



**IN THE COURT OF APPEAL  
OF NEWFOUNDLAND AND LABRADOR**

**Citation:** *Shute v. Paradise (Town)*, 2024 NLCA 19

**Date:** June 4, 2024

**Docket Number:** 202301H0030

**BETWEEN:**

TERRANCE SHUTE and ELIZABETH SHUTE

APPELLANTS

**AND:**

TOWN OF PARADISE

RESPONDENT

**Coram:** D.E. Fry, C.J.N.L., W.H. Goodridge and D.M. Boone JJ.A.

**Court Appealed From:** Supreme Court of Newfoundland and Labrador,  
General Division 201901G2271  
(2023 NLSC 24)

**Appeal Heard:** January 18, 2024

**Judgment Rendered:** June 4, 2024

**Reasons for Judgment by:** D.M. Boone J.A.

**Concurred in by:** D.E. Fry C.J.N.L. and W.H. Goodridge J.A.

**Counsel for the Appellant:** Michael J. Crosbie K.C.

**Counsel for the Respondent:** Erin E.E. Best and Robert Bradley

## Authorities Cited:

**CASES CITED:** *Paradise (Town) and Shute, Re*, 2019 CarswellNfld 173; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42; *Newfoundland and Labrador (Information and Privacy Commissioner) v. Beverage Industry Association of Newfoundland and Labrador*, 2023 NLCA 2; *Rugby Water Board v. Foottit*, [1973] A.C. 202 (UKHL); *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32; *Horn v. Sunderland Corporation*, [1941] 2 K.B. 26, 1 All E.R. 480 (UK); *Irving Oil Co. v. The King*, [1946] S.C.R. 551; *Lasade Enterprises Ltd. v. Newfoundland*, 1993 CanLII 7775 (NLCA); *R. v. Reid*, 2021 NLCA 13; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678; *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3; *Antrim Truck Centre Ltd v. Ontario (Ministry of Transportation)*, 2013 SCC 13, [2013] 1 S.C.R. 594; *Patterson v. British Columbia (Ministry of Transportation and Highways)*, 1997 CanLII 4109 (BCCA); *Kirby v. Portugal Cove (Municipality)*, 1989 CanLII 3960 (NLCA); *Atlantic Mining NS Corp. (D.D.V. Gold Limited) v. Oakley*, 2019 NSCA 14, leave to appeal to SCC refused, 38620 (24 October 2019); *Houle v. Manitoba*, 2016 MBCA 76; *Drew v. The Queen*, [1961] S.C.R. 614; *Partridge, Re*, 2019 NSUARB 108, aff'd in part *Partridge v. Nova Scotia (Attorney General)*, 2021 NSCA 60; *His Majesty the King in Right of Newfoundland and Labrador v. O.D. Holdings Limited and City Sand and Gravel Limited*, 2022 NLCA 60; *Newfoundland (Minister of Works, Services and Transportation) v. Airport Realty Ltd.*, 2001 NFCA 45; *The Queen v. Loiselle*, [1962] S.C.R. 624; *Lynch v. St. John's (City)*, 2020 NLCA 31; *Bartlett v. Corner Brook (City)*, 2004 NLCA 50; *Manitoba v. Russell Inns Ltd. et al.*, 2013 MBCA 46; *Roberts v. Newfoundland and Labrador (Minister of Transportation and Works)*, 2005 NLCA 26.

**STATUTES CONSIDERED:** *Urban and Rural Planning Act*, 2000, SNL 2000, c. U-8, ss. 69, 75, 50, 61, 70, 77; *Urban and Rural Planning Act*, SN 1953, No. 27, s. 44 (3); *Expropriation Act*, RSNS 1989, c. 156, s. 3.

**TEXTS CONSIDERED:** Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed (Scarborough, Ont: Carswell, 1992).

**RULES CONSIDERED:** *Court of Appeal Rules*, NLR 38/16, rules 58, 53.

**D.M. Boone J.A.:**

[1] This appeal is about whether the Appellants (“the Shutes”) were adequately compensated for the expropriation of an easement over a portion of their property. It requires considering the method for valuing an expropriated interest, the availability of non-pecuniary damages as compensation for expropriation, and the law of costs in expropriation matters generally and this appeal in particular.

**BACKGROUND**

[2] The Shutes live on their property on Topsail Road, in the Town of Paradise. The Town planned a project to widen Topsail Road. Newfoundland Power asked that the Town expropriate land from property owners along the road to accommodate a power line easement in case power poles and lines would need to be moved incidental to the road work. In July 2013, the Town issued Notices of Expropriation to the Shutes and others. Expropriation became effective 10 days after service of the Notice.

[3] The Notice told the Shutes that the Town planned to expropriate land along the front of their property. The expropriated land is a 140.788 square metre piece. It is situated mainly between a brick retaining wall and the road reservation, and entirely within the 7.6 metre setback from the road within which development other than landscaping was prohibited by the Town Development Regulations (Appeal Book, Vol. 4, Tab 9.6.C, at p. 580). The Supreme Court judge referred to the land subject to the expropriation as the “Strip”, and for consistency I will do the same.

[4] In 2018, the Shutes filed a Statement of Claim with the Supreme Court claiming that the expropriation from the Shutes was unnecessary. The Town then abandoned all but 1.43 square metres of the Strip, returning the fee simple title of that land to the Shutes. However, the Town retained an easement over the Strip for the purposes of construction and maintenance of the power line and related structures.

[5] The Notice had been served on the Shutes along with an offer of compensation in the amount of \$11,750, the appraisal on which that offer was based, and a letter in which the Town undertook that “[a]ny work related to the reinstatement of your property will be completed by the Town and/or its contractor as part of the road upgrade.”

[6] The parties engaged in protracted negotiations about compensation for the expropriation. The Shutes demanded amounts not only for the value of the expropriated land but also amounts for constructive expropriation of some of the rest of their land, disturbance, professional expenses, interest and “general, aggravated and punitive damages”.

[7] The Town conducted remedial work on the Shutes’ property while the parties were negotiating. This work was pursuant to the Town’s undertaking given at the time of the expropriation. The Town completed work, to the Shutes’ benefit, beyond that strictly necessary because of the road widening project or the expropriation. The scope, design, timeliness (including responsibility for delay) and quality of work undertaken by the Town as “reinstatement” became significant points of contention between the parties.

[8] It is sufficient to note for the purposes of this appeal that the Town or its contractors completed the following work on the Shutes’ property: the addition of a sloped ditch with decorative stone in front of the property; the destruction of an old brick wall along the front of the Shutes’ property and its replacement with a new, longer wall; the replacement of the Shutes’ 70 foot driveway, including provision of the material required for the underbed; the replacement of the Shutes’ concrete curb running along their driveway, and the placement of new survey pins at the back of the property. This work was completed at significant cost to the Town over a considerable time. The parties each contributed to the delay and they each blamed the other for it. The Shutes agreed that the reinstatement work resulted in the aesthetic improvement of their property.

[9] The expropriation resulted in the Town acquiring 1.43 square metres of land and a utility easement over 140 square metres of an approximately 2500 square metre property. Electrical wires and supporting poles were already in place before the expropriation over the Strip, and even before the Shutes bought the property in 1994. The utility had already obtained and registered an easement over the Strip in 1932 (Appeal Book, Vol. 8, Tab 20, at p. 1162). In other words, the interest in the Strip that was taken from the Shutes by expropriation had essentially already been sold to the utility by their predecessors in title. The utility did not erect any new structures or move the power poles and wires on the easement following expropriation. The road widening project did not move Topsail Road any closer to the Shutes’ house.

