IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *His Majesty the King in Right of Newfoundland and Labrador v. O.D. Holdings Limited and City Sand and Gravel Limited*, 2022 NLCA 60
Date: November 8, 2022
Docket Number: 202101H0032

BETWEEN:

HIS MAJESTY THE KING IN RIGHT
OF NEWFOUNDLAND AND LABRADOR

APPELLANT

AND:

O.D. HOLDINGS LIMITED and CITY
SAND AND GRAVEL LIMITED

RESPONDENTS

Coram: Hoegg, Butler and Knickle JJ.A.

Tribunal Appealed From: Newfoundland and Labrador (Board of Public Utilities)

Appeal Heard: January 26 and 27, 2022
Judgment Rendered: November 8, 2022

Reasons for Judgment by: Butler J.A.
Concurred in by: Hoegg and Knickle JJ.A.

Counsel for the Appellant: Donald E. Anthony K.C. and Eugene Chao
Counsel for the Respondents: Ian F. Kelly K.C. and Daniel M. Glover

CASES CITED: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Lynch v. St. John's (City)*, 2020 NLCA 31; *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, [2013] 1 S.C.R. 594; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201; *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670; *Newfoundland (Minister of Works, Services, and Transportation) v. Airport Realty Ltd.*, 2001 NFCA 45, 205 Nfld. & P.E.I.R. 95; *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, [2012] 2 S.C.R. 675; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32; *Cunningham v. Wheeler; Cooper v. Miller; Shanks v. McNee*, [1994] 1 S.C.R. 359; *Medoc Properties Limited v. Standard Trust Company*, 2014 NLCA 13, 346 Nfld. & P.E.I.R. 348.

STATUTES CONSIDERED: *Expropriation Act*, RSNL 1990, c. E-19, sections 32(5), 17(1), 19(1), 27(1), 27(2), 34(1).

RULES CONSIDERED: *Court of Appeal Rules*, NLR 38/16, rule 58(4).

ORDERS CONSIDERED: *Her Majesty in Right of Newfoundland and Labrador as represented by the Honourable Minister of Works, Service and Transportation*, (28 April 2021), EA1, online: PUB<pub.nf.ca/orders/exp2021full.htm>.

Butler J.A.:

INTRODUCTION

[1] This appeal addresses the legal principles applicable to a claim of detrimental affection and related damages. The Newfoundland and Labrador Board of Commissioners of Public Utilities ("the PUB") allowed the Respondents' claim and ordered damages in the amount of $10,139,196.66 plus interest and costs. The order arose from the Appellant's expropriation of land from the Respondents for the construction of the Outer Ring Road ("ORR") in Paradise, Newfoundland and Labrador. The Appellant seeks to set aside the PUB's decision.

[2] The term "detrimental affection" referenced in the *Expropriation Act*, RSNL 1990, c. E-19 (“the *Act*”) has the same meaning as the term "injurious affection" used in some expropriation statutes of other jurisdictions and the jurisprudence. While the two terms are interchangeable, the term "detrimental affection" is used primarily in this decision.

BACKGROUND

[3] The Respondents are, respectively, the owner and operator of a quarry in Paradise, NL (the “Quarry”). Operations at the Quarry were subject to the conditions contained in a series of leases issued by the Provincial Department of Mines and Energy.

[4] In 1994, the Provincial Department of Transportation and Works (“DTW”) commissioned a report from Vibration Assessment Limited to determine what effect the construction of the contemplated ORR would have on the Respondents’ Quarry operations (the “Yan Report”).

[5] The Yan Report concluded that no changes or modifications to the Respondents’ existing drilling and blasting operations would be necessary to accommodate the ORR and that only intermittent road closures would be required.

[6] Relying upon the Yan Report, in 1995-96 the Appellant expropriated property from the Respondents for the construction of the ORR. At its closest point the proposed ORR was located approximately 40 metres from the Quarry.

[7] As the Appellant explained in its factum at paragraph 6, “quarry operations take place in phases or ‘lifts’, whereby an extraction site is created by blasting and drilling. At the time of the expropriation, the Respondents were in the first lift, and anticipated a second lift in their development plans.”

[8] The Respondents were concerned that the ORR *would* adversely affect their Quarry operations. They advised DTW’s counsel on March 12, 1997 that the most significant part of their claim associated with the expropriation could be for detrimental affection and loss of business. In response DTW maintained that the Respondents would not have to change their drilling and blasting operations because of the ORR.

[9] In July 1998, a blast at the Quarry resulted in a flyrock incident causing some damage in a subdivision development in close proximity to the Quarry.

Operations were suspended and did not resume until July 1999 with a revised blasting pattern approved by the Appellant.

[10] Between 2005 and 2008 the Respondents worked with the Appellant's Quarries Branch for the renewal of the Quarry lease. This included the Respondents' development plan for the second lift prepared by Jacques Whitford Consulting Engineers. The plan was to sequentially quarry the second lift from front to back. Quarries Branch approved the development plan for the second lift and renewed the Quarry lease in 2008.

[11] In 2010, in preparation for the second lift, the Respondents engaged Newfoundland Hard-Rok ("Hard-Rok") to consider various options to protect the ORR from the risk of flyrock. Hard-Rok recommended that all development and production blasts within 100 metres of the ORR be covered with heavy duty rubber tire blasting mats which had never previously been utilized at the Quarry and which would result in significant additional costs.

