

**IN THE COURT OF APPEAL OF MANITOBA**

*Coram:* Mr. Justice William J. Burnett  
Madam Justice Jennifer A. Pfuetzner  
Madam Justice Lori T. Spivak

***BETWEEN:***

<b><i>GROUP III DIVERSIFIED INC.</i></b>	)	<b><i>A. F. Hacault</i></b>
	)	<i>for the Appellant</i>
	)	
(Applicant) Appellant	)	<b><i>K. B. Bomback</i></b>
	)	<i>for the Respondent</i>
- and -	)	
	)	<i>Appeal heard:</i>
<b><i>THE CITY OF WINNIPEG</i></b>	)	<b><i>October 20, 2021</i></b>
	)	
(Respondent) Respondent	)	<i>Judgment delivered:</i>
	)	<b><i>April 7, 2022</i></b>

**PFUETZNER JA**

[1] The applicant (the owner) appeals an order of the Land Value Appraisal Commission (the LVAC) assessing compensation of \$177,057.57 owing to it for the expropriation of a portion of its property at 500 Madison Street (the property) by the respondent (the City).

[2] The owner sought compensation for the value of the land taken, injurious affection of the remainder of its property and disturbance damages in the total amount of \$5,749,000.

[3] As I will explain, this is one of the rare cases where the reasons of the LVAC are so deficient and replete with errors that they do not allow for

appellate review. I would send the matter back, in its entirety, to the LVAC for a new hearing in accordance with the guidance provided in these reasons on the applicable legal principles.

### Background

[4] On March 25, 2015, the City expropriated a portion of the southern part of the property along St. Matthews Avenue (the expropriated land) for the purpose of realigning and extending St. Matthews Avenue through Madison Street to St. James Street (the road construction). Prior to this time, St. Matthews Avenue reached a dead end at Madison Street.

[5] The property is zoned M1 (light manufacturing) and, prior to the expropriation, it had an area of 143,749 square feet. The expropriated land was 11,284 square feet in area and contained several mature trees that were removed. A tenanted single-story industrial and office building on the north side of the property was not directly impacted by the expropriation (the original building). The property has three driveways—one on St. Matthews Avenue and two on Madison Street—which remained unchanged by the expropriation and road construction.

[6] Previously, there was a median cut on St. Matthews Avenue where it intersects with Kensington Street (which runs south from St. Matthews Avenue), allowing for vehicles to turn both ways onto or off of Kensington Street. The LVAC heard evidence that the median cut was also used by trucks travelling eastbound on St. Matthews Avenue to turn left and proceed north into the property via the driveway on St. Matthews Avenue. The median cut and the driveway did not line up. They were off-set, with the median cut being west of the driveway. The median cut was situated in the

middle of a public road and was not on the expropriated land. As part of the road construction, the median cut was eliminated and the new road and a new median were built, in part, on the expropriated land. The owner claims that the ability of trucks to access the property through the median cut was important to it and its tenant. The owner also asserts that the elimination of this access created safety and parking issues.

[7] Prior to the expropriation, the owner had plans to construct and lease out a new 10,000 square foot building at the southeast corner of the property in order to produce additional income from the property (the pad site). The City had issued a foundation permit for the pad site in January 2014. By March 2014, the City changed its plans for the road construction to include the expropriated land and revoked the foundation permit.

[8] During the road construction, the City relocated a gas distribution box from near the southeast corner of the property at St. Matthews Avenue and Madison Street northward on Madison Street, to the north of the original building. The gas distribution box was not located on the property and, after being moved, remained within the City's right of way. As the gas distribution box was originally situated within the area of the planned road construction, it had to be relocated. The owner's position was that the newly located gas distribution box created a safety hazard for its tenant's clients/employees and interfered with the development potential of the property.

[9] Both the City and the owner retained appraisers to provide opinions on the compensation due to the owner as a result of the expropriation.

[10] The City's appraiser made the following assessments. He estimated the market value of the expropriated land to be \$113,000 based on the direct

comparison approach to valuation and the highest and best use of the property being industrial. He assessed the owner's disturbance damages as \$14,305 for replacement of the trees removed from the expropriated land. As for injurious affection, the City's appraiser's opinion was that none occurred. He noted that the driveway access to the property from St. Matthews Avenue and Madison Street remained unchanged other than the removal of the median cut. The appraiser stated that, "[p]rior to the taking, this break in the median would not have provided for legal access to the subject property. Therefore its closure is not considered to have an impact on the property after the taking." Moreover, the City's appraiser was of the view that the expropriation and road construction resulted in a betterment to the remaining property in the amount of \$2,001,300. This is because "the increased traffic, enhanced visibility and access created from St. James Street would likely enhance development potential" and would allow the property to be used for commercial development.