[10] The expropriation process started in 2013. The negotiations spanned a period of over five years until the matter was referred to a Board of Assessors (the “Board”).

The Board has the power to fix the amount of compensation and, pursuant to section 69 of the *Urban and Rural Planning Act, 2000*, SNL 2000, c. U-8 (“URPA”), may decide questions of law and fact that it considers necessary for that purpose.

[11] The Board held a hearing at which both parties were represented by counsel. The Town presented evidence from its employees regarding the process of expropriation and remediation, and from an appraiser regarding the value of the expropriated interest. The Shutes testified. They did not call any appraisal evidence but did cross-examine the Town’s appraiser, whose qualification as an expert they accepted.

### **The Board Decision**

[12] The appraiser testified before the Board that in his opinion the value of the expropriated easement interest was \$8,295, equal to 70% of the value of the fee simple interest, and that the value of the 1.43 square metre piece to which the Town retained the fee simple was \$122. The Board accepted this evidence as to value and ordered that the Town pay the Shutes the total of \$8,417, together with interest at the rate prescribed by *URPA*.

[13] The Board also accepted the appraiser’s opinion that the road widening did not cause measurable injurious affection to the Shutes’ remaining property. The Shutes had advised the Board that they were not seeking compensation for injurious affection except in respect of land that was severed from the rest of their property because of the replacement of the retaining wall.

[14] The Board rejected the Shutes’ argument that the land ought to have been valued as if the entire Shute property could be developed into two residential lots. The Board said that no evidence had been presented by the Shutes that would support a higher value for the property if it was so developed.

[15] The Board found, at paragraph 65(c) of its Decision that “[t]he expropriation and subsequent abandonment of the parcel of land did not diminish the utility of the land taken except as it was affected by the easement rights provided to Newfoundland Light & Power...the front of the Shutes’ property is as useful or as superfluous as it was before the expropriation governed by the same Town regulations with respect to set backs and function”.

[16] The Board rejected the Shutes' claim for compensation for land "orphaned" outside the newly constructed retaining wall. The Board found that the old wall did not follow the Shutes' front boundary, and therefore some of this land was already orphaned before expropriation. The Board also found that the Shutes suffered no loss by this land being orphaned because setback regulations already restricted development and the Shutes could landscape it to the same extent they could have before expropriation (*Paradise (Town) and Shute, Re*, 2019 CarswellNfld 173, at para. 85, the "Board Decision").

[17] The Board found that the Shutes were entitled to "Disturbance damages":

111 In view of the foregoing the Board finds that there is ground for awarding Disturbance damages in this case. Despite the Town Building Inspectors reasonable and concerned efforts in his dealings with the Shutes, the Board is concerned that the overall action of the Town caused significant upset for the Shute family, summed up as follows:

The Shutes not being advised of their rights under expropriation when served with the Notice of Expropriation.

Not being advised of what protocol they might follow, seeking independent professional advice, etc.

Being confronted with the contractor with the threat of a lien.

Issues with the wall and continuous back and forth regarding all the reinstated improvements.

Making the Shutes feel as though Town were doing them a favour by reinstating the improvements.

A series of delays that dragged out completion of all the works over a 3<sup>1</sup>/<sub>2</sub> year period, especially given the anxiety affect on the Shutes who suffer from ill health

[18] The Board decided that "[b]earing in mind the difficulty in assessing damages for the delay, the stress, anxiety, disturbance and interference the Shutes were put through...and bearing in mind their status of health, a substantial compensation is warranted" (para. 112). The Board decided that the best approach to setting the compensation was to consider the offers put forward by the parties during the process and that the "offer made by the Town of \$65,000.00...is a fair and reasonable award, which amount is inclusive of the claim for (1) the value of the land and easement

acquired, (2) the disturbance caused to the Shutes, and (3) all legal and professional costs incurred prior to the hearing” (para. 117). The Board also awarded interest on that amount in accordance with *URPA*. Finally, the Board decided that it did not have express authority to award solicitor-client costs and it awarded party and party costs to the Shutes (para. 55).

### **The Supreme Court Decision**

[19] Section 75(5) of *URPA* provides for a right of appeal to the Supreme Court “against the findings of the board upon questions of law or fact in connection with the expropriation or upon the question of the amount of compensation awarded by the board.” The Shutes and the Town each appealed to the Supreme Court. The Shutes argued that the Board erred: in its valuation of the expropriated land because the Board accepted the appraiser’s opinion as to the highest and best use of the land as mixed residential when it should have been valued as a service structure building lot; in failing to award the Shutes severance damages for the land orphaned outside their retaining wall; for failing to properly consider the effect of the Town having first expropriated the land and then abandoned it back with an easement, the amount of disturbance damages awarded, and for failing to award the Shutes their pre-hearing costs on a solicitor-client basis. The Town cross-appealed, arguing that the Board erred in awarding the Shutes disturbance damages and by not awarding the Town the costs of the hearing.

[20] The Supreme Court judge decided that the Board had not erred in valuing the expropriated interest in land, or in denying the Shutes’ claim for severance damages, or in its consideration of the effect of abandonment of the fee simple expropriation. He accepted the Shutes’ argument that the Board had authority to award their pre-hearing costs on a solicitor-client basis and he awarded those costs accordingly. He allowed the Town’s appeal from the award of non-pecuniary disturbance damages. He denied the Town’s appeal from the Board’s award to the Shutes of their costs of the hearing. The judge ordered that the parties bear their own costs of appeal because each had been partly successful. In the result, he held that the Shutes were entitled to \$8,417 as compensation for the expropriated land and easement, together with interest on that amount, reasonable pre-hearing costs taxed on a solicitor-client basis, and Column 3 costs for the hearing.

## **The Appeal to this Court**

[21] The Shutes appeal the decision of the Supreme Court judge to allow the Town's appeal of the award of disturbance damages and to deny the Shutes' appeal regarding severance damages. They also appeal the judge's decision regarding hearing costs.

## **STANDARD OF REVIEW**

[22] The questions on a second level appeal to this Court in an administrative law matter are whether the judge on the first level of appeal selected the appropriate standard of review and applied it correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42; and *Newfoundland and Labrador (Information and Privacy Commissioner) v. Beverage Industry Association of Newfoundland and Labrador*, 2023 NLCA 2.

[23] The parties agreed on appeal that the Supreme Court judge correctly selected the appellate standard in reviewing the Board Decision, and that he used the correct aspect of that standard in deciding each of the issues. The question, therefore, is whether the judge correctly applied that standard, or in other words, whether this Court comes to the same conclusions as the judge.

## **ISSUES**

[24] The following issues arise on the appeal:

1. Did the Board err in its valuation of the expropriated interest in land?
2. Did the Board err by denying the Shutes' claim for non-pecuniary damages for disturbance?
3. Did the Board err by denying the Shutes' claim for damages for severance?
4. Did the Board err in its costs award?

[25] As outlined below, Issues 2 and 3 will be discussed together in addressing whether the Board erred in awarding damages to the Shutes.

## ANALYSIS

### **The Principles Underlying the Assessment of Compensation for Expropriation**

[26] Expropriation is a compulsory taking of land for a public purpose.