[12] By letter dated February 25, 2011, Quarries Branch imposed conditions to be met during blasting for the second lift, including that "DTW requires that blasting mats are used in such a way as to prevent the blast from damaging DTW infrastructure." This condition was contained in Quarries Branch's final approval for the blasting plan on June 3, 2011.

[13] The additional costs associated with the use of blasting mats was confirmed by the Appellant's experts (RESPEC) and the Director of the Quarries Branch. This led to discussions with the town of Paradise regarding the possibility of quarrying adjoining lands owned by the Appellant instead of proceeding with the second lift on the Respondents' land. A tentative agreement reached between the parties in 2012 was subject to development approvals from both the town of Paradise and the City of St. John's. These approvals were pursued between 2012 and 2017 but were not attainable.

[14] Meanwhile, between 2011 and 2014, the Respondents tried to maintain the Quarry operations. In the fall of 2012 they began blasting for the second lift with the use of blasting mats while discussions continued with the town of Paradise. However, this resulted in repeated road closures, public complaints and a recognition by the Respondents that the cost and difficulty of using blasting mats exceeded what they expected.

[15] The last blast at the Quarry took place in November 2014. By 2018 existing stockpiles of aggregate materials were exhausted. The Quarry ceased

operations in October 2018 when the Respondents concluded that it was uneconomic to quarry the second lift with the Appellant's requirement to use blasting mats as the cost of quarry operations would be three times the costs of normal quarry operations.

[16] The matter was initially referred to the PUB by the Appellant in January 2000 and the Respondents' claim for compensation was partially resolved by a Settlement Agreement dated May 29, 2000. However, the Settlement Agreement did not release "… any claims by the Claimants for injuries or detrimental affection to the remaining area containing approximately 48 acres owned by the Claimants on Topsail Road, which lands contain a quarry operated by the Claimants pursuant to the Department of Mines and Energy Quarry Lease No. 358 and an asphalt plant." (PUB Order No. E.A.1 (2021), at page 1).

[17] On October 25, 2018 the Respondents filed an application with the PUB asking it to determine the compensation payable to them for their detrimental affection claim. They sought $10,356,443.92 plus interest and costs.

THE PUB HEARING AND ORDER

[18] The PUB hearing was held in October 2020.

[19] Consistent with the PUB's practice and procedure, considerable evidence was filed in advance of the hearing and subsequently adopted by witnesses who testified at the proceedings.

[20] The Respondents' pre-filed evidence included an expert's report from David A. Howe FCPA, FCA, ICD.D which addressed compensation for detrimental affection.

[21] The Appellant filed an expert report from RESPEC regarding mitigation of the detrimental affection to the Quarry operations.

[22] In reply, the Respondents filed an expert report from Stantec Consulting Ltd. addressing the mitigation issues.

[23] In a decision released on April 28, 2021, the PUB found that the Yan Report's conclusion (that no changes or modifications to the Respondents' existing operations would be necessary to accommodate the ORR) was incorrect. It found that the construction of the ORR required blasting restrictions to be imposed by the Appellant upon the Respondents' Quarry operations.

[24] The PUB found that the Respondents' damages arose from the expropriations and the construction of the ORR and that the Respondents had established that the interference to their operations was both substantial and unreasonable. The PUB rejected the Appellant's assertion that the Respondents had failed to make reasonable efforts to mitigate or that mitigation was possible and the PUB accepted the assessment of damages presented by David Howe. The PUB's award of $10,139,196.66 (plus interest and costs) included $9,420,893.47 for loss of the second lift.

[25] On this appeal, the Appellant accepts that the Respondents' loss arose from the expropriations and the construction of the ORR (Appellant's Factum, paras. 59 and 60). However, the Appellant alleges that the PUB erred in finding that the expropriation and construction of the ORR resulted in **unreasonable** interference with the use of the Respondents' lands sufficient to constitute detrimental affection. The Appellant also challenges the PUB's award of damages and asserts that the award for loss of the second lift should have been $5,656,482.50.

STANDARD OF REVIEW

[26] Section 32(5) of the *Act* provides a statutory appeal mechanism to the parties:

> The Minister or an owner of land that has been expropriated may, within 30 days after the date of an award, give to the other party notice of an appeal to the Court of Appeal against the findings of the board upon a question of law or fact in connection with the expropriation or upon the question of the amount of compensation awarded by the board.

[27] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 the Court established that on a statutory appeal such as this, "appellate standards apply when a court reviews the decision" of the administrative body. It confirmed that the "applicable standard is to be determined with reference to the nature of the question" and in accordance with the Court's decision in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (*Vavilov*, at paras. 17, 33 and 37).

[28] Subsequently, and with specific regard to section 32(5) of the *Act*, this Court in *Lynch v. St. John's (City),* 2020 NLCA 31 held in relevant part:

> 75 In this case, the statutory appeal right is extensive. It is not limited, as was the case in *Bell Canada*, to questions of law or jurisdiction. It expressly covers challenges

> based on questions of law, fact and the quantum of compensation. There is nothing in its language to indicate a more limited appellate standard than that flowing from the *Housen* approach …
>
> 76 I am satisfied, therefore, that the appellate standard of review contemplated by *Housen* applies.

