DECISION **2018 NSUARB 37**
M07287

NOVA SCOTIA UTILITY AND REVIEW BOARD

IN THE MATTER OF THE EXPROPRIATION ACT

- and -

IN THE MATTER OF the Claims of **WAYNE OAKLEY** regarding the expropriation of his lands by **D.D.V. GOLD LIMITED** located at 6569 Mooseland Road, Middle Musquodoboit, Nova Scotia

BEFORE:	**Dawna J. Ring, Q.C., Member**
APPLICANT:	**WAYNE OAKLEY** Robert H. Pineo, LL.B. Jeremy P. Smith, LL.B. J. Paul Niefer, LL.B.
RESPONDENT:	**D.D.V. GOLD LIMITED** John A. Keith, Q.C. Jack K. Townsend, LL.B.
HEARING DATE:	July 17-18, 2017
DECISION DATE:	**February 23, 2018**
DECISION:	**Compensation for Mr. Oakley's disturbance is awarded at 15% of the market value of his property, being $45,750. The Board retains jurisdiction to consider interest and costs, if the parties are unable to agree.**

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I SUMMARY

[1] For the development of its gold mine, D.D.V. Gold Limited, now Atlantic Mining NS Corp., expropriated the lands of Wayne Douglas Oakley in Moose River Gold Mines, Halifax Regional Municipality, Nova Scotia, PID 40627218 and 40627226 (the Lands) on June 18, 2012, by way of a Vesting Order issued under s. 70(1) of the *Mineral Resources Act*, S.N.S., 1990, c. 18, as amended (*MR Act*).

[2] Mr. Oakley was in occupation of the Lands when they were expropriated which included his home. The parties have agreed to the market value of the Lands at $305,000. At dispute is: what, if any, compensation should be awarded for Mr. Oakley's disturbance under s. 27(3)(b)(ii) of the *Expropriation Act*, R.S.N.S. 1989, c. 156, as amended.

[3] In Nova Scotia and the two jurisdictions with similar legislations, this is the first case to determine these damages for the expropriation of a person's entire property and home, as opposed to a business.

[4] After considering all facts and arguments of the parties, the Board awards compensation at 15% of the market value of the Lands for Mr. Oakley's disturbance, being $45,750.

[5] The Board retains jurisdiction to consider interest and costs, if the parties are unable to agree.

II RELEVANT LEGISLATION

[6] The Board has read the *Acts* as a whole. However, the most relevant sections for this Decision are:

Mineral Resources Act

Purpose of Act

1A The purpose of this Act is to support and promote responsible mineral resource management consistent with sustainable development while recognizing the following goals:

(a) providing a framework for efficient and effective mineral rights administration;

(b) encouraging, promoting and facilitating mineral exploration, development and production;

(c) providing a fair royalty regime; and

(d) improving the knowledge of mineral resources in the Province.

Application for right in land

70 (1) Whenever a lessee requires land, or a right or interest in land, for a mine or any purpose connected with or incidental to a mine and no agreement can be made for the acquisition thereof, or a right-of-way or easement in respect to the land, the lessee may present an application to the Minister stating that

(a) the lessee is the lessee under a certain lease;

(b) the lessee requires certain land or some right or interest therein, of which a plan and description is attached, for one or more of the above purposes in connection with the area covered by the lease;

(c) a person named is the owner of the land, and the lessee is willing to make an arrangement with the owner for the acquisition of the land, right or interest, stating the nature of the proposed agreement and the price that the lessee is willing to pay, but the owner is unwilling to accept; and

(d) the lessee requests that the Minister make an order that the right or interest in the lands required by the lessee be vested in the lessee.

(2) The application shall be accompanied by the deposit with the Minister of such sum as directed for costs or expenses that may be ordered to be paid by the lessee to the owner where the Minister requires the deposit.

(3) Upon application, the Minister may, by a vesting order, vest in the lessee the property right claimed by the lessee or such other right as the Minister may determine.

(4) A vesting order issued by the Minister shall be filed at the registry of deeds for the registration district in which the land to which the order relates is situate and the filing thereof is deemed to be a deposit of expropriation documents pursuant to the Expropriation Act.

(5) Upon the filing of a vesting order by the Minister, the lessee named in the order is and is deemed to be the expropriating authority within the meaning of the Expropriation Act.