[27] In Canada there is no constitutional guarantee of compensation to owners of expropriated property. Expropriation and the entitlement to compensation for it are “entirely creatures of statute” (see Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed (Scarborough, Ont: Carswell, 1992) at 160, footnote 137, citing *Rugby Water Board v. Footitt*, [1973] A.C. 202 (UKHL)). However, because expropriation involves a significant interference with property rights, at common law there is a “presumption that whenever land is expropriated, compensation will be paid” and therefore a principle of statutory construction that favours compensation for expropriation (*Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32, at para. 22; *Todd*, at 31-38).

[28] The power to expropriate for municipal purposes is set out in section 50 of *URPA*. Section 61(1) mandates the payment of compensation by the expropriating authority.

[29] The “principle of equivalence...is at the root of statutory compensation, the principle that the owner shall be paid neither less nor more than his loss” (*Horn v. Sunderland Corporation*, [1941] 2 K.B. 26, 1 All E.R. 480, at 49 (UK)). The “displaced owner should be left as nearly as possible in the same position financially as he was prior to the taking, provided that the damage, loss or expense for which compensation was claimed was directly attributable to the taking of the lands” (*Irving Oil Co. v. The King*, [1946] S.C.R. 551, at 556).

[30] The primary constituent elements of compensation in Canadian expropriation law are fair market value for expropriated property, disturbance, and injurious affection (*Todd*, at 128-130). These elements are expressly adopted in *URPA*, section 70.

[31] The Shutes based their claim before the Board on the elements of fair market value and disturbance. On appeal to this Court, they argued that their disturbance claim should be regarded as a species of injurious affection.

***Issue 1: Did the Board err in its valuation of the expropriated interest in land?***

[32] The Board stated that the legal parameters for its task in fixing the value of the interest expropriated from the Shutes were set out in section 70 of *URPA*, and that section 70(a), (b) and (g) were of particular importance:

**Assessing compensation**

70. (1) In fixing the amount of compensation to be paid under this Act a board shall act in accordance with the following rules:

(a) the compensation shall be an amount based on the fair market value of the land and on existing use value at the time of the start of expropriation proceedings and an account shall not be taken of the compulsory acquisition of the land, and disturbance of the owner or occupier, or other injurious affection;

(b) the fair market value of the land shall be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realize but the board may consider returns and assessments of capital value for taxation made or acquiesced by the owner of the land;

...

(g) an advantage which the owner may derive or be likely to derive directly or indirectly from the contemplated work and operations for which the land is expropriated shall be taken into account in reduction of the amount of the compensation;

[33] This Court has previously defined fair market value in the context of expropriation compensation as “the highest price (sometimes expressed as the most probable selling price) estimated in terms of money that a property will bring if exposed for sale on the open market, allowing a reasonable time to find a purchaser who buys with knowledge of all the uses to which it is adapted and for which it is capable of being used” (*Lasade Enterprises Ltd. v. Newfoundland*, 1993 CanLII 7775 (NLCA), at para. 25).

[34] Fair market value embraces the concept of highest and best use (HABU), which “recognizes that market value may reflect a higher and better use than the current one” (*Lasade*, at para. 26). HABU accounts for potential alternative uses, but the potential for such uses must be reasonable, not speculative, and there must be a probability that any required rezoning will be approved (*Lasade*, at paras. 27-29).

[35] The Board recounted the appraiser’s evidence that the Strip had no real marketable value because there was no market for it. Therefore, he used the unit price method to value the expropriated interest. He first determined the HABU for the property, then compared the unit price (i.e., price per square metre) for sales of neighbourhood properties with the same HABU, and finally applied a factor to account for the Shutes’ continued ownership of the property subject to the easement. The appraiser opined that the HABU for the property was its existing mixed residential zoning. He described how he had researched comparable sales to determine an appropriate unit price of \$85 per square metre. He testified that to purchase an easement, Canadian utility companies generally paid between 50% to 100% of the value of the property, and he explained that he determined that 70% was an appropriate percentage factor to account for the Shutes’ continued ownership rights. Applying those inputs, he calculated the fair market value of the expropriated easement was rounded to \$8,295. That value was different than the appraisal that had underpinned the Town’s first offer of \$11,750, recognizing that the Town had abandoned the expropriation of the fee simple in favour of a utility easement, leaving the Shutes with ownership of all but 1.43 square metres of the Strip.

[36] The appraiser testified that when he wrote his opinion, he was not aware of a 1932 Deed of Easement over the Strip in favour of the utility (in other words, the utility had already purchased the interest that was expropriated by the Town). He said that if he had known of the pre-existing easement, his valuation of the interest expropriated from the Shutes would have been less than the amount in his appraisal. The Board decided that it would have been unfair to take the pre-existing easement into account because it had not been presented to the parties before the hearing. The Town did not appeal that decision.

[37] The Board noted that the Shutes did not call any appraisal evidence, and they accepted the appraiser’s qualifications and methodology. The Shutes relied on cross-examination and arguments by their lawyer to advance their position that the fair market value of the expropriated interest should be fixed at a higher amount. The Shutes argued that the HABU for the Strip ought to have considered that the Shutes’ large lot could have been subdivided into two lots with their existing house torn

down, or three lots with their existing house remaining. This potential subdivision would have resulted in a higher value set by reference to the higher end of neighbourhood sales, at a unit price of \$192 per square metre, that the appraiser had rejected as comparable. The Board rejected these arguments:

83 Michael Crosbie, QC, in an e-mail dated December 30, 2015 on pages 3 and 4, argued on behalf of the Shutes that the value of the land taken at \$85 /m<sup>2</sup> as estimated by Mr. Pickett was incorrect. He maintained that the Shutes property was an oversized lot and could be subdivided into two lots along the frontage, each being 450 m<sup>2</sup> and worth the going lot price shown by comparable sales of between \$95,000 and \$110,000 per lot, the total value of the two lots being between \$190,000 and \$220,000. The land taken of some 140 m<sup>2</sup> would represent approximately 16% of the area of the lots and the loss would therefore average \$32,800. The Board dismisses this argument. The highest and best use of the property as determined by Mr. Pickett in his evidence is as a single family residence, albeit on a large lot. There was no evidence put before the Board to prove that the value of the existing residential property on a large lot was worth less than the value of the land as if subdivided into two lots with the house being torn down. Mr. Crosbie also argued that the two lots could be created and the residence kept as a back-lot development. Again, there was no evidence that such a contrived subdivision would have been approved by the Town or would be marketably feasible. Neither Mr. Crosbie, the Town representatives nor Mr. Pickett could cite cases where such a subdivision of an oversize lot had taken place. The likelihood of such a subdivision taking place is too remote for the consideration of the Board.

[38] A proposed alternative use must be one that has a reasonable probability of coming into being and a reasonable probability of affecting the current market value before it will be considered in setting compensation (*Lasade*, at para. 29). The Board's rejection of the Shutes' suggested alternative future use of the Strip is consistent with that requirement.

[39] The Board accepted the opinion of the Town's appraiser because there was no contrary evidence (Board Decision, at para. 54) and because the appraiser's evidence was "fair and grounded in reasonable assessments" (Board Decision, at para. 91).