[29] In *Lynch* this Court interpreted *Vavilov* to mean (again, in relevant part) that:

> 73 For statutory appeals, unless the statutory appeal provision stipulates otherwise, this would seem to mean, amongst other things, that:
>
> - questions of law involving interpretation of the tribunal's home statute will now be reviewed on a correctness standard;
>
> …
>
> - the appellate court may interfere and set aside the tribunal decision whenever material error is found whereas, under the former *Dunsmuir* reasonableness standard, error was not the touchstone for interference provided the decision, viewed holistically and contextually, could nevertheless be said to be reasonable; and
>
> - if material error is found, the appellate court may, at its option but always in accordance with principle, proceed to decide the merits of the case in accordance with proper legal rules or remit the case to the tribunal for further adjudication in accordance with those rules, whereas on judicial review the power of the court was generally restricted to setting aside the decision and remitting it to the tribunal.

[30] In the consideration of the issues placed before it, the PUB made conclusions of fact, law, and mixed fact and law. In the analysis that follows, these conclusions will be addressed with the appropriate standard of review from *Housen*.

ISSUES

[31] The two issues to be addressed on this appeal are whether the PUB erred:

(1) In finding that the test for detrimental affection was met and that the Respondents were entitled to compensation; and

(2) In its calculation of the compensation due to the Respondents by including the loss of the second lift at the Quarry without deduction of any residual value.

ANALYSIS

Issue 1: Did the PUB err in finding that the test for detrimental affection was met and that the Respondents were entitled to compensation?

The Elements of the Test for Detrimental Affection

[32] The *Act* contemplates a claim for damages for detrimental affection:

> 17(1) The minister shall pay compensation to the owner of land expropriated and to the owner of land detrimentally affected by the expropriation.

[33] The PUB was referred to *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, [2013] 1 S.C.R. 594, for the test to be met on a claim for damages for detrimental affection. 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. It therefore concluded that the analytical framework established in *Antrim* should guide the PUB's assessment (PUB Order, at 14).

[34] On this appeal the Appellant accepts that the test for detrimental affection stated in *Antrim*, at para. 5 applies and that the Respondents were required to establish that:

1. the damage must result from action taken under statutory authority;

2. the action would give rise to liability but for that statutory authority; and

3. the damage must result from the construction and not the use of the works.

[35] The Appellant concedes further that the PUB correctly found that elements one and three were established (Appellant's Factum, at para. 60).

The Requirements of the Second Element of the *Antrim* Test

[36] The parties agree that the PUB appropriately recognized that the second element of the *Antrim* test imports the law of private nuisance. To meet the test, the impugned interference must be both substantial and unreasonable (*Antrim*, at para. 18).

[37] As stated in *Antrim*, at para. 19:

> …A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances…

[38] On this appeal the Appellant also concedes the substantial element. Therefore the enquiry is reduced to "whether the non-trivial interference was also unreasonable in all of the circumstances" (*Antrim*, at para. 19).

Standard of Review for a Finding of Unreasonable Interference

[39] A finding of unreasonable interference may be likened to a finding of unreasonable conduct as both address an objectively established acceptable standard in light of the circumstances.

[40] As stated in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 28:

> ... The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

[41] What constitutes reasonable conduct in light of the circumstances is a question of mixed fact and law (*Galaske v. O'Donnell*, [1994] 1 S.C.R. 670, 112 D.L.R. (4th) 513, at 690-691). What constitutes unreasonable interference in light of the circumstances is a question of mixed fact and law.

[42] A question of mixed fact and law is reviewed on a standard of palpable and overriding error (*Housen*, at para. 29). "Where, however, the erroneous finding of negligence of the trial judge rests on an incorrect statement of the

legal standard, this can amount to an error of law" (*Housen,* at para. 31) which would be reviewed on a standard of correctness.

How is Unreasonable Interference Assessed?

[43] *Antrim* explains at paras. 25 and 26:

> …the reasonableness of the interference must be assessed in light of all of the relevant circumstances. The focus of that balancing exercise, however, is on whether the interference is such that it would be unreasonable in all of the circumstances to require the claimant to suffer it without compensation.
>
> In the traditional law of private nuisance, the courts assess, in broad terms, whether the interference is unreasonable by balancing the gravity of the harm against the utility of the defendant's conduct in all of the circumstances… In relation to the gravity of the harm, the courts have considered factors such as the severity of the interference, the character of the neighborhood and the sensitivity of the plaintiff… The frequency and duration of an interference may also be relevant is some cases…A number of other factors… are relevant to consideration of the utility of the defendant's conduct… these factors are not a checklist; they are simply "[a]mong the criteria employed by the courts in delimiting the ambit of the tort of nuisance"… Courts and tribunals are not bound to, or limited by, any specific list of factors. Rather, they should consider the substance of the balancing exercise in light of the factors relevant in the particular case.

[44] Several points made by the Court in *Antrim* are worth repeating.

[45] Firstly, "[w]hether there has been an unreasonable interference with the use and enjoyment of the plaintiff's land is a question of judgment based on all of the circumstances". The focus of the appeal is therefore whether the PUB "… appropriately carried out the balancing inherent in the law of private nuisance." (*Antrim*, at para. 16)

[46] Secondly, the Court drew an important "distinction between the utility of the conduct, which focuses on its purpose, such as construction of a highway, and the nature of the defendant's conduct, which focuses on how that purpose is carried out" (at para. 28). Acknowledging that the "focus of the reasonableness analysis in private nuisance is on the character and extent of the interference with the claimant's land" the Court acknowledged that the "nature of the defendant's conduct is not, however, an irrelevant consideration" and that where "the conduct is either malicious or careless, that will be a significant factor in the reasonableness analysis" (at para. 29).