Expropriation Act

71 In connection with the proceedings pursuant to Section 70,

(a) the Expropriation Act applies mutatis mutandis to the expropriation;

(b) notwithstanding Section 4 of the Expropriation Act, whenever the provisions of that Act conflict with the expropriation provisions of this Act, the expropriation provisions of this Act prevail;

(c) the lessee is deemed to be the statutory authority for the purpose of the Expropriation Act;

(d) the Minister is deemed to be the approving authority for the purpose of the Expropriation Act.

Expropriation Act:

Purpose of Act

2 (1) It is the intent and purpose of this Act that every person whose land is expropriated shall be compensated for such expropriation.

(2) Further, it is the intent and purpose of this Act that where a family home is expropriated the position of the owner in regards to compensation shall be such that he will be substantially in the same position after the expropriation as compared with his position before the expropriation.

(3) Recognizing that strict market value is not in all cases a true compensation for a family home that is expropriated since it may not provide equivalent accommodation to the owner of the family home, this Act shall be interpreted broadly in respect of the expropriation of a family home so that effect is given to the intent and purpose set forth in subsection (2).

Duty to pay compensation

24 Where land is expropriated, the statutory authority shall pay the owner compensation as is determined in accordance with this Act.

Aggregate of items to be compensated

26 The due compensation payable to the owner for lands expropriated shall be the aggregate of

(a) the market value of the land or a family home for a family home 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.

Value

27 **(3)** Where the owner of land expropriated was in occupation of the land at the time the expropriation document was deposited in the registry of deeds and, as a result of the expropriation, it has been necessary for him to give up occupation of the land, the value of the land expropriated is the greater of

(a) the market value thereof determined as set forth in subsection (2); and

(b) the aggregate of

(i) the market value thereof determined on the basis that the use to which the land expropriated was being put at the time of its taking was its highest and best use, and

(ii) the costs, expenses and losses arising out of or incidental to the owner's disturbance including moving to other premises but if such cannot practically be estimated or determined, there may be allowed in lieu thereof a percentage, not exceeding fifteen, of the market value determined as set forth in subclause (i),

plus the value to the owner of any element of special economic advantage to him arising out of or incidental to his occupation of the land, to the extent that no other provision is made by this clause for the inclusion thereof in determining the value of the land expropriated.

...

(8) For the purposes of subclause (ii) of clause (b) of subsection (3) consideration shall be given to the time and circumstances in which an owner was allowed to continue in occupation of the land after the expropriating authority became entitled to take physical possession or make use thereof, and to any assistance given by the expropriating authority to enable such owner to seek and obtain alternative premises.

Costs

52 **(5)** Where the compensation awarded to an owner by the Board is equal to or less than the amount offered in the offer to settle, the owner is entitled to costs, as determined by the Board, to the date of service of the offer to settle but the owner shall bear the owner's own costs that are incurred after that date.

(6) An offer to settle shall not be disclosed to the Board before its determination of the compensation payable to the owner. [Emphasis added]

III BURDEN OF PROOF

[7] The Claimant, Mr. Oakley, has the burden of proof. Proof is on a balance of probabilities, which is described as "what is more likely than not"; or tips the balance, that is, slightly more than 50%.

IV ISSUE

[8] The main issue in this case is:

1. What, if any, compensation should be awarded to Mr. Oakley for his disturbance pursuant to s. 27(3)(b)(ii) of the *Expropriation Act*?

[9] The parties have raised numerous sub-issues which will be addressed in the Findings section.

V FACTS

[10] As the parties agreed to the market value of the Lands, the Board heard from two witnesses: Mr. Oakley and Walter Ralph Bucknell. Since 1999, Mr. Bucknell has been the General Manager of D.D.V. Gold Limited (now Atlantic Mining NS Corp.), the name resulting from a merger in 2014. At all material times to this proceeding, he was also a Director of the parent company, Atlantic Gold Corporation. Any or all of the companies will be referred to in this Decision as "Gold".

[11] Some evidence heard by the Board related to issues of costs for these proceedings under s. 52, and interest (costs and interest), which the Board has retained jurisdiction to determine, if the parties cannot agree. Those facts are not addressed in this Decision.

[12] Mr. Bucknell explained the difference between mineral titles and service titles. The minerals below the ground are owned by the Crown. Mineral titles give the company rights to extract the minerals. Surface titles are the real estate; titles to be acquired from the property owners, like Mr. Oakley.