[40] On appeal to the Supreme Court, the Shutes argued that the Board erred in fixing value because it relied on the appraiser's opinion that was flawed because the appraiser utilized the wrong HABU. The Shutes relied on a position regarding HABU that was different than the one they took before the Board. They argued that following the Board hearing, they had discovered that the expropriated strip of land could, in accordance with the Town Development Regulations, have been utilized as a structure building lot on which a utility or Town structure could have been built. If this HABU had been recognized, the Shutes say that the unit price value would

have been at the high end of neighbourhood sales for small building lots, or \$192 per square metre. This is the price which the Shutes say they would have demanded, and a utility would have paid, if the parties had been permitted to negotiate freely.

[41] The Town argued before the Supreme Court that this HABU position was a new argument and the Shutes ought not have been permitted to advance it on appeal, and further, that no evidence established that the use of the land as a structure building lot was physically possible, legally permissible, probable, marketable, financially feasible and maximally productive.

[42] The Supreme Court judge found:

[46] Aside from the proposition in the Shutes' appeal submissions that a designation as a structured building lot is permissible and that it is the highest and best use of the land, it is not clear that such a designation would attract a higher valuation in this circumstance. I am not satisfied that further evidence would not have been adduced by the Town had this argument been advanced before the Board.

...

[50] The Board, in arriving at its own opinion of market value, considered the evidence of the Appraiser and concluded that it was fair and based on reasonable grounds. It found that it could not see any reason why it should not accept the valuation of the land acquired and easement right taken as being \$8417. I find no reason to disturb the Board's conclusion in this regard.

[43] The Shutes made the same arguments regarding valuation to this Court as they had before the Supreme Court. I come to the same conclusions as the Supreme Court judge.

[44] The Shutes raised the argument regarding use of the property for a utility structure building lot for the first time on appeal to the Supreme Court. They did not adduce any evidence before the Board regarding this use, and they did not cross-examine the appraiser about this potential use. The Town says that it would have introduced evidence to address this argument if this alternative use had been raised before the Board.

[45] “Appellate courts sit in review of decisions made in trial courts. The requirement that issues be raised and adjudicated at trial before they will be considered on appeal is inherent in the appellate function” (*R. v. Reid*, 2021 NLCA

13, at para. 10). The question whether an appellate court should consider an argument raised for the first time on appeal was addressed by the Supreme Court of Canada in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678:

32 ...Unless the parties have fully addressed a factual issue at trial in the evidence, and preferably in argument for the benefit of the trial judge, there is always the very real danger that the appellate record will not contain all of the relevant facts, or the trial judge's view on some critical factual issue, or that an explanation that might have been offered in testimony by a party or one or more of its witnesses was never elicited. As Duff J. put it in *Lamb v. Kincaid* (1907), 38 S.C.R. 516 (S.C.C.), at p. 539:

A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.

[46] A party raising a new issue bears the burden to persuade the appellate court that all the evidence necessary to resolve the issue is in the record, and therefore the other side will not be prejudiced by considering the argument (*Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, at para. 23).

[47] The Shutes did not meet that burden. No evidence before the Board bore on the question whether this property could reasonably have been used as a structure building lot. As this point was not raised by the Shutes in the Board hearing, there was no evidence that related to the probability or marketability or financial feasibility or value of such a use or the sale of the property for such a use. The record on appeal does “not contain all of the relevant facts, or the trial judge's view on some critical factual issue, or that an explanation that might have been offered in testimony by a party or one or more of its witnesses was never elicited” (*Performance Industries*, at para. 32).

[48] Therefore, I would not entertain on appeal an argument that the Board erred in law in not considering that the Strip could have a future use as a structure building lot.

[49] The Board accepted the appraiser's evidence regarding HABU, the appropriate unit price value and the percentage factor to be applied to account for the Shutes' continued ownership of the property subject to the easement, and it fixed the compensation due to the Shutes based on that evidence. The Shutes have not

demonstrated any error by the Board in reaching its conclusion on valuation. I would therefore dismiss this ground of appeal.

***Issues 2 & 3: Did the Board err in awarding damages?***

[50] The Shutes told the Board that they claimed damages for disturbance, but not for injurious affection. The Board awarded the Shutes \$65,000 in damages. The Board stated that the award “is inclusive of the claim for (1) the value of the land and easement acquired, (2) the disturbance caused to the Shutes, and (3) all legal and professional costs incurred prior to the hearing” (Board Decision, at para. 117). The Board did not set out the amount of legal and professional costs claimed by the Shutes. Nevertheless, considering that the Board accepted the appraiser’s valuation of \$8,417, a substantial portion of the award must have been characterized as damages for disturbance which the Board said was intended to compensate for stress, anxiety, and delay, and bearing in mind the Shutes’ status of health (Board Decision, at para. 112).

[51] The Town appealed the award of disturbance damages to the Supreme Court, arguing that the Shutes were not entitled to disturbance damages at all because they had not been forced to relocate and, in the alternative, that disturbance damages are intended to compensate for economic loss and not for non-pecuniary damage such as stress, anxiety and non-economic consequences of delay.

[52] The Shutes also appealed this part of the award to the Supreme Court, on the following grounds. First, they said it was a mistake on their part to not claim damages for injurious affection before the Board. They realized after the fact that under *URPA*, disturbance is a form of injurious affection and a claim for disturbance is essentially a claim for injurious affection. This argument was based on *URPA*, section 70(2) which says that a Board may award damages “for the disturbance to the owner or occupier or for other injurious affection that is properly the subject of compensation.” Second, the Shutes argued that expropriation, injurious affection, and disturbance are all based on harm to real property. Therefore, analogy to tort damages should shape claims for such harm (ordinarily sought in tort, specifically in trespass, nuisance, and negligence) arising from expropriation. Based on those arguments, the Shutes had maintained before the Supreme Court that the Board had erred in making a global compensation award, and that in respect of damages for injurious affection or disturbance, they ought to have been awarded \$35,500. They referred to tort and breach of “peace of mind” contract cases in support of this amount. Their claim was based in the stress, anxiety and delay related to the

expropriation process and the work completed by the Town on their driveway, retaining wall and curb.

[53] The Supreme Court judge allowed the Town's appeal from the disturbance damages portion of the Board's award, finding that it was based on an error of law:

[86] The Board noted the lack of evidence offered by the Shutes to quantify the disturbance claim and acknowledged that there was no objective basis in the evidence to assess a claim for disturbance.

[87] What the Board said they were compensating for was not items of the type described by *Todd* as compensable claims for disturbance; rather, the Board compensated the Shutes for stress, anxiety, disturbance and interference that the Shutes went through. These are not elements of economic loss as contemplated by subsection 70(2) of the Act.

[88] Awarding disturbance damages for the reasons articulated by the Board is an error of law. Accordingly, the component of the Board's \$65,000 award that relates to disturbance damages must be set aside.

[54] The Shutes appealed to this Court. They repeated the same arguments that they had made to the Supreme Court, but they also again raised new arguments.

[55] The Shutes' claim, as presented in this Court, has essentially three components that each require different analysis. First, they say that although the Board was wrong to make an all-inclusive, rolled-up award for disturbance, legal costs and lost value of the land, they maintain that the Board was correct in awarding them damages for stress, anxiety and delay. Second, they say that their claim for disturbance should properly have been considered to have included a claim for injurious affection and that they should have been compensated because the easement rights expropriated from them allowed the utility to erect transformers, towers and other equipment, that the ditch placed along their frontage made the land between the wall and the road difficult to maintain, and that their remaining land was consequently made overall less desirable. Third, they appeal the Board's denial of their claim for severance damages resulting from the new retaining wall having "orphaned" their land between the wall and the roadway. They combined all these arguments under the heading of "consequential damages".