[11] The owner's appraiser took a different approach. In valuing the expropriated land, the appraiser also used the direct comparison approach, but he used different comparators as he considered the highest and best use of the property to be retail development rather than industrial use. In his opinion, the value of the expropriated land was \$389,000. The owner's appraiser identified several losses that he considered to be either injurious affection or disturbance damages. These include, first, a disturbance damage of \$1,330,000 due to lost potential income from the pad site. Next, the appraiser calculated a loss of potential building or parking expansion on the east side of the property in the amount of \$350,000 due to relocation of the gas distribution box. Finally, he opined that the original building suffered injurious affection

as the expropriation and road construction made it less desirable for tenants for reasons such as loss of curb appeal, but primarily because the elimination of the median cut significantly reduced truck access to the property. His opinion was that the gross income of the original building would be reduced from \$11 per square foot to \$5 per square foot for a capitalized loss of \$3,680,000.

### The Law—an Overview

[12] Prior to considering the LVAC’s reasons for decision, I will provide an overview of the legal framework in which the LVAC operates. The relevant provisions of *The Expropriation Act*, CCSM c E190 (the *Act*), are included in the attached appendix. Section 2(1) of the *Act* states that “this Act applies wherever an authority expropriates land or in the exercise of its lawful powers causes the injurious affection of land, and due compensation shall be determined in accordance with the provisions hereof.”

[13] Under section 15(1) of the *Act*, an owner or the authority may apply to the LVAC “for the determination of compensation payable by the authority to the owner for the expropriation.” The LVAC is to hold a hearing and then determine the compensation payable. The LVAC may also determine the reasonable appraisal, legal and other costs of the owner that are to be paid by the authority (see sections 15(2), 15(7) of the *Act*).

[14] In *Houle v Manitoba*, 2016 MBCA 76, this Court considered how the *Act* defines due compensation (at para 24):

Section 26(1) identifies four discrete categories of compensation payable to an owner where land is expropriated, namely:

- a) the market value of the land;
- b) disturbance costs;
- c) damages for injurious affection; and
- d) the value to the owner of any special economic advantage incidental to his actual occupation of the land.

### *Market Value*

[15] In every instance where land is expropriated, the owner will be entitled to compensation for the market value of the land taken. Market value is defined in section 27(1) of the *Act* as “the amount that the land might reasonably be expected to realize if sold in the open market by a willing seller to a willing buyer.”

[16] There are certain factors, related to the calculation of market value, that the *Act* states cannot be considered in calculating due compensation. Of relevance to this appeal are the following two factors: “any increase or decrease in the value of the land resulting from the imminence of the . . . expropriation” (at section 27(2)(b)), and “any increase in the value of the land resulting from the land being put to a use that . . . is contrary to law” (at section 27(2)(d)).

### *Disturbance Costs*

[17] As explained in *Houle*, “Disturbance costs are described generally in section 28(1) as the reasonable costs, expenses and losses arising out of, or incidental to, the expropriation” (at para 25). Further, it was noted that “[d]isturbance damage may be defined generally as economic loss suffered by an owner by reason of having to vacate expropriated property” (at para 28,

quoting Eric CE Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed (Scarborough: Carswell, 1992) at 274), and that “it [is] permissible for the [LVAC] to award compensation for disturbance costs that would be incurred in the future and that such compensation need not be limited to costs, expenses or losses that have already been incurred” (at para 31; see also *Rebel Holdings Ltd et al v Division Scolaire Franco-Manitobaine*, 2008 MBCA 65, which states that “the broad and liberal interpretation of s. 28(1), as mandated by the Supreme Court, allows the [LVAC] to award damages for costs that will be incurred” (at para 198) (emphasis added)).