[13] Mr. Oakley was 75 years old at the time of the hearing. Twenty years earlier, on October 10, 1997, he purchased the Lands which consist of approximately 5.25 acres and 1,200 feet of road frontage on Mooseland Road. A small crescent shaped abandoned road area of approximately three-quarters of an acre (PID 40627234) separated a one-fifth of an acre area from the main portion of the Lands.

[14] In 1998, Mr. Oakley began building his home on the Lands. After the building was roof tight and some initial interior work was completed, Mr. Oakley intended to finish projects when he had the money to do so.

[15] His home was a single-story of approximately 31.5 x 24 feet (760 square feet) with two bedrooms and an open kitchen/living room area with a cathedral ceiling. It had hardwood floors, pinewood walls and douglas fir plywood on the outside. A 306 square foot deck ran the length of the home on the front and had two sets of stairs. It was heated by a Vermont Casting woodstove and electric heat. Water was obtained from a dug well which was not connected to the house. The property had an onsite pit toilet (outhouse). The property also had a shed of approximately 12 x 24 (300 square feet) which housed Mr. Oakley's tools and weight lifting equipment, amongst other things.

[16] Mr. Oakley cleared an area of approximately two acres which was hydro-seeded. As there was too much acid in the soil, the grass remained for 3-4 years. He built a large trout pond which was 14 feet deep.

[17] Mr. Oakley did not have a land telephone line as he was told by the telephone company that he would have to pay the cost of the line from the road to his home; at an estimated cost of $5,000. He was encouraged to obtain a cell phone, but stated he had to stand on the hill outside his home to obtain telephone service.

[18] Mr. Oakley testified that upon hearing of the gold mine, he stopped work on completing his home. It was 90% finished when it was expropriated. Projects not completed included connecting the water to the house, installing plumbing, and covering the outside with a log-type wooden siding.

[19] Mr. Oakley had been a journeyman plumber and steamfitter with certificates in both trades. He obtained work through his union until approximately 1997. Afterwards, he worked off and on doing some private work in the trades with a friend, did various odd jobs, and bought and sold cars. He stated two hands were needed for plumbing and steamfitting which he could not do alone after losing his hand. He fully retired at the age of 65 in 2007.

[20] Gold's mine in the area was named the Touquoy Gold Project (Project).

[21] In November 2002, Mr. Bucknell and Gold's Chair, Ron Hawkes, attended a tradeshow in Halifax. They assessed there was a potential to explore and develop a mine in the Moose River area which, ultimately, led to Gold executing a two-year option agreement for the mineral titles on May 31, 2003. This was to give Gold time to obtain further information and decide whether to enter into a full agreement or withdraw.

[22] During the subsequent two years, Gold mainly drilled holes and determined what would be necessary to develop the mine including environmental permits, surface (property) titles, and mining leases.

[23] Mr. Bucknell testified the Project required 60 property titles involving approximately 35 individuals. Prior to 2004, Gold entered into approximately 20 to 25 purchase option agreements with property landowners in the area. These agreements were for a period of two years, but could be extended. Gold paid the landowners for these

options. Mr. Bucknell testified Gold did not want to buy the properties because of the risks still involved with developing the mine. The agreements provided Gold with security to the property titles without having to purchase them. No such agreement was entered into with Mr. Oakley.

[24] Mr. Oakley testified he heard rumours about the mine, prior to his first contact with Gold.

[25] Mr. Bucknell said Gold decided to live and work in Moose River which, at the time, consisted of approximately 12 to 15 homes.

[26] On March 10, 2004, Gold offered Mr. Oakley $100/hole to drill test holes on his Lands. Mr. Oakley stated he heard other landowners had received $250/hole, therefore, he advised Gold the offer would not cover the damage it may do to his property. No test holes were drilled on his Lands.

[27] For approximately three to six months in 2004, Mr. Oakley had his Lands for sale. He testified he had separated from his wife in 1991. He was having personal problems, including some health issues, and difficulty securing work. His wife pressured him to "do his duty" which the Board understands to be to pay money. He described this period as not having been in "the proper frame of mind" and when he came around, he took the Lands off the market (Transcript, p. 125).

[28] Mr. Oakley received a Quit Claim Deed when he purchased the Lands. Around 2004, his property lawyer encouraged him to clear the title and migrate the property. Carl Redden, a resident of Moose River and relative of the family that previously owned the Lands, signed an Affidavit on May 26, 2004, testifying to the ownership.