[56] The Shutes argued that their claim for "disturbance/injurious affection" should have been valued at \$79,825. They relied in this Court on the same tort and

contract cases they relied on before the Supreme Court. They also continued to maintain that the severance claim should have been valued based on the position that the orphaned land had lost all market value and therefore they should be compensated as if the fee simple had been taken from them. They valued this land at \$192 per square metre or \$9,212.

### **The Shutes Did Not Establish a Claim for Disturbance**

[57] The Shutes presented their claim to the Board as disturbance damages. Pursuant to section 70(1)(a), disturbance is not to be considered in establishing the fair market value of expropriated land. However, “disturbance that is properly subject of compensation” is an element of statutory compensation under section 70(2). Disturbance is not defined in *URPA*. Whether disturbance is properly the subject of compensation has been considered by the case law. The holding of these cases is summed up by *Todd*, at page 274: “Disturbance damage may be defined generally as economic loss suffered by an owner by reason of having to vacate expropriated property.”

[58] There are thus two conditions that must be satisfied to establish an entitlement to disturbance loss: relocation and ensuing economic loss that “can accurately be described as the natural and reasonable consequences of an expropriation” (*Dell Holdings Ltd.*, at para. 27). In this case, the Shutes were not required to relocate, and they did not demonstrate any economic loss. It was an error for the Board to award them disturbance damages.

### **The Shutes Did Not Establish a Claim for Injurious Affection**

[59] In this Court, the Shutes advanced a claim for injurious affection and argued that they should have been compensated because the expropriated easement rights resulted in their land being less desirable because the utility could erect transformers, towers and other equipment, and because the ditch placed along their frontage made the land between the wall and the road difficult to maintain.

[60] “Injurious affection occurs when the defendant's activities interfere with the claimant's use or enjoyment of land. Such interference may occur where a portion of an owner's land is expropriated with negative effects on the value of the remaining property. Alternatively, it may arise where, although no land is expropriated, the lawful activities of a statutory authority on one piece of land interfere with the use

or enjoyment of another property...” (*Antrim Truck Centre Ltd v. Ontario (Transportation)*, 2013 SCC 13, [2013] 1 S.C.R. 594, at para. 4).

[61] Injurious affection can occur in one of three ways (*Todd*, at 331-333): 1) partial taking, where the land remaining to the owner is rendered less valuable as a result of being separated from the expropriated portion (“severance”); 2) partial taking, where the remaining land is rendered less valuable because of the authority’s actual or intended use of the expropriated land (“pure injurious affection”); or 3) where no land is taken but the land is rendered less valuable because of the activities of the authority (“constructive expropriation”). The first two types of expropriation are in issue on this appeal.

### **The Claim for Injurious Affection by Partial Taking (Severance)**

[62] The Shutes told the Board that they were not seeking damages for injurious affection except for severance damages related to “orphaned land” (Appeal Book, Vol. 12, Tab 31, Transcript, January 24, 2019, at p. 263-265). A claim for severance is, as *Todd* described it at page 331, a claim for partial taking, where the land remaining to the owner is rendered less valuable because it was separated from the expropriated portion.

[63] The Shutes alleged that the land between the reconstructed retaining wall and their property boundary was severed and had therefore lost all value. The Board found that that part of the land was “orphaned” before the expropriation. The Board also accepted that the evidence showed that the Town had presented the Shutes with options as to where to rebuild the retaining wall, and the Shutes chose to have it follow a straight line rather than track their property line. The Board also found that the land outside the retaining wall had no marketable value in any event because it was entirely within the setback. The Board denied severance damages and the Supreme Court judge, at paragraphs 53-59, dismissed the appeal on that point.

[64] I agree with the Supreme Court judge. The claim is not an injurious affection claim. The land was not severed by expropriation, but by the placement of the new retaining wall built by the Town as part of its undertaking. The new wall was placed by agreement between the parties. Development of the land outside the retaining wall was prohibited by the setback regulations and therefore, according to the evidence before the Board, had no real marketable value. It was as suitable for use after the placement of the new wall as it was before that (Board Decision, at para. 85). The Shutes testified that the severed land was more difficult to maintain than it

was before, but this was because of a ditch added to the front of the property, and not because of the placement of the wall. The Shutes did not introduce any evidence before the Board to demonstrate that the placement of the retaining wall detrimentally affected the value of either their remaining land or the value of the orphaned land.

[65] The Board did not err by denying the Shutes' severance claim.

### **The Claim for Injurious Affection by Partial Taking (Pure Injurious Affection)**

[66] There have been power lines and poles on and over the Strip since before the Shutes bought their land. The Shutes, however, claim that the easement expropriated from them allows the utility to build structures and equipment which would cause a greater detrimental effect on the value of their remaining land. This is a claim for pure injurious affection. It is an entirely new claim presented in this Court for the first time. Not only is it presented for the first time, but the Shutes, through their experienced counsel, had made clear in their correspondence with the Town, and then confirmed to the Board, that they were not claiming for it (Appeal Book, Vol. 12, Tab 31, Transcript, January 24, 2019, at p. 263-265; Respondent's Supplemental Appeal Book, Transcript, January 28, 2019, at p. 45, 65). The appraiser's report and testimony considered only injurious affection from the road work (Appeal Book, Vol. 12, Tab 31, Transcript, January 24, 2019, at p. 257-259). In this regard, the Board noted the appraiser's evidence that there "was no measurable injurious affection" (Board Decision, at para. 39). The Board also "determined that the front of the Shutes' property is as useful or as superfluous as it was before the expropriation governed by the same Town regulations with respect to set backs and function" (Board Decision, at para. 65). The Shutes did not present any evidence to support their position that their remaining land lost value because of the expropriated easement and, because they did not make such a claim, the Town did not have opportunity to address it with evidence and argument to the contrary. The Shutes cannot advance that claim on appeal.

### **The Claim for Damages for Stress, Anxiety and Delay**

[67] In their submissions to the Board, the Shutes based their claim for stress, anxiety and delay in disturbance. In their arguments before this Court, the Shutes based their claim for non-pecuniary damages on injurious affection. The Shutes did not establish the conditions necessary for a compensation award for either

disturbance or injurious affection, and their appeal on this issue can be dismissed on that basis.

[68] I also agree with the Supreme Court judge that non-pecuniary damages are not available under the statutory compensation scheme set out in *URPA*.

[69] I agree with the rationale set out by the Law Reform Commission of British Columbia in its *1971 Report on Expropriation*, cited by the British Columbia Court of Appeal in *Patterson v. British Columbia (Ministry of Transportation and Highways)*, 1997 CanLII 4109 (BCCA) at paragraph 44, in coming to its conclusion that “personal losses” for injurious affection with partial taking provided for in the British Columbia *Expropriation Act*, SBC 1987, c. 23, section 39, did not include personal injuries or health effects caused by public works:

These kinds of circumstances tempt a suggestion that expropriated owners should be entitled to something more than economic loss. There are, however, other factors which in the view of the Commission outweigh the desirability of making a general provision of that sort. First, emotional distress and sentimental value are simply not capable of measurement in terms of dollars. Second, these elements will be different in every case and it would be a virtually impossible task to judge each case on its merits. A flat percentage added on to market value would be preferable from an administrative point of view, but it would result in giving compensation without regard to the position of the individual claimant and, no doubt in some cases, where there was no loss of this kind at all. Finally, the ultimate source of whatever compensation is payable by public expropriating authorities is the taxpayer. It is arguable, at least, that he will carry a sufficient burden if he provides for full economic reinstatement.