### *Injurious Affection*

[18] Generally speaking, damages for injurious affection are meant to compensate an owner for a reduction in the value of its lands and for other prescribed damages resulting from the actions (including, but not restricted to, expropriation) of a statutory authority (see Christopher J Williams, Andrea Skinner & Matthew Helfand, *Expropriation Law in Ontario* (Toronto: LexisNexis, 2021) at 66).

[19] Section 25(1) of the *Act* provides that “[a]n authority that expropriates land or that in the exercise of its lawful powers causes the injurious affection of land shall pay to the owner thereof due compensation in accordance with this Act for the loss or damage thereby caused.”

[20] Compensation for injurious affection is elaborated upon in the *Act* in respect of a partial expropriation where the expropriation has a negative effect on the value of the remaining land or results in other damage. Compensable injurious affection damages are divided into three categories

under section 30(1) of the *Act*.

[21] First, under section 30(1)(a), a landowner is entitled to compensation for “any reduction in market value of the remaining land of the owner caused by the expropriation of the part”. This is perhaps the most typical type of injurious affection in a partial taking and is sometimes referred to as “[s]everance [d]amage” (Todd at p 331).

[22] Next, section 30(1)(b) of the *Act* provides compensation for “the damages sustained by the owner as a result of the existence and the use but not the construction of the works upon the part of the land expropriated” (emphasis added). This codifies compensation for what Todd describes as “pure injurious affection” (at p 332, quoting *Minister of Transport v Edwards* (1963), [1964] 1 All ER 483 (CA (Eng)) (*Edwards*)), which occurs “[w]here part of the owner’s land is expropriated the remaining piece or pieces may be less valuable as a result of the actual or intended use made of the portion expropriated” (Todd at p 332). This head of injurious affection damage is restricted by the wording of section 30(1)(b). Not only is damage from the construction process of the works excluded but, notably, damage is limited to the existence and use of that part of the works that has been built on the expropriated land. As noted by Todd, “The owner cannot recover compensation for deleterious effects which originate from the use of land acquired from other owners or already owned by the public authority” (at p 338). This limitation is a codification of the rule in *Edwards* (the *Edwards* rule).

[23] In jurisdictions which still apply the *Edwards* rule, injurious affection calculations involve the challenging and artificial exercise of

determining how much of the injurious affection is attributable to the part of the public project located only within the bounds of the expropriated property, regardless of how big or small that proportion might be. The *Edwards* rule has been subject to much criticism for being arbitrary and because it is “inconsistent with current Canadian principles of full compensation” (Paul B Scargall, Shane Raymon & Shara N Wright, “Private Rights, Public Good: Balancing Competing Interests under Expropriation Law”, in Todd L Archibald & Randall Scott Echlin, *Annual Review of Civil Litigation 2005*, (Toronto: Thomson Reuters, 2021), ch I at section II.3 (online: WL Can (date accessed 25 March 2022)); see also Todd at p 340). The Manitoba Law Reform Commission recommends that it be abolished in Manitoba (see Manitoba Law Reform Commission, *Creating Efficiencies in the Law: The Expropriation Act of Manitoba: Final Report*, Report #137 (Winnipeg: MLRC, 2019) (the MLRC Final Report)).

[24] Finally, section 30(1)(c) of the *Act* provides compensation for “such other damages sustained by the owner as a result of the existence, but not the construction or use, of the works as the authority would otherwise be responsible for in law if the existence of the works were not under the authority of a statute” (emphasis added). This section provides for damages (not otherwise included in section 30(1)(a) or section 30(1)(b)) as a result of the existence of the works. Important limitations are again imposed. As noted by the Manitoba Law Reform Commission, compensation would not be awarded for things like noise, dust, litter and vibration arising from the use of the works (see the MLRC Final Report at p 7). The damages are not specifically limited to that part of the works constructed on the expropriated land as in section 30(1)(b). However, the compensable damages are restricted

to those that would have been actionable at common law, such as under the tort of nuisance, for example.

[25] Injurious affection damages, where no land is taken from an owner, are provided for in section 31 of the *Act*. Such damage can occur where the actions of the statutory authority interfere with the owner's use of its land, resulting in a reduction of market value or other damages (see Williams et al at p 67). A claim for injurious affection where no land is taken must be made by application to the Court of Queen's Bench within two years after the work which caused the damage is first used (see section 31(2) of the *Act*). Notably, the LVAC does not have jurisdiction over such claims (see the MLRC Final Report at p 7). Although the Manitoba Law Reform Commission has recommended that the *Act* be amended to transfer jurisdiction for such a claim from the Court of Queen's Bench to the LVAC, this has not occurred.