[29] Mr. Bucknell testified Gold held an Open House in Moose River in August 2004. This was to explain to the community what Gold was doing, its aspirations, and the requirements for developing the mine, including the need to buy properties in the area:

> Q. And how did you -- what did you go about doing in order to get to know the community?
>
> A. We just engaged with people on a daily basis. We made a point of meeting people, and we had our first open house in the old, vacant, and decommissioned church at Moose River in 2004, I think it was August, to explain to -- to formally explain to the -- to the residents and anybody locally who was stakeholders, what we were doing, what our aspirations were, what the risks were, that we needed to buy land, the surface titles, and that we needed to get environmental permits and so on. [Emphasis added]
>
> [Transcript, p. 166]

Mr. Bucknell said it lasted a few hours and approximately 40 to 50 people attended, including Mr. Oakley.

[30] Gold purchased its first property in Moose River in March 2005. In May 2005, Gold exercised its option and entered into an Agreement for the mineral titles.

[31] Gold held another Open House in December 2005. Mr. Bucknell said this second Open House covered the same general information as the first. He recalled there were no adverse commentary from the community.

[32] Mr. Bucknell testified that between 2005 and 2007 Gold continued to drill test holes and do the technical work needed for the feasibility study.

[33] In early 2007, Gold began working with governmental agencies. On March 15th, it registered its surface gold mine and processing plant for environmental assessment. A Public Notice was published in the Chronicle Herald and posted in various other places in the area listed in the Notice including Reid's General Store, the Irving Gas Station. It stated:

> This is to advise that on March 15th, 2007 DDV Gold Ltd. registered a surface gold mine and processing facility for environmental assessment, in accordance with Part IV of the Environment Act.

> The purpose of the proposed undertaking is to mine and process gold from a surface mine and mill in Moose River Gold Mines, Halifax County beginning in the second half of 2007...
>
> Copies of the environmental assessment registration information may be examined at the following locations: ...
>
> [Exhibit O-4, Tab 25, p. 639]

[34] By letter dated April 10, 2007, Mr. Bucknell was informed an environmental assessment had been completed by the Department of Environment and a focus report was required. A telephone survey of 502 residents on the Eastern Shore was conducted in September 2007 to assess their attitudes about the mine. The Focus Report was completed on November 2007 and, once again, a Notice was issued stating where the public could review it and provide any comments.

[35] On February 1, 2008, the mine was approved by the Minister. The mine approval was reported in the media including in an article in The Coast dated April 23, 2009.

[36] Further properties were purchased in 2008.

[37] On March 18, 2008, Mr. Bucknell met with Mr. Oakley at his home. For the meeting, Mr. Oakley had prepared a proposed purchase price with his daughter. The two men agreed to a purchase price for the Lands and Mr. Oakley could retain his home and shed, but he would have to remove these at his own costs. They also agreed one-half of the purchase price would be paid within two weeks, on April 1st, with the other half paid before July 2008. Mr. Murphy would be Gold's local contact person for all arrangements.

[38] Mr. Bucknell advised he would have to get permission from Gold's Board of Directors and he would get back to Mr. Oakley within days. Mr. Oakley testified he asked Mr. Bucknell what influence he had over the Board of Directors and understood Mr. Bucknell to have indicated he had a lot of influence and said:

> ... "I can -- between you and I, I feel safe telling you now that we have a deal."
>
> [Transcript, p. 62]

[39] To get ready to move his home and shed, Mr. Oakley located a piece of property he could purchase from his ex-father-in-law, Donald Hollett, on Cooper Corner Road in Middle Musquodoboit. He could pay the purchase price when the funds were available on April 1, 2008.

[40] Mr. Oakley contacted a company to move the buildings and received a quote. He showed them the route. He was told the road on the Cooper Corner property had to be widened. Mr. Oakley cut back bush and vegetation for approximately six feet on both sides of the road. He cleared a 50x50 foot area consisting of alders and a field and had the area leveled for the buildings. The buildings would be laid on 8x8 and 10x10 timbers which he purchased in Nine Mile River, brought to the site and laid them.

[41] As Mr. Oakley's vehicle could not move the alders, brush, timbers or his personal items, he purchased a second-hand truck for $12,000. He is not claiming the cost of this vehicle.

[42] Mr. Oakley moved his personal items from his home into storage in Halifax. He did this work himself which was more time consuming with one hand.

[43] Mr. Oakley testified he went to Gold's office around April 1st, as he and Mr. Bucknell agreed. He spoke to Mr. Murphy who said he had not heard anything about a

settlement to purchase his Lands or a cheque. Mr. Oakley asked him to check into it as half the funds were to have been there for him by April 1st.