[47] Thirdly, the severity of the harm and the public utility of the impugned activity are not equally weighted considerations because "a high degree of public utility would always trump even very extensive interference" (at para. 33). In this respect, the Court approved this Court's decision in *Newfoundland (Minister of Works, Services and Transportation) v. Airport Realty Ltd.*, 2001 NFCA 45, 205 Nfld. & P.E.I.R. 95, at para. 39.

[48] Finally, at "the heart of the balancing exercise involved in assessing the reasonableness of an interference" is the "distinction … between, on one hand, interferences that constitute the 'give and take' expected of everyone and, on the other, interferences that impose a disproportionate burden on individuals" (at para. 39).

The Parties' Positions on Reasonableness

[49] The Appellant's position on this issue was that the Appellant had acted reasonably by expecting the Respondents to operate their Quarry in a manner that protected the ORR and did not impede the Appellant's legitimate use of its land.

[50] The Respondents maintained however that prior to the construction of the ORR, their leases with the Appellant contained no requirement for blasting mats to protect adjacent lands and that the Respondents had anticipated that the restrictions imposed on their lease would result in significant additional costs for the Respondents' development of the second lift.

[51] The Respondents submitted that this anticipation was realized once the second lift was started. They conducted a financial analysis of the expected cost of production of the second lift accounting for the additional costs of the 900 blasting mats expected to be needed, along with additional equipment, labour and other operational costs. This was presented to the PUB by the Respondents' expert, David Howe. They maintained that the Appellant's substantial interference (now conceded) had rendered their Quarry operation uneconomical and that it would be unreasonable in all the circumstances to require the Respondents to suffer it without compensation.

The PUB's Assessment of Reasonableness

[52] In framing the issue, the PUB agreed that it was reasonable for the Appellant to expect the Respondents to carry on their operations with due care for adjoining landowners. However, the PUB held that:

> "… the Minister's reasonable expectations in that regard are not the proper focus of the reasonableness analysis as set out by *Antrim*. Reasonableness must be viewed in the context of the effect the expropriating authority's conduct has on the affected landowner. Thus, a reasonableness analysis must focus on whether the Minister (sic) actions impose a disproportionate share of the impact of a beneficial service on them by leaving them uncompensated for damage caused by an activity which benefits the community at large.
>
> (PUB Order, at 20. line 39 and at 21, line 1 citing *Antrim* at para. 30 quoting *Royal Anne Hotel Co. v. Village of Ashcroft* (1979), 95 D.L.R. (3d) 756, [1979] 2 W.W.R. 462 (BCCA), at 761).

and

> Additionally, the Minister's assertion that City Sand did not have the right to indiscriminately allow flyrock to escape beyond the boundaries of their property does not correctly frame the issue before the Board. The issue is the Province's use of its land; not the Claimants' use of theirs. The question *Antrim* requires the Board to answer is whether the additional costs of continuing to pursue quarry operations with the additional restrictions imposed as a result of the Outer Ring Road should be borne by the Claimants instead of the general public. The Board has to decide if it is reasonable or fair that City Sand be put out of business to further the convenient flow of highway traffic on the Northeast Avalon. …

(PUB Order, at 21, lines 25-32.)

[53] The PUB framed its assessment of the reasonableness element of the *Antrim* test correctly. As *Antrim* states at para. 28:

> … the focus in nuisance is on whether the *interference suffered by the claimant* is unreasonable, not on whether *the nature of the defendant's conduct* is unreasonable.

[54] The PUB broadly assessed the substantial and reasonable elements together. (PUB Order, at 16-23) This was appropriate because some facts were relevant to both elements. There was also factual overlap within the various factors that *Antrim* endorsed as being among the criteria employed by the courts for consideration on the issue of the gravity of the harm (albeit without being bound to a specific list) (*Antrim*, at para. 26).

[55] Therefore, this portion of the PUB's decision must be considered as a whole in the Court's consideration of whether, in finding the Appellant's interference unreasonable, the PUB appropriately balanced the gravity of the harm caused to the Respondents against the utility of the Appellant's conduct in the construction of the ORR (*Antrim*, at para. 26).

Utility of the Appellant's Conduct

[56] There was no challenge either to the utility of the Appellant's conduct in expropriating the Respondents' land for the ORR (which was an essential public service) or to the Appellant's right to impose restrictions on the Respondents' lease.

Manner in Which the Work was Carried Out

[57] The PUB acknowledged that the Respondents had alerted the Appellant to their concern about adverse effects to their Quarry operations from the ORR as early as 1997 but that the Appellant chose to rely upon the Yan Report's conclusion that no change in the Respondents' operations would be required in its dealings with the Respondents. The PUB found the Yan Report's conclusion in this regard to be incorrect.

Sensitivity of the Respondents

[58] The PUB considered the Respondents' operation of the Quarry since 1971, the terms of the earliest lease on record (1986) as well as the terms of subsequent lease renewals. The PUB acknowledged that the Respondents' operation was a risky and regulated activity but that there was no evidence that blasting mats were needed to protect adjacent lands before the ORR was developed. The PUB recognized that the Respondents accepted that the Appellant had the right to regulate their business and that blasting mats were now a requirement.