[26] The parties agree, as do I, that section 31 of the *Act* does not apply in the circumstances of this case.

### *Betterment*

[27] The *Act* provides that "[t]he value of any advantage to . . . the remaining lands . . . derived from the works . . . shall be set-off, but only against the amount of the damages for injurious affection" (at section 32). In this way, the *Act* provides for the possibility that the value of an owner's property may be enhanced, or bettered, by the improvements made by the expropriating authority.

[28] As with injurious affection, betterment is measured with reference to a point in time after the expropriation, when the works have been completed

and are in use. This is in contrast to market value which is assessed as of the date of expropriation. Conceptually, betterment is the corollary of injurious affection as both seek to gauge the effect of the completed works on the value of the remaining land. If there is both betterment and injurious affection, they are off-set.

### *Costs*

[29] An owner is entitled to be reimbursed by the expropriating authority for its “reasonable appraisal, legal and other costs that are reasonably incurred . . . for the purpose of determining the compensation payable” (at section 15(6) of the *Act*). These costs are often dealt with after the hearing to determine compensation (see section 15(7)).

### *Summary—Partial Taking*

[30] As submitted by counsel for the owner at the hearing of the appeal, in a partial expropriation, fair market value of the land is the focus of the calculation of compensation. However, if there is a business or revenue aspect to the land that has been affected, there will be a disturbance claim. Injurious affection arises in a partial expropriation where there is a negative impact on the value of the remaining land.

### The LVAC’s Reasons for Decision

[31] The LVAC heard evidence over the course of four days in March 2019 and was provided with documentary evidence, including expert appraisal reports filed by the owner and the City. Twenty months after hearing the owner’s application, the LVAC issued its reasons for decision and order

(the reasons).

[32] In the reasons, the LVAC described the compensation issues for its determination as relating to the median cut, betterment, injurious affection/damages, the gas distribution box, the pad site and appraisal values. The LVAC described the parties' positions and the substance of their respective experts' evidence. It noted that the owner claimed injurious affection damages due to the closure of the median cut, the loss of potential to build on the pad site, the loss of building or parking expansion on the east side of the property due to the new location of the gas distribution box, loss of curb appeal and possible loss of tenant renewal.

[33] In the "Analysis" section of the reasons, as I will explain, the LVAC made decisions on most, but not all, of the issues raised. The total compensation awarded was:

• value of land taken	\$125,000.00
• injurious affection	0.00
• (less betterment)	0.00
• damages:	
○ trees removed	14,305.00
○ balance of permit fee	3,822.80
○ BA Group invoice	<u>33,929.77</u>
Total Compensation:	\$177,057.57

Issues and Positions of the Parties

[34] The owner raises several grounds of appeal. It argues that the LVAC

incorrectly interpreted and applied principles of expropriation law and failed to provide adequate or any reasons for many of its decisions.

[35] In particular, the owner asserts that the LVAC erred in finding that a left-hand turn from St. Matthews Avenue onto the property via the median cut was illegal under *The Highway Traffic Act*, CCSM c H60 (the *HTA*); compounding that error by finding that such a turn was an illegal use of the property under section 27(2)(d) of the *Act*; failing to find that the remainder of the property was injuriously affected by the closure of the median cut; determining the market value of the expropriated land, including by failing to perform a market-value analysis; applying the wrong test in determining if the relocation of the gas distribution box resulted in injurious affection of the remaining land; failing to provide sufficient or any reasons for denying the \$1,330,000 disturbance claim for loss of the pad site; failing to order compensation for the work to be done to repair or replace the sprinkler system; and making inconsistent decisions on legal and consulting costs. The owner asks this Court to order payment of both its disturbance claim and the claim for repair of the sprinkler system and to refer all other issues back to the LVAC for redetermination.

[36] The City's position is that the reasons are "detailed, thoughtful and far from insufficient"; the LVAC correctly found that a left-hand turn through the median cut was illegal under section 109 of the *HTA* and, as an impermissible use, no value could be assigned to the median cut; reading the reasons in light of the record shows that it properly considered a market-value analysis; it agrees that the LVAC failed to consider whether moving the gas distribution box had an impact on the value of the property and considered the irrelevant fact that it was not on the owner's land; the LVAC did not err in

denying the \$1,330,000 disturbance claim for loss of the pad site when the reasons are read in light of the submissions; the LVAC was correct to deny compensation for the sprinkler system as there was no proof of payment for the repairs; and the LVAC made no error in leaving the determination of reasonable legal and consulting costs to the parties.