[70] Unless the expropriation statute provides for it, or controlling or persuasive authority supports it, I would not extend compensation for expropriation to cover losses for stress, anxiety or health effects. As outlined below, neither circumstance exists in this case.

[71] An amount may be awarded under *URPA*, section 70(2) “for the disturbance to the owner or occupier or for other injurious affection that is properly the subject of compensation.” Neither disturbance nor injurious affection is defined in *URPA*. The criteria for determining whether disturbance or injurious affection is properly the subject of compensation must therefore be determined by factors external to the Act. The legislature was clearly importing the law regarding compensation for disturbance and for injurious affection as it had developed at the time the predecessor legislation was passed, with the same wording as the current section 70(2), in 1953 (*Urban and Rural Planning Act*, SN 1953, No. 27, s. 44 (3)).

[72] The common law at the time the predecessor legislation was passed does not support the Shutes' position that compensation for disturbance ought to reflect the same principles as compensation for trespass or nuisance. In the leading English Court of Appeal case of *Horn*, Lord Justice Scott noted, at page 46, his "doubt [of] the completeness of the analogy of damages for trespass". In *Horn* (at 49) the Court also confirmed that damages for disturbance should only be awarded for "personal loss imposed by the owner by the forced sale, whether it be the cost of preparing the land for the best market then available, or incidental loss in connection with the business he has been carrying on, or the cost of reinstatement, because otherwise he will not be fully compensated."

[73] The view that compensation for disturbance is only for economic losses is reflected in the case law since that time. For instance, in *Kirby v. Portugal Cove (Municipality)*, 1989 CanLII 3960 (NLCA) this Court described disturbance damages as encompassing:

36 ...The prime expense of course is the expense of moving. It cannot be assumed that the removal of chattels from the expropriated property will coincide with the acquisition of new premises. Chattels will usually have to be removed to storage and moved again when new premises are acquired. Storage charges may be encountered. Legal expenses are involved in the acquisition of new premises. The time of the owner in attending to these matters is not to be ignored.

[74] The Shutes did not cite any Canadian case where non-pecuniary damages for disturbance have been awarded. This is not surprising, for the reason explained by the Nova Scotia Court of Appeal in *Atlantic Mining NS Corp. (D.D.V. Gold Limited) v. Oakley*, 2019 NSCA 14, at paragraph 17 (leave to appeal to SCC refused, 38620 (24 October 2019)): "No Canadian court or tribunal has interpreted disturbance "losses" as non-pecuniary." In *Atlantic Mining*, the Court overturned an award of non-pecuniary disturbance damages and adopted the statement from the authors of *The Law of Expropriation and Compensation in Canada* that "Disturbance damages may be defined generally as **personal economic loss** suffered by an owner by reason of his having to vacate the expropriated property." (*Todd*, at 274). The Manitoba Court of Appeal also adopted this definition in *Houle v. Manitoba*, 2016 MBCA 76, at paragraph 28.

[75] Cases such as *Kirby*, and *Drew v. The Queen*, [1961] S.C.R. 614, in which awards for disturbance calculated as a percentage of the value of expropriated land where losses are not easily calculated, do not help the Shutes. The losses

compensated by the percentage awards in those cases were still economic losses, and not losses of the nature for which the Shutes claim compensation.

[76] The Shutes also rely on a decision of the Nova Scotia Utility and Review Board in *Partridge, Re*, 2019 NSUARB 108. In *Partridge*, the Nova Scotia Board acknowledged that *Atlantic Mining* had determined that a claim for non-pecuniary damages was not available as compensation for disturbance but found that a claim for injurious affection was contextually different than a claim for disturbance. The Board awarded damages for the disruptive effects of noise and fumes on the basis that “non-pecuniary type awards for injurious affection grounded in a loss of use and enjoyment of property are available to the Claimants.” In coming to that conclusion, the Board said the following:

283 The reconciliation comes from the specific purpose which the modern injurious affection provisions which follow the Ontario and Nova Scotia models are meant to address.

284 Firstly, unlike costs, expenses and losses arising from a disturbance, no expropriation need take place at all for an owner to have a potential claim for injurious affection. It is therefore clear the injurious affection provisions are more expansive than disturbance damages.

285 Secondly, the types of activities which give rise to injurious affection, particularly as they relate to a situation with no taking, are limited by express language. By contrast, the word "damages" has a more expansive meaning than the word "losses", found in the injurious affection provisions of British Columbia legislation and the disturbance provisions of the *Expropriation Act*.

286 Thirdly, the use of the words "...as the statutory authority would be liable for if the construction were not under the authority of a statute..." has been interpreted to mean that private nuisance law was incorporated in the *Expropriation Act*, and similar Ontario legislation.

287 Fourthly, private nuisance law recognizes granting non-pecuniary damages for interference with the use and enjoyment of property. Personal bodily harm is specifically discussed in *Antrim*.

288 In this context, injurious affection is meant to provide claimants with similar remedies as others who suffer nuisance, provided the claim is grounded in property ownership, and relates to the loss of use and enjoyment of that property, subject to the spatial limitations created by the *Edwards Rule* where there is a taking. In this sense,

the proprietary aspect of the *Expropriation Act* discussed in *Atlantic Mining* is maintained.

289 This approach would be consistent with the approach to statutory interpretation of expropriation legislation discussed in *Dell Holdings*. The Board has therefore decided non-pecuniary type awards for injurious affection grounded in a loss of use and enjoyment of property are available to the Claimants.

[77] The Board in *Partridge* interpreted the *Expropriation Act*, RSNS 1989, c. 156, which defined injurious affection from a partial taking to mean:

3(1)(h) “**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, ...

[78] The Board noted that the statutory language providing for the assessment of damages for injurious affection with partial taking was similar to the statutory provision for compensation with no taking that was interpreted and applied by the Supreme Court in *Antrim*. In *Antrim*, the Supreme Court described the statute under consideration:

5 The Ontario *Expropriations Act*, R.S.O. 1990, c. E.26, provides a right to compensation for injurious affection on certain conditions: s. 21. Where none of the claimant's land is expropriated, the Act provides a right to compensation for "such reduction in the market value of the land to the owner, and ... 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": s. 1(1). Thus, in order to recover under the Act, the claimant has to meet these three statutory requirements, which are often referred to as the requirements of "statutory authority", "actionability" and "construction and not the use". These requirements mean that (i) the damage must result from action taken under statutory authority; (ii) the action would give rise to liability but for that statutory authority; and (iii) the damage must result from the construction and not the use of the works. Where these conditions are present, the Act requires that the complainant be compensated for the amount by which the affected

land's market value was reduced because of the interference, and for personal and business damages: ss. 1(1) and 21.

[79] The Board decision in *Partridge* was upheld by the Nova Scotia Court of Appeal in *Partridge v. Nova Scotia (Attorney General)*, 2021 NSCA 60. The Court of Appeal agreed with the decision of the Board that the statutory remedy in the *Expropriation Act*, RSNS 1989, c. 156, section 3(1)(h), replaced the common law remedy of nuisance.

[80] *URPA* does not use similar language to describe the compensation due on a partial taking.