[44] Mr. Oakley attended at Gold's office on a number of occasions. He testified that by the end of April he was "disgusted" that he had no word from Mr. Bucknell, and Mr. Murphy did not know what to tell him. Mr. Oakley did not hear anything from Gold until he saw Mr. Bucknell almost two years later on February 12, 2010.

[45] Mr. Oakley stated it was [stressful] (Transcript, p. 74). He described this as:

> Q. He goes on to say that you expressed displeasure that Mr. Bucknell:
> ...
>
> A. Well, I -- oh, guaranteed, I was displeased. And I explained that Mr. Bucknell; I thought that a man of his stature could have at least called and let me know that there was no deal or wrote me a letter. I had no communication with him at all and he couldn't -- according to Mr. Murphy, there was no correspondence or whatever between him and Mr. Bucknell on that deal.
> ...
>
> ... Mostly why I was mad is because he didn't contact me; he left me in limbo. For two years, not two weeks. And, you know, I had made those arrangements, preparations. [Emphasis added]
>
> [Transcript, pp. 80 & 82]

[46] After three to four months, Mr. Oakley moved his personal items out of storage and back into his home. He had to pay for this storage.

[47] Mr. Oakley testified that in August 2008 he had to sell his property at 929 Herring Cove Road in Halifax for a loss. He purchased the property at the Cooper Corner Road for $25,000 between this sale and the expropriation. The Cooper Corner property consisted of the two properties, one being 11.5 acres which contained the old farmhouse and the other lot had two acres. At that time, he did not have the money to build anything on the property.

[48] Mr. Bucknell testified that as he was driving down the road from Mr. Oakley's home after their March 18, 2008, meeting, he thought the amount they had agreed to was exorbitant. He did not believe he should take it to the Board of Directors and did not do so.

[49] Mr. Bucknell testified he never got back to Mr. Oakley. He suspects he did get telephone calls from Mr. Murphy advising that Mr. Oakley had come to the office. Again, he did not provide any communication to Mr. Oakley through Mr. Murphy or anyone else.

[50] On February 14, 2010, Mr. Bucknell again attended at Mr. Oakley's home. He informed Mr. Oakley the Board of Directors had not approved the previous deal. He apologized for not getting back to him.

[51] Mr. Oakley stated his price to sell his property. Mr. Bucknell stated that apart from the sale price, Gold would require clear title which meant the Lands would have to be migrated. Mr. Oakley testified Mr. Bucknell stated Gold would pay for the migration. Mr. Bucknell did not recall offering to have Gold pay for it, but testified the company had paid for others in the area to migrate their properties. One reason was because Gold wanted the migrations done correctly.

[52] To migrate the property, Mr. Oakley testified his property lawyer said he had to find a person, not connected to the property or the Redden family, who could testify to its ownership and use. Mr. Oakley stated it was difficult and time consuming to find such a person. He spoke to a number of people and travelled around to speak to them. Eventually he met a qualified person and took her to his lawyer's office where she provided her testimony and signed an Affidavit (Transcript, pp. 84-85). The Lands were

migrated on July 14, 2011. Mr. Oakley paid the legal account of $1,500 [Exhibit O-6]. Gold did not reimburse him.

[53] After the migration, Mr. Oakley stated he called Gold's office and left a message with Mr. Bucknell, but heard nothing further:

> Q. So what happened next after you migrated the property?
> A. I migrated the property and I called Mr. Bucknell's office in Moose River. He wasn't there. I spoke to his secretary and I said, "Tell Wally that I done the work that he requested me to do. Everything is all done now and the rest is up to him." I never did speak to Wally; he never got back to me. …
>
> [Transcript, p. 89]

[54] Subsequent to the migration, Gold sent an offer (below their proposed settlement in 2008) to Mr. Oakley's property lawyer, which Mr. Oakley refused.

[55] By letter dated August 5, 2011, Gold applied to the Minister of Natural Resources (Minister) for a vesting order of Mr. Oakley's Lands under s. 70 of the *MR Act*.

[56] Gold continued to purchase properties for the mine throughout 2010 and 2011. Newspaper articles regarding the Project creating jobs and gold prospecting were published in the Chronicle Herald on November 24 and December 11, 2011.

[57] A Notice of an Application for a Vesting Order to enable Gold's mine to be constructed on various properties (identified by their PID numbers), including the Lands of Mr. Oakley, called for interested parties to send all relevant information to the Department of Natural Resources (Department) by no later than February 20, 2012.