### Jurisdiction and Standard of Review

[37] Section 44(1) of the *Act* allows any party to a proceeding before the LVAC to “appeal the amount certified as compensation payable” to this Court. Such an appeal “may be made on questions of law or fact or mixed law and fact” and this Court may “refer any matter back to the [LVAC] for determination” or “make any determination that the [LVAC] has the power to make” (at section 44(2)).

[38] As the *Act* provides for a statutory appeal, this Court is to apply appellate standards of review “determined with reference to the nature of the question” (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 37). For example, questions of law, including questions of statutory interpretation, will be reviewed on the standard of correctness. Questions of fact and of mixed fact and law will be reviewed on the standard of palpable and overriding error (*ibid*).

### Analysis

[39] I will now address the issues raised by the owner.

#### *Closure of Median Cut*

[40] The LVAC considered the effect of closing the median cut and

found that “the [t]enant may be inconvenienced, but the trucks [were] still able to enter the south entrance of the [p]roperty . . . . This [did] not constitute a loss or damages to the [o]wner.” It also stated that it “[did] not find that access to, and parking at, the [p]roperty was severely impacted.” Moreover, the LVAC accepted the City’s argument that a left turn through the median cut into the driveway on the property was illegal under sections 109(1), 121(1) and 121(3) of the *HTA*. Relying on section 27(2)(d) of the *Act*, the LVAC concluded that compensation “cannot be awarded for something that is deemed illegal use” and, therefore, it “reject[ed] compensation for the loss of the [m]edian [c]ut.”

[41] The LVAC’s reasons in respect of the median cut focused nearly exclusively on whether a left turn from St. Matthews Avenue via the median cut was illegal and whether that disentitled the owner to compensation for its closure due to section 27(2)(d) of the *Act*.

[42] There are significant problems with the LVAC’s analysis.

[43] Section 27(2)(d) has no application to the consideration of injurious affection. The purpose of that section is to ensure that, in determining market value of expropriated land, no consideration is given to any enhancement of market value by virtue of the expropriated land itself being put to an illegal use (see Todd at pp 171-72). Courts in England have extended this principle beyond market value to deny a claim for disturbance damages where income is being earned from an illegal use of expropriated property (see Guy RG Roots et al, eds, *The Law of Compulsory Purchase*, 3rd ed (Haywards Heath: Bloomsbury Professional, 2018) at para 445). However, I am not aware of this principle having been expanded to apply to injurious

affection.

[44] In my view, the LVAC was correct in finding that the left turn was illegal. However, as section 27(2)(d) of the *Act* does not apply to injurious affection claims, the LVAC should have considered the three possible categories of injurious affection under section 30(1) of the *Act* and whether any of them applied to the closure of the median cut. If the LVAC concludes that damages for injurious affection are appropriate, it will then have to consider whether the road construction resulted in any advantage to the remaining land and, if so, the value to be set-off by way of betterment.

[45] I will return later to the illegality of the left turn and the question of whether the LVAC should have considered the median cut in assessing the market value of the expropriated land.

#### *Pad Site*

[46] The owner asserted before the LVAC that it suffered disturbance damages in the form of the loss of potential revenue from the pad site. The owner's appraiser determined the loss to be \$1,330,000. The LVAC neither awarded disturbance damages for lost revenue, nor explained why it did not. The entirety of its analysis with respect to the pad site is:

With respect to the loss of potential to build a [p]ad [s]ite on the south east corner of the [p]roperty, the [o]wner had only preliminary drawings and engineering completed, but had not started construction. The [o]wner applied and received a foundation permit, which the City later revoked. The [LVAC] believes the [o]wner should be reimbursed for reasonable engineering costs along with the balance of the foundation permit costs.

[47] The LVAC ordered the City to return the balance of the foundation permit fee of \$3,822.80.

[48] The LVAC was aware of the \$1,330,000 claim for disturbance damages as it is referred to in the “Background” section of the reasons. No explicit decision is made. However, essentially through default, the claim was not awarded. The lack of any reasons makes it impossible for this Court to review the decision.