[81] In *His Majesty the King in Right of Newfoundland and Labrador v. O.D. Holdings Limited and City Sand and Gravel Limited*, 2022 NLCA 60, this Court applied *Antrim* to a case of constructive expropriation, the third form of injurious affection described by *Todd* as occurring where no land is taken but the land is rendered less valuable because of the activities of the authority (*Todd*, at 331-333). In *O.D. Holdings*, the Court accepted *Antrim* as authority for the proposition that damages for constructive expropriation should be assessed on the same basis as damages for the tort of private nuisance. The Court noted at paragraph 33 that the “PUB concluded that although *Antrim* had not previously been relied upon in this province to interpret the *Act*, it nevertheless adopted historic principles that had been applied to constructive expropriation claims in Newfoundland and Labrador”, and that the parties accepted that *Antrim* stated the correct test in importing the principles of the law of private nuisance into the assessment in this province of damages for constructive expropriation. Indeed, that was the holding of this Court in *Newfoundland (Minister of Works, Services and Transportation) v. Airport Realty Ltd.*, 2001 NFCA 45, which in turn relied for that proposition on the decision of the Supreme Court of Canada in *The Queen v. Loiselle*, [1962] S.C.R. 624.

[82] However, *Antrim*, *O.D. Holdings*, *Airport Realty* and *Loiselle* were all cases involving compensation for constructive expropriation and the approach to the assessment of compensation in those cases has no application to this case. As *Todd* explains at page 368, the entitlement to compensation for injurious affection where no land is taken “has nothing to do with the law of expropriation...compensation is substituted for damages at law to which the landowner would have been entitled had enabling legislation not authorized the construction and use of the particular public work”. Therefore, at page 334, *Todd* says it follows that a claim for constructive expropriation “should only succeed if, but for the statute authorizing the works, it would have succeeded as a claim for damages at law....” A claim for compensation

for the deleterious effects of government activity, where no land is taken, is conceptually different than a claim where some land is taken. The principles of compensation in one situation are not applicable in the other.

[83] I would therefore dismiss the Shutes' appeal from the decision of the Supreme Court to deny the severance claim, and to overturn the Board award for non-pecuniary damages for stress, anxiety and delay.

***Issue 4: Did the Board err in its costs award?***

[84] The Board's costs award had two components: pre-hearing and hearing costs.

[85] The Board's global award of \$65,000 included an undifferentiated amount to compensate for all legal and professional costs incurred by the Shutes prior to the hearing. The Supreme Court ordered that the Town pay the Shutes their reasonable pre-hearing costs taxed on a solicitor-client basis. No appeal is taken to this Court from that decision.

[86] The Board awarded the Shutes costs for the hearing taxed on a party and party basis. The Shutes appealed that order, arguing that the Board should have awarded hearing costs on a solicitor-client basis. The Supreme Court found that the Board had the authority to award costs on a solicitor-client basis but did not overturn the Board decision to award costs on a party and party basis. The Shutes appeal to this Court from that decision and argue that they ought to have been awarded hearing costs on a solicitor-client basis.

[87] The Town appealed the award of hearing costs and argued that the Town, and not the Shutes, ought to have been awarded costs of the Board hearing. The Town based its position on *URPA*, section 77(2), and on the history of offers and counteroffers between the parties leading up to the hearing.

[88] *URPA*, section 77(2) reads as follows:

77(2) Where the compensation awarded by a board is greater than the sum which the minister, council or regional authority offered in writing for the land that was expropriated or injuriously affected, the minister, council or regional authority shall pay the costs and expenses of the hearing before the board and the fees of the board provided for in this Part but, where the compensation awarded does not exceed the sum offered, the person who refused the offer shall pay those costs, expenses and fees, and where, in respect of land expropriated or injuriously affected, no sum was offered

before expropriation, those costs, expenses and fees shall be paid by the party designated by the board.

[89] The history of negotiations between the parties was recounted by the Supreme Court judge at paragraph 16:

[16] The history of the protracted and unsuccessful negotiations prior to the hearing before the Board may be summarized as follows:

- Before the Notice of Abandonment, the Town offered \$12,206.32, the appraised value of the Strip, in addition to remediation infrastructure work that was required.
- The Shutes counter-offered at \$99,710.46 plus indemnification of professional fees and disbursements.
- The Town offered \$65,000 including professional fees and disbursements.
- The Shutes counter-offered at \$130,000 including professional fees and disbursements.
- The Town offered \$75,000 including professional fees and disbursements.
- The Shutes counter-offered with \$110,000 including professional fees and disbursements.
- The Town then executed the Notice of Abandonment and offered \$35,900.
- The Shutes counter-offered at \$84,130 plus professional fees which were estimated to be \$35,424.

[90] The Supreme Court judge decided that the operative offer for the purposes of considering the application of section 77(2) was \$35,900. I agree with his decision. The Town abandoned the fee simple in most of the Strip and expropriated only an easement over that area. The Town offers before that time were predicated on expropriation of the fee simple interest in the Strip and were no longer relevant.

[91] The Supreme Court judge dismissed the Town appeal of hearing costs:

[105] While we know that the Board accepted that \$8,417 as a value of the land, we do not know how much the Board had incorrectly awarded for disturbance damages.

Nor do we know how much of the award allowed for the Shutes' prehearing legal fees and expenses.

[106] We do not know how much the Shutes will be awarded on taxation until their pre-hearing costs are taxed, however, we know from the Record that Mr. Crosbie's legal fees as of October 20, 2017 were estimated to be \$35,425 (Record, Tab 48). The Shutes' pre-hearing fees together with the \$8,417 plus interest awarded for the expropriation is greater than the Town's offer of \$35,900.

[107] Accordingly, pursuant to subsection 77(2) of the Act, the Shutes are entitled to their costs and expenses before the Board. As a result, the Board's Decision awarding the hearing costs to the Shutes is upheld.

[92] The Town did not appeal from that decision.

[93] Therefore, the only appeal before this Court regarding the award of hearing costs is the Shutes' appeal, on the basis that they ought to have been awarded solicitor-client, and not party and party, hearing costs.

[94] The Board decided at paragraph 55 that it did not have express authority under *URPA* to award solicitor-client costs and that section 77(1) required that costs, if awarded, be taxed on a party and party basis. *URPA*, section 77(1) provides as follows:

77. (1) The board may award costs with respect to a hearing before it under this Act but the costs shall be taxed by a taxing officer of the Trial Division in accordance with the scale of costs in the *Rules of the Supreme Court, 1986*

[95] The Supreme Court judge decided:

[95] Section 77 does not require costs to be on a party and party basis nor does it preclude the award of solicitor and client costs.

[96] In *Lynch 2020*, our Court of Appeal has given guidance on the interpretation of s. 34(1) of the Expropriation Act. That provision provides that:

34. (1) The board may award costs in respect of a hearing before it under this Act, but the costs shall be taxed by a taxing officer of the Supreme Court in accordance with the scale in the Appendix to Rule 55 of the Rules of the Supreme Court, 1986.

[97] The Court of Appeal noted that while s. 34(1) refers to taxation of costs “in accordance with” a specified scale relating to party and party costs, the task of assessment was to be informed by the factors listed in rule 55.15 of the *Rules of the Supreme Court, 1986*, S.N.L., 1986, c. 42 Sch. D. The Court of Appeal stated that this suggests that the possibility exists of awarding solicitor and own client costs in expropriation proceedings. Therefore, the same possibility exists under section 77 of the *Act*.

