pronounce by its judgment any award that ought originally to have been made, bearing in mind, of course, the nature of the proceedings and the evidence ad duced below as well as the general principles applicable to the exercise of appellate jurisdiction."

49 Section 11 (2) of the former Act provided that:

> The practice and procedure as to the appeal and proceedings incidental thereto are the same mutatis mutandis as upon an appeal from the High Court ....

50 In our view, the final clause of s. 32(3) does not grant to the Court of Appeal a power to award costs below which the Board itself could not have awarded.

51 There will be no costs of the application.

Judgment accordingly.

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