*Gas Distribution Box*

[49] The owner claimed injurious affection of the property due to the City’s decision to move the gas distribution box, interfering with the owner’s ability to develop the property. The LVAC rejected this claim, stating that “[t]he [g]as [d]istribution [b]ox was relocated onto City property; therefore the [o]wner ha[d] not lost any land, therefore no loss of development potential.”

[50] As earlier indicated, injurious affection damages can arise as a result of the exercise of an authority’s statutory powers in the absence of an expropriation. The owner relies on this, arguing that “[i]njurious affection is payable if, by exercising its lawful powers to move the gas works, the City affected the market value of the land. This is so even though no land was lost”. I agree. To the extent that the LVAC concluded otherwise, it erred. Like the claim for injurious affection resulting from the closure of the median cut, the LVAC should have considered the three possible categories of injurious affection under section 30(1) of the *Act* and whether any of them applied to the relocation of the gas distribution box.

### *Sprinkler System*

[51] As previously noted, the expropriated land contained several mature trees that were removed which disturbed an underground sprinkler system that had to be repaired or replaced. The owner provided a quote to the LVAC in the amount of \$17,380.75 for the necessary work. The LVAC rejected this claim because “an invoice ha[d] not been provided to show what work was actually completed.”

[52] The LVAC’s decision not to award the cost to repair or replace the sprinkler system merely because there was no evidence that the work had actually been completed is arbitrary and wrong. This claim was in the nature of disturbance damages. As previously explained, a disturbance claim is compensable if it is a reasonable cost, expense or loss arising out of or incidental to the expropriation. Such claims are not limited to those that have already been incurred.

### *Market Value*

[53] The LVAC accepted the City’s appraiser’s estimate of the market value of the expropriated land. It awarded compensation of \$125,000 for the expropriated land, being 11,284 square feet at \$11.03 per square foot, rounded up. In doing so, the LVAC stated, “Compensation can only be paid for the value of the [p]roperty at the [d]ate of [e]xpropriation, not the possible future value.” The LVAC’s reasons for its assessment of the market value of the expropriated land are very scant. No reasons are given for its rejection of the owner’s appraiser’s opinion, nor does the LVAC provide its own market-value analysis.

[54] The owner submits that the LVAC erred in failing to ascertain the value of the property “in its actual condition at the time of expropriation with all its existing advantages and with **all its possibilities**”.

[55] In particular, the owner asserts that the LVAC erred by failing to consider the highest and best use of the property which would include the development potential of the pad site. It maintains that the value chosen by the LVAC effectively took into account the City’s cancellation of the foundation permit for the pad site as a result of the impending expropriation, violating section 27(2)(b) of the *Act*, which requires that fair market value be determined without reference to any decrease in value of the land resulting from the imminence of the expropriation. If the LVAC did fail to consider the potential development value of the property due to the impending expropriation, this would be an error.

[56] In addition, the owner argues that the LVAC erred by not considering the value to the property of truck access through the median cut.

[57] I agree with the City that the left turn through the median cut was illegal under the *HTA* as it violated the prohibition that “[n]o driver shall drive a vehicle to the left of the directional dividing line of a roadway” (at section 109(1)), and is not permitted by any of the exceptions thereunder. This is because, in order to perform the left turn, a driver was required to drive into the lane of oncoming traffic, albeit for a relatively short distance, to access the driveway on the property due to the median cut and driveway not lining up.

[58] Having determined that the left turn was illegal, the next step in the analysis is to determine if it was an illegal use only of the median cut or if the

completion of the left turn into the property resulted in the illegal use of the property as well. If it was an illegal use of the property, in a market-value analysis, the ability to make the left turn would be excluded from consideration under section 27(2)(d) of the *Act*. These are questions best left to the LVAC for determination.

*Conclusion—Due Compensation*

[59] Given the errors, lack of clarity and absence of reasons for the LVAC's decisions on the underlying components of due compensation and in keeping with the owner's submissions at the appeal, I would return the issue of due compensation for the expropriation to the LVAC for a new hearing. In doing so, all issues relating to due compensation, including injurious affection and betterment, are to be returned to the LVAC.