Character of the Neighbourhood

[59] The PUB was aware that prior to the construction of the ORR, the Respondents' Quarry was bounded on three sides by residential neighbourhoods, the closest being 300 metres from the Quarry. It was aware of the three flyrock incidents and the conditions imposed upon the Respondents' leases as a result. It recognized that it was because the ORR was now constructed within 40 metres of the Quarry that the Appellant had required use of blasting mats.

[60] The PUB addressed the documentary evidence which supported the Respondents' concern that the proximity of the ORR would preclude quarrying of the proposed second lift and the Appellant's position that no change to drilling and blasting operations would be required.

Duration and Severity of the Harm

[61] The PUB reviewed the evidence that supported the conclusion that the Appellant's requirement for use of blasting mats resulted in significant additional costs for the Respondents to develop and produce the second lift. The PUB also reviewed the evidence that supported the Respondents' decision to stop blasting in September 2012. It acknowledged that the Respondents were not asserting either that they had the right to permit flyrock to escape or that the Appellant had no right to impose the conditions. The Respondents claimed only that the incremental costs associated with the additional restrictions represented an unreasonable interference.

[62] The PUB acknowledged the harm to be permanent. The severity of the harm was addressed by the PUB in its assessment of the asserted costs of using the blasting mats. The PUB reviewed the evidence presented on the costs of producing blasted rock using the original blasting pattern and the costs anticipated with the use of blasting mats being three times the costs of normal quarry operations. It also considered that the Respondents would have had to incur significant upfront costs to produce the second lift, with no assurance that these costs could be recovered in the sale of product.

The PUB's Conclusion on Reasonableness

[63] The PUB concluded that, considering the applicable law and facts of the case:

> In developing the Outer Ring Road the Minister detrimentally affected the Claimants' land by imposing such exceptional and disproportionate expenses on the Claimants that they were no longer able to carry on their quarry operations economically. In these circumstances the Board finds it is unreasonable, as contemplated in *Antrim*, for the Claimants to bear the burden of the costs imposed on them arising from the construction of the Outer Ring Road.

(PUB Order, at 21, lines 33-37.)

Conclusion on Issue One

[64] The PUB was guided by the correct legal principles and considered all the relevant circumstances on the issue of the gravity of the harm in reaching its conclusion on unreasonable interference. Its reasons as a whole reflect an understanding of "the purpose of providing compensation for injurious affection … (namely) to ensure that individual members of the public do not have to bear

a disproportionate share of the cost of procuring the public benefit" (*Antrim*, at para. 38).

[65] No error of law, mixed fact and law or fact is disclosed in the PUB's assessment of the detrimental affection claim or in its conclusion that the non-trivial interference was unreasonable in the circumstances and that the Respondents were entitled to compensation.

[66] I would therefore dismiss this ground of appeal.

Issue 2: Did the Board err in its calculation of the compensation due to the Respondents by including the loss of the second lift at the Quarry without deduction of a residual value?

Mitigation Principles

[67] Having determined that the Respondents were entitled to compensation for detrimental affection arising from the expropriation, the PUB correctly identified that the onus shifted to the Appellant to prove, on a balance of probabilities, that the Respondents did not act reasonably and that alternative measures were available that would have mitigated the financial loss (PUB Order, at 24, lines 4-6).

[68] While the Appellant has not directly appealed the PUB's findings with respect to mitigation, it argues that the PUB was required to deduct a residual value in determining compensation for the loss of the second lift. This is, effectively, an argument that the Respondents should have quarried the second lift to mitigate the loss.

Standard of Review for Mitigation

[69] In *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, [2012] 2 S.C.R. 675, the Court determined that a finding of whether a party could have mitigated involves applying a legal standard and is a question of mixed fact and law reviewable on a standard of palpable and overriding error:

> 47 The finding about whether Southcott could have mitigated involves applying a legal standard; it is a question of mixed fact and law. Whether or not there were comparable properties and whether they were profitable is a finding of fact. Implicit in the Court of Appeal's decision is the conclusion that the trial judge's findings of fact were unreasonable.

The Parties' Positions on Mitigation

[70] The Appellant's position on mitigation was set out in RESPEC's expert report which addressed the following questions:

- Why didn't the development of the second lift start sooner?
- Why wasn't the second bench developed farther away from the Outer Ring Road to make blasting easier? and
- Why, after approximately 50 blasts for development work, didn't City Sand hire the necessary external resources to close the highway and complete the remaining blasts?

(PUB Order, at 24-25.)

[71] The PUB summarized the opinions expressed on these questions in both RESPEC's report and by witnesses who testified for RESPEC at the hearing.

[72] RESPEC acknowledged that the Yan Report's conclusion with respect to the impact of the proposed ORR on the Quarry operations was incorrect and that the Appellant had relied on this Report to assure the Respondents that the ORR would not cause any significant problems.

[73] However, RESPEC expressed the view that all parties knew from the outset that the ORR would be built where it was, that the Respondents had been reporting very early on that it would affect their blasting operations and that the Respondents' timing and location of the second lift made economical development of the second lift very difficult.

[74] Specifically, RESPEC's witnesses Cameron Thomas and Daykin Schnell had testified that it was very unusual for a quarry with multiple lifts to wait until one lift was completed before starting another because it limits options and makes it more difficult to keep up production.

[75] As to location and methodology, RESPEC's witnesses suggested the Respondents could have reasonably avoided some or all of their losses by choosing a different method and location to open a quarry face for the second lift.