[96] The Supreme Court judge relied on that reasoning to uphold the Board award of pre-hearing costs to the Shutes on a solicitor-client basis. However, he also upheld the Board’s decision to award only party and party costs to the Shutes for the hearing without consideration of whether the Board’s misapprehension of its lack of authority to award solicitor-client costs informed the basis for its award of hearing costs.

[97] In opposing the Shutes’ appeal to this Court from the award of hearing costs on a party and party scale, the Town relied on arguments similar to the section 77(2) arguments that it advanced in support of its own costs appeal before the Supreme Court. It argued that the Shutes’ position throughout negotiations was unreasonable, and that this kind of bargaining should not be encouraged by the extension of full costs indemnity. The Town also argued that most of the Board hearing time was taken up with the Shutes’ claims related to their non-pecuniary losses that the Board ought not have entertained.

[98] This Court has previously endorsed the view that “expropriated property owners should be sufficiently funded in order to make an expropriation claim and to present their case at an expropriation hearing” and that this principle of full compensation ought to “animate the exercise of discretion” in a Board’s decision regarding costs (*Lynch v. St. John’s (City)*, 2020 NLCA 31, at paras. 91-92). In most cases, the principle of full compensation should result in the award of full indemnity costs of a Board hearing. Further, this Court has also noted that the assessment of costs in an expropriation hearing is not necessarily the same as in a court proceeding. Board hearing costs should take into account that expropriated owners should not be deterred from seeking legal advice and therefore that a lack of success on a particular argument or position in a Board hearing does not preclude the award of full compensation for legal costs (*Bartlett v. Corner Brook (City)*, 2004 NLCA 50, at paras. 22-24).

[99] However, although the Board has the jurisdiction to award full indemnity costs for the hearing before it, this does not mean that it must do so in all cases. In

*Lynch (2020)*, this Court, at paragraph 170, endorsed the following statement of the law in *Manitoba v. Russell Inns Ltd. et al.*, 2013 MBCA 46:

In determining whether to grant that application, the administrative tribunal would be guided by the principles applicable to expropriation proceedings and the applicable law, including the presumption of full indemnification, who had initiated the incidental proceedings, the nature of those proceedings, and whether they were necessary, and the requirement in s. 15(6) that the costs and expenses be both reasonable and reasonably incurred.

[100] In a similar vein, this Court in *Roberts v. Newfoundland and Labrador (Minister of Transportation and Works)*, 2005 NLCA 26, at paragraph 62, held that although a claim for legal costs in connection with an expropriation hearing is subject to the presumption of full indemnity, that presumption must be “tempered by the requirement of reasonableness”.

[101] In this case, the Board noted, at paragraph 57, that it was “cognizant of and has taken into account the settlement offers exchanged”.

[102] I would not disturb the Board award of hearing costs on a party and party scale, and I would dismiss the Shutes’ appeal on this ground.

### **Did the Supreme Court err in its costs award?**

[103] The Supreme Court decided that the parties should bear their own costs in that court because each was partially successful. The Shutes appeal from that decision. They argue that the presumption of full indemnity for an expropriated owner continues through appeals to the Supreme Court and this Court, and that this presumption applies regardless of the outcome of the appeals.

[104] The Shutes’ position is contradicted by the *URPA*, section 75(5) and (6). Section 75(5) provides both the landowner and expropriating authority a right of appeal from a Board award; section 75(6) says that costs on appeal “may be awarded by the court for or against the minister, council, regional authority or owner of land that has been expropriated”. That provision preserves the discretion of the court in respect of costs on appeals from Board decisions.

[105] The discretion of the court is also not limited by the principle of full indemnity for expropriated owners before the Board as that “is an entirely different standard and rationale for indemnifying against costs than is applicable in this Court” (*Lynch*

(2020), at para. 180), although the principle underlying the presumption of full indemnity can in an appropriate case be a consideration for the court in exercising its discretion.

[106] I would not disturb the decision of the Supreme Court judge to order that each of the parties bear their own costs in that court, and I would dismiss the Shutes' appeal on this ground.

### **Costs in this Court**

[107] The Town has been successful in this appeal. It should have its costs in this Court. The only question remaining is the scale of costs that it ought to be awarded.

[108] The *Court of Appeal Rules*, NLR 38/16 respecting costs provide:

58(4) The Court may award costs in accordance with any column or combination of columns under the scale of costs, and in exercising its discretion for this purpose, the Court may consider

- (a) the amounts claimed and the amounts recovered;
- (b) the importance of the issues;
- (c) the complexity, difficulty or novelty of the issues;
- (d) the manner in which the proceeding was conducted, including any conduct that tended to shorten or unnecessarily lengthen the duration of the matter;
- (e) the failure by a party to admit anything that should have been admitted;
- (f) seniority of counsel at the bar;
- (g) fair payment for the work of a person acting on his or her own behalf; and
- (h) any other relevant matter.

[109] The Town seeks costs on Column 5 for the appeal because the Shutes' approach to the entire expropriation process, including appeals, has unduly complicated the process and extended the time required to resolve it. The Town says

that the Shutes' unrealistic and frequently shifting positions have resulted in it taking 11 years to resolve a straightforward expropriation involving a small strip of land.

[110] I agree that the Shutes' position throughout this process has been out of proportion to the issues and money at stake. The Town set out in 2013 to expropriate a small strip of land for possible use by the electrical utility. Power lines and poles were already in place over this Strip, and it turns out there was already a registered easement limiting the Shutes' rights over it. Even before the expropriation process, the Shutes were prohibited from developing the Strip because it was within the setback area. The expropriation did not reduce the value of either the Strip or the Shutes' remaining land. The Town provided the Shutes with a new retaining wall, a new 70-foot driveway and new concrete curb. Although the work to accomplish this was delayed, these improvements were not strictly required to effect the expropriation. It seems that the Shutes gained far more than they lost. The Shutes' position regarding the compensation they were due was unreasonable throughout negotiations.

[111] The Shutes made arguments before the Supreme Court that they had not made before the Board, and arguments in this Court that they had not made before the Supreme Court. The value of the claim they advanced shifted as well. Before the Supreme Court they sought \$44,712 in consequential damages; before this Court they asserted consequential damages of \$79,825. The Town was required to address these shifting positions.

[112] The Shutes' filings in this Court were not only considerably disproportionate to the stakes of the litigation but contravened the *Court of Appeal Rules*, rule 53, which requires that a Factum include a concise Statement of Facts and no more than 40 pages of argument, without authorization. The Shutes' Factum was a total of 116 pages and included a 73-page Statement of Facts. The Statement of Facts in the Shutes' Factum went well beyond stating facts and included significant argument and multiple references to case law and other authorities. The Statement of Facts also did not make any reference to the sources of the facts in the record, and included some assertions that did not have any evidentiary basis in the record.

[113] Therefore, with particular regard to proportionality and the manner in which this proceeding was conducted, in accordance with rule 58(4)(a) to (d) of the *Court of Appeal Rules*, I would award costs in this Court to the Town, to be taxed on Column 5.

**DISPOSITION**

[114] I would dismiss the appeal with costs to the Town to be taxed on Column 5.

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D.M. Boone J.A.

**I concur :** \_\_\_\_\_

D.E. Fry C.J.N.L.

**I concur :** \_\_\_\_\_

W.H. Goodridge J.A.