*Legal and Consulting Costs*

[60] The owner provided the LVAC with a book of documents "which included a summary of costs showing dates, invoice numbers and amounts." The LVAC ordered payment of only one consulting invoice from the BA Group in the amount of \$33,929.77 as a copy of the invoice was provided. Because "[a]ctual invoices and/or company statements were not supplied" for the rest, it found that "[t]he evidence the [LVAC] ha[d] [was] insufficient to determine all costs." However, the LVAC later concluded its reasons by awarding "reasonable appraisal, legal and other costs reasonably incurred".

[61] The LVAC's reason for denying almost the entirety of the owner's claims for legal and consulting costs is arbitrary. The owner provided evidence of the expenses it incurred by providing a listing of invoices and

amounts. To deny payment simply because copies of the underlying invoices were not provided is not in keeping with what counsel agreed is the usual practice of the LVAC. Moreover, the LVAC denied the costs claims but, at the same time, ordered payment of the owner's reasonable costs. Presumably, and illogically, this would have required a second hearing to review the exact same claims.

[62] The panel was advised by counsel at the appeal that the parties have reached agreement on many of the owner's costs claims. To the extent that any such claims are unresolved, I would return them to the LVAC for a new hearing.

### Conclusion

[63] This is one of those rare circumstances where the LVAC's reasons for its decisions on certain issues are so inadequate as to prevent "informed consideration of the grounds of appeal" (*FH v McDougall*, 2008 SCC 53 at para 98). Moreover, the reasons fail to fulfil other purposes of reasons—in particular, they do not "justify and explain the result", nor do they "tell the losing party why he or she lost" (*ibid*; see also *Histed v Law Society of Manitoba*, 2021 MBCA 70 at para 82). This, coupled with the numerous errors I have identified, requires a new hearing.

[64] I would allow the appeal and send the claim back, in its entirety, to the LVAC for a new hearing in accordance with the guidance provided in these reasons on the applicable legal principles. As there has already been significant delay in achieving resolution of the outstanding issues, including the 20 months that it took the LVAC to release the reasons, I urge the LVAC to prioritize this matter.

Costs of the Appeal

[65] As the owner has been substantially successful, I would award it costs of the appeal in accordance with sections 15(6) and 44(3) of the *Act*.

\_\_\_\_\_  
Pfuetzner JA

I agree: \_\_\_\_\_  
Burnett JA

I agree: \_\_\_\_\_  
Spivak JA

## APPENDIX

Relevant provisions of *The Expropriation Act*, CCSM c E190:

### **Application of Act**

**2(1)** Notwithstanding any Act of the Legislature enacted before January 1, 1971, whether special or general, this Act applies wherever an authority expropriates land or in the exercise of its lawful powers causes the injurious affection of land, and due compensation shall be determined in accordance with the provisions hereof.

### **Application to commission to determine compensation**

**15(1)** After an offer of compensation is served under section 16, the authority or an owner of the land may, subject to section 37 (time limits), apply to the commission, in accordance with the rules of the commission, for the determination of compensation payable by the authority to the owner for the expropriation.

### **Certification of amount by commission**

**15(2)** On receiving an application under subsection (1), the commission shall give the authority and owner of the land an opportunity to be heard and shall determine and certify the compensation payable by the authority to the owner.

### **Authority to pay costs of owner**

**15(6)** The authority shall pay reasonable appraisal, legal and other costs that are reasonably incurred by an owner for the purpose of determining the compensation payable under this Act for an expropriation.

### **Commission may determine costs**

**15(7)** Where the amount of compensation payable under this Act for an expropriation is settled by the authority and an owner without a hearing or is determined by the commission, the commission may, on application by the authority or owner, determine the costs.

**Authority to compensate for injurious affection**

**25(1)** An authority that expropriates land or that in the exercise of its lawful powers causes the injurious affection of land shall pay to the owner thereof due compensation in accordance with this Act for the loss or damage thereby caused.

**Due compensation for land**

**26(1)** Where land is expropriated, the due compensation payable to the owner therefor shall be the aggregate of

- (a) the market value of the land determined as hereinafter set forth;
- (b) the reasonable costs, expenses and losses arising out of or incidental to the owner's disturbance determined as hereinafter set forth;
- (c) damages for injurious affection as hereinafter set forth; and
- (d) the value to the owner of any special economic advantage to him arising out of or incidental to his actual occupation of the land, to the extent that no other provision is made therefor in due compensation.