[76] In response to the Appellant's experts' opinions, the Respondents provided the PUB with a chronology of actions it had taken since 1995, many of which it asserted RESPEC had ignored. The Respondents relied on expert

reports from Hard-Rok and Stantec with respect to the development and timing of the second lift.

The PUB's Assessment of Mitigation

[77] The PUB was referred to *Southcott Estates Inc.* for the general principles of mitigation. It was aware that in approaching this issue, "the burden of proof is on the defendant, who needs to prove both that the plaintiff has failed to make reasonable efforts to mitigate and that mitigation was possible" and that mitigation "is a doctrine based on fairness and common sense, which seeks to do justice between the parties in the particular circumstances of the case" (PUB Order, at page 24, citing *Southcott Estates Inc.*, at paras. 24 and 25).

[78] The Appellant's expert (RESPEC) expressed the view that since all parties knew from the outset that the ORR was going to be built where it was, there were steps that the Respondents could have taken to mitigate their losses. These included starting the second left earlier, in a different location and using a different methodology known as a "sinking cut". The Appellant's position on mitigation therefore required the PUB to review technical and complicated evidence regarding quarry development.

[79] The PUB's assessment of the mitigation questions comprises pages 25-29 of the PUB Order. In this portion of the PUB's Order, the PUB addressed the opinions expressed by RESPEC as well as the Respondents' response to RESPEC's views as expressed by their experts, Hard-Rok and Stantec.

[80] Specifically the PUB reviewed the Respondent's chronology of actions they had taken since the initial expropriation in 1995 (which they asserted the RESPEC report had largely ignored) and which included:

- Advising the Province as early as March 1997 of the potential for a significant detrimental affection and loss of business claim as a result of the impact of the Outer Ring Road on the quarry operations, including the potential inability to quarry the second lift.

- Making an offer to the Province in February 1998 of up to 900,000 tonnes of rock, at $3.00 per tonne, from the second lift immediately adjacent to the Outer Ring Road for use in its construction. This offer was not accepted by the Province on the basis that they could get the necessary rock at lower cost. The Province advised that they could use 600,000 tonnes which, according to City Sand, would have encompassed the entire area that would subsequently require blasting mats.

- Retaining professional expertise to prepare its lease renewal application in 2005, including the development plan for the second lift which was anticipated to be quarried from the low side of the quarry, cutting back into the slope to create an operational face. This development plan was accepted by Quarries Branch in 2008.

- Retaining Nfld. Hard-Rok, which was familiar with the quarry, to prepare its blasting plan for the second lift. The blasting plan recommended that all development and production blasts within 100 meters of the Outer Ring Road be covered with heavy duty rubber tire blasting mats. This blasting plan was accepted by Quarries Branch in May-June 2011.

- Supporting efforts in 2011-2012 by Ken Andrews of Quarries Branch to explore with Paradise the possibility of quarrying adjoining lands instead of proceeding with the second lift.

- Reaching agreement with the Minister on the detrimental affection claim in which the Minister would convey the adjoining land and rock in lieu of cash compensation provided that City Sand would be able to quarry 2,000,000 tonnes of rock from this property and that approval for such could be obtained.

- Working cooperatively with DTW and Quarries Branch over the period 2012-2017 to obtain approval to quarry the adjoining land, including engaging consultants to assist with the Municipal Plan amendments.

(PUB Order, at 27-28.)

[81] Following the PUB's review of the evidence on the mitigation questions, the PUB agreed that the potential impact of the construction of the ORR on the Respondents' Quarry operations was a concern to both the Respondents and the Appellant prior to the expropriation and construction of the ORR.

[82] However, the PUB noted that Yan had been asked to:

- examine the feasibility of continuing quarry blasting operations given the location and construction of the proposed ORR;

- assess the extent of the potential blasting hazards;

- make recommendations for the control of quarry blasting procedures to alleviate potential adverse effects; and

- express an opinion on the practicality of current blasting methods in use at the Quarry.

(PUB Order, at 29.)

[83] The PUB noted that the Yan Report had concluded that "it would not be necessary [for the Respondents] to make any changes or modifications to its drilling and blasting operations to accommodate the existence of the proposed (ORR)." Further, it noted that the Yan Report had recommended that the existing reasonable and practicable precautions used in the Quarry would invariably also protect the new ORR. The PUB further noted that while fugitive fly-rock was a possibility, the Yan Report recommended only that all traffic could be stopped by flag persons during an imminent blasting operation, which it expected to happen "at a maximum of twice a year" (PUB Order, at 30).

[84] The PUB concluded that the Appellant had relied upon the Yan Report in its denial of the Respondents' claim for detrimental affection.

[85] With specific regard for the second lift, the PUB concluded that:

- It was always understood by the parties that the development of the quarry would take place in two phases or lifts.
- At the time of the expropriation in 1995-1996, quarrying of the first lift was still underway and quarrying of the second lift estimated to contain an additional 2,200,000 tonnes of rock, had not started.
- As part of its lease renewal in 2005, the Respondents submitted a development plan prepared by Jacques Whitford Consulting Engineers to sequentially quarry the second lift from front to back, starting at the foot of a slope to produce a face and the Appellant had accepted this development plan in 2008.
- The Respondents had engaged Hard-Rok to develop a blasting plan for the second lift which included a recommendation that all development and production blasts within 100 meters of the ORR be covered with heavy duty blasting mats. The Appellant included this requirement in its response to the blasting plan and the blasting plan was approved by the Appellant in 2011.
- Respecting the timing of the second lift, the only evidence provided to the PUB to support the Appellant's assertion that the Respondents should have started the second lift earlier was RESPEC's statement that completing one bench or lift before starting another is unusual. The PUB found this opinion, by itself, insufficient to support the conclusion that the Respondents had made an unreasonable choice on timing.
- The choice of where to start the second lift and which quarrying techniques to use were inseparable and that the Respondents' choice of location was informed by its experience in blasting at the Quarry since 1971. Further, there was nothing on the record to suggest that the Respondents were ever

> encouraged or directed to pursue the alternative development plan for the second lift suggested by RESPEC.
>
> (PUB Order, at 31-32.)