**Market value defined**

**27(1)** The market value of land is the amount that the land might reasonably be expected to realize if sold in the open market by a willing seller to a willing buyer.

**Factors not considered**

**27(2)** In determining the due compensation payable to the owner no account shall be taken of

- (b) any increase or decrease in the value of the land resulting from the imminence of the development in respect of which the expropriation is made or from any imminent prospect of expropriation; or
- (d) any increase in the value of the land resulting from the land being put to a use that could be restrained by any court or is contrary to law or is detrimental to the health of the occupants of the land or to the public health.

**Compensation for disturbance of owner**

**28(1)** Subject to subsection (3), the authority shall pay to an owner in respect of disturbance, such reasonable costs, expenses and losses as arise out of or are incidental to the expropriation, including

- (a) where the land includes the residence of an owner, other than a tenant, an allowance to compensate for the inconvenience and the cost of finding another residence in the amount of five per cent of the compensation payable in respect of the market value of that part of the land expropriated that is used by the owner for residential purposes, if that part was not being offered for sale on the date the declaration was signed;
- (b) where the land taken does not include the owner's residence, the owner's costs of finding premises to replace those expropriated, if the lands were not being offered for sale on the date the declaration was signed;
- (c) relocation expenses, including
  - (i) moving costs, and
  - (ii) legal fees, land survey costs and other expenses reasonably incurred in acquiring other lands; and
- (d) where the land is subject to a security interest, the amount of any loss he is likely to sustain as a result of the acceleration of payment thereof due to the expropriation where the prevailing rate of interest for an equivalent security is greater than the rate of interest provided for by the security interest on the land.

**Injurious affection in partial takings**

**30(1)** Compensation for injurious affection where an authority expropriates part of the land of an owner shall consist of the amount of

- (a) any reduction in market value of the remaining land of the owner caused by the expropriation of the part;

- (b) the damages sustained by the owner as a result of the existence and the use but not the construction of the works upon the part of the land expropriated; and
- (c) such other damages sustained by the owner as a result of the existence, but not the construction or use, of the works as the authority would otherwise be responsible for in law if the existence of the works were not under the authority of a statute.

**Partial taking defined**

**30(2)** For the purposes of this section it shall be deemed that part of the lands of an owner is expropriated only where the owner from whom land is expropriated retains land contiguous to that expropriated or retains land of which the value was enhanced by unified ownership and unity of use with that expropriated.

**Due compensation to include amount for injurious affection**

**30(3)** Compensation under this section shall be determined in the proceedings for the determination of and as part of the due compensation payable for the land expropriated.

**Injurious affection where no land taken**

**31(1)** Due compensation for injurious affection where an authority does not acquire part of the land of an owner shall consist of the amount of such damages sustained by the owner, including any reduction in the market value of the land, as are the result of the existence, but not the construction or use, of the works and for which the authority would be responsible in law if the works were maintained otherwise than pursuant to the authority of a statute.

**Time for making claim limited**

**31(2)** Subject to subsection (3), a claim for due compensation under this section shall be made by the person suffering the damage or loss by application to the court within two years after the work is first used for the purpose for which it was constructed or acquired or after it has been substantially completed, and if not so made the right to compensation is forever barred.

**Betterment considered**

**32** The value of any advantage to the lands or the remaining lands of an owner derived from the works for which part of the lands of the owner was expropriated or by which the lands were

injuriously affected shall be set-off, but only against the amount of the damages for injurious affection.

**Appeal of certified amount to Court of Appeal**

**44(1)** A party to a proceeding before the commission may appeal the amount certified as compensation payable to The Court of Appeal within 40 days after the day the commission certifies the amount under subsection 15(2), or within seven days from the day the commission issues a decision or certifies an amount under subsection 15(5), whichever is the later.

**Powers of Court of Appeal**

**44(2)** An appeal under subsection (1) may be made on questions of law or fact or mixed law and fact, and The Court of Appeal may

- (a) refer any matter back to the commission for determination; or
- (b) make any determination that the commission has the power to make.

**Costs**

**44(3)** The costs of an appeal are in the discretion of The Court of Appeal, and the court may order that costs be awarded to the owner and assessed in accordance with subsection 15(6) where the owner's appeal is successful or where the appeal of an authority is unsuccessful.