[86] The PUB concluded that the Appellant had not proven either that it was more likely than not that the Respondents failed to act reasonably or that alternative measures were available that would have reduced the Respondents' financial loss. It concluded that the Respondents took reasonable steps to mitigate their claim (PUB Order, at 32, line 38).

Conclusion on Mitigation

[87] The cited portions of the PUB's Order addressing mitigation reflect:

- Consideration of the lengthy history of relations between the parties relative to the Respondents' regulated quarry operations;
- A full appreciation of quarry development and particularly for the Respondents' development plan, the Appellant's proposed alternative plan and its related challenges; and
- The Respondents' 1998 proposed potential mitigation measure (to use quarried rock from the area close to the ORR as fill for the ORR which would have exhausted the area which the Appellant eventually required to be covered with blasting mats) and which proposal the Appellant rejected.

[88] The PUB's approach to the question of mitigation was consistent with the general mitigation principles endorsed by the Court in *Southcott Estates Inc*. The PUB's assessment reflects the Court's direction that the Respondents did not have to make perfect choices judged with the benefit of hindsight; nor did they have to make risky choices in their mitigation efforts. The PUB's conclusion was supported by the evidence which it accepted and its reasons reflect the application of fairness and common sense endorsed by *Southcott Estates Inc.* to the mitigation questions.

[89] No error of law, mixed fact and law or fact is disclosed in the PUB's assessment of the mitigation questions or in its conclusion that the Appellant had failed to meet the burden of proof upon it to establish either that the Respondents had failed to make reasonable efforts to mitigate or that mitigation was possible.

Standard of Review for Quantum of Compensation

[90] The quantum of compensation for detrimental affection is a finding of fact (*Guerin v. The Queen*, [1984] 2 S.C.R. 335, at para. 54). The PUB's award is therefore entitled to deference unless a palpable or overriding error of fact or mixed fact and law is identified in the PUB's assessment.

Principles Applicable to the Quantum of Compensation

[91] Section 19(1) of the *Act* gives the PUB the power to fix the amount of compensation to be paid for land expropriated or detrimentally affected:

> 19(1) Where
>
> (a) the minister and the owner of land expropriated or detrimentally affected by the expropriation cannot agree on the amount of compensation to be paid for the expropriated land or on account of being detrimentally affected;
>
> the amount of compensation to be paid shall be fixed by the board.

[92] While section 27(2) of the *Act* provides for an award of damages "or for another detrimental effect properly the subject of compensation", (unlike section 27(1) which addresses compensation for expropriation of land) no rules are stated to guide the PUB.

[93] On this appeal, it is not disputed that the full compensation principle applies and that the claimant is to be made "economically whole" (*Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32, at paras. 20-23). Application of the full compensation principle was affirmed by this Court in *Lynch*, at paras. 85-93.

The PUB's Quantification of Compensation

[94] The PUB recognized that it should apply the full compensation principle from *Lynch* and that the application of this principle required it to interpret the *Act* in a broad and purposive manner to achieve full indemnification (*Lynch*, at para. 86 and PUB Order, at 33, lines 27-28).

[95] In *Lynch*, this Court emphasized that, in the application of the full compensation principle:

- The legislation should be interpreted in favour of the landowner because of its vulnerable position; and

- There is an obligation on the state "to repair the injury caused to particular individuals for the public good, and to minimize the loss, inconvenience and disturbance to the life of its citizens to as great an extent as possible." (*Lynch*, at paras. 85-93)

The Second Lift

[96] The Respondents had asked the PUB to award compensation as follows:

Loss of the Second Lift	$ 9,420,893.47
Additional costs 2011-2015	465,000.00
Wasted Capital Costs	217,247.26
Additional First Lift Costs	75,000.00
External Costs: Legal & Planning to 2017	178,303.19
	$10,356,443.92

[97] On this appeal the Appellant challenges only the PUB's assessment of the loss of the second lift.

[98] The Respondents valued the loss of the second lift using a present value calculation of the income stream they expected to receive from quarrying the second lift over a period of 17 years. The Respondents asserted that the rock it planned to quarry in the second lift was a "stranded asset".

[99] The Appellant maintained that the Respondents had not lost the second lift because it could still be quarried and had not lost any value. In the alternative it suggested the loss was to be calculated by:

Value of the rock *in situ* without blasting restrictions	$10,882,580.00
Less Value of rock *in situ* with blasting restrictions	- 5,226,097.50
Reduction in value of rock *in situ*	$ 5,656,482.50

[100] The PUB addressed the Appellant's assertion that the rock was still available to be quarried and therefore had value. Specifically, the Appellant relied on the testimony of the Respondents' President (Robert O'Keefe) during

cross examination in which the Appellant asserted Mr. O'Keefe had acknowledged that the unquarried rock had some value.

[101] The Appellant referred this Court to a lengthy portion of the October 13, 2020 transcript at pages 220-227 which it described as critical to the issue of the PUB's alleged error in valuing the Respondents' loss of the second lift.

[102] In essence, during this portion of his cross examination Mr. O'Keefe had testified that his traditional blasting costs had been $1.69 per tonne without mats and $4.45 per tonne with mats and he agreed that there was $2.55 in potential profit if he sold rock extracted under the new restrictions (a sale price of $7.00 per tonne less $4.45 in costs). The Appellant asserted therefore that there was *in situ* value of the rock of $5,226,097.50 to be deducted.

[103] Mr. O'Keefe said twice that he was "going blank" or "drawing a blank" with respect to these calculations and this portion of the Appellant's cross examination of Mr. O'Keefe concluded with counsel acknowledging that he would "ask all these questions" and "the math will be checked" with the Respondents' expert, David Howe.

[104] The value of the *in situ* rock was subsequently addressed directly by the Respondents' expert, David Howe who agreed with the margin of $2.55 per tonne and that valuation principles required consideration of the residual value of an asset.

[105] However, Mr. Howe did not concede that a residual value of $5,226,097.50 should be factored into the calculation because while the rock *in situ* had some potential financial value, there was no evidence that "another party would be willing to come in, and … acquire or take over the operations and undertake that level of cost to do the blasting" (Transcript, October 14, at 183).

[106] The PUB noted further that while the Appellant's expert (RESPEC) supported the second lift having residual value, the Appellant had not filed expert evidence to support its alternative method of calculation (PUB Order, at 36, lines 24-25).

[107] The PUB compared the Appellant's valuation of the loss of the second lift with the valuation prepared by David Howe, which had applied the conventional net present value methodology. The PUB noted that the Appellant's calculation did not apply a discount rate to arrive at a net present value (PUB Order, at 36, lines 41-42).

[108] The PUB accepted:

- the Respondents' evidence that production costs of $16.23 per tonne on the first 536,974 tonnes of rock in the second lift rendered its development uneconomical;

- that the record did not support either that a different production method was available to protect the ORR while quarrying the rock at a marketable price or that a different production strategy would economically justify development;

- that no third party had come forward willing to develop the Quarry;

- that the present value method of valuing the loss of the expected income stream was the appropriate manner of addressing the loss of the second lift; and

- that a discount rate of 2.5% reduced by 30% to 1.75% to reflect the impact of taxation on the expected income stream was appropriate as supported by the expert evidence of David Howe.

[109] The PUB found that it was reasonable for the Respondents to calculate the net present value of the claim on the assumption that, in the absence of the blasting restrictions required as a result of the construction of the ORR, they would have quarried their second lift for 17 years.

[110] The PUB concluded that the Respondents' calculation represented a reasonable present value for the 17-year income stream the Respondents expected from the second lift and awarded $9,420,893.47 to compensate for the damages suffered by the Respondents for the loss of their ability to economically quarry the second lift. In addition the PUB ordered additional first lift costs, legal and planning costs, interest and costs (PUB Order, at 37).

Conclusion on Quantum of Damages

[111] The PUB's conclusions on the quantum of compensation were supported by those portions of the evidence which the PUB accepted and in particular the uncontradicted expert opinion of David Howe that no deduction for residual value of rock *in situ* was appropriate.

[112] The Respondents were entitled to be restored to the position they would have been in had the ORR not been built and with one exception conceded by the Respondents at the appeal hearing and addressed below, the inclusion of the value of the *in situ* rock did not amount to double recovery (*Cunningham v. Wheeler; Cooper v. Miller; Shanks v. McNee*, [1994] 1 S.C.R. 359, at 368-9).

[113] In 2012, the Quarry was out of rock so it started the second lift and blasted 51 times producing only 20,600 tonnes of rock at a value of $5.31 per tonne. The parties acknowledge therefore that the sum of $109,386 should have been deducted from the PUB's award of $9,420,893.47 for the loss of the second lift.

[114] With this exception, no error is established in the PUB's award of $9,420,893.47 in damages for the second lift.

Conclusion on Issue Two

[115] For the reasons stated I would (with the exception of the deduction of $109,386 from the damages award for the second lift) dismiss this ground of appeal.

COSTS

[116] The PUB awarded costs to the Respondents on a full indemnity basis pursuant to section 34(1) of the *Act.* No basis has been established to interfere with the PUB's costs award.

[117] While the Respondents sought full indemnity (solicitor-client) costs on appeal, this Court has previously determined that such a basis is rarely employed and is "reserved for cases deserving censure or other extraordinary circumstances" (*Lynch,* at para. 180). Nevertheless, as in *Lynch,* I would, pursuant to rule 58(4) of the *Court of Appeal Rules*, NLR 38/16, award party and party costs for one counsel on Column 5 "on the basis of seniority and experience of counsel, the complexity of the issues and the amounts at stake" (*Lynch*, at para. 181). See also *Medoc Properties Limited v. Standard Trust Company*, 2014 NLCA 13, 346 Nfld. & P.E.I.R. 348, at paras. 30-33.

DISPOSITION OF APPEAL

[118] With the exception of the deduction of $109,386 in damages awarded by the PUB for the second lift, I would dismiss this appeal and award the Respondents party and party costs for one counsel on Column 5.

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G. D. Butler J.A.

I concur: _____
L. R. Hoegg J.A.

I concur: _____
F. J. Knickle J.A.