[58] In an undated Notice to Mr. Oakley at the Herring Cove Road address, the Minister noted the Department had been advised by Gold that it had offered Mr. Oakley the lump sum referenced above and was declined by Mr. Oakley [Joint Exhibit Book, O-4, Tab 12].

[59] On March 8, 2012, Gold received the Appraisal Report prepared by Nigel G. Turner of Turner Drake & Partners Ltd. which assessed the market value for the Lands at $305,000.

[60] The Minister issued the Vesting Order on June 12, 2012, which granted Gold title to Mr. Oakley's Lands and stated that upon the filing of the Vesting Order, Gold was required to compensate Mr. Oakley in accordance with the statutory provisions of the *Expropriation Act*.

[61] Notice from the Minister that the Vesting Order was granted was sent to Mr. Oakley by registered mail/courier on June 13, 2012, to the Herring Cove Road address.

[62] The Vesting Order was filed at the Registry of Deeds on June 18, 2012, being the date of expropriation.

[63] A settlement offer was provided by Gold to Mr. Oakley on September 12, 2012, and 75% was paid to him as required by the *Expropriation Act*. After receiving these funds, Mr. Oakley testified he started to construct his home on the Cooper Corner property. Mr. Oakley testified that, ultimately, he was able to stay in his home in Moose River until January 2013. After that, he moved his personal items into his mother's shed in Middle Musquodoboit and a friend's shed. He did not pay for this storage. He also stated he moved around between his mother's and children's residences. Upon completion, Mr. Oakley moved his personal items into his new home.

[64] At the time of the hearing, Mr. Oakley was living there with his wife after they had reconciled.

[65] On cross-examination, Mr. Oakley was shown Deeds for the properties he purchased for $25,000 from Mr. Hollett. These Deeds transferred the properties between

his ex-father-in-law and his estranged wife in 2000 and 2006. Mr. Oakley stated he was not aware of the transfers as he was separated from his wife at those times. He was unsure, but thought they occurred because of Mr. Hollett's health issues. Despite these, Mr. Oakley paid $25,000 to his ex-father-in-law for the two properties on Cooper Corner Road.

[66] Mr. Oakley also testified that his daughter had a significant health issue and a young child. He moved into his daughter's home temporarily to care for them with his estranged wife. His home, however, continued to be his Moose River house.

[67] On February 1, 2016, Mr. Oakley commenced proceedings under the *Expropriation Act* against Gold (and refiled it on February 17, 2016, to correct PID numbers). He claimed:

> 3. The Claimant claims the following compensation:
>
> (a) The Market value of PID Nos. 40627218 and 40627226 and 40627234
>
> (b) Value of the Claimant's home
>
> (c) The value of the disturbance damages incurred
>
> (d) Recovery of all reasonable legal costs, disbursements and experts' fees;
>
> (e) Interest;
>
> (f) Such further and other relief under the *Expropriation Act* that later becomes apparent and as this Honourable Board thinks fit and just.
>
> [Exhibit 0-2, p. 2]

[68] A Reply was filed by Gold dated March 8, 2016.

[69] On January 31, 2017, Mr. Oakley obtained an Appraisal Report from Altus Group Copyright 2017. It appraised the three properties, for which Mr. Oakley was claiming compensation, at a market value of $325,000.

[70] On June 26, 2017, Mr. Oakley accepted the Respondent's valuation of his Lands, which does not include the third property, at $305,000.

[71] Mr. Oakley claimed compensation of 15% of the Market Value of the Lands ($45,750), for his disturbance. It is outlined in para. 15 of his counsel's Pre-Hearing Brief as follows:

> (a) He was kept in a state of abeyance from developing his property to fully enjoy it from 2004 to the date of expropriation (June of 2012). During this time, the Claimant was unsure of if and when his land would be acquired by the Respondent and what compensation he would receive from it;
>
> (b) He spent considerable time in negotiations for the sale of the Subject Property prior to the expropriation. In fact, he had originally asked for $360,000 and negotiated to a conditional offer of $250,000 with Mr. Bucknell. For his part, Mr. Bucknell did not even bother to present this conditional offer to the Respondent's Board for approval. Clearly, had he done so, and acted in good faith, this matter might well have resolved for less than the cost of this expropriation litigation;
>
> (c) At the urging of Mr. Bucknell, the Claimant incurred the legal costs for having his land migrated into the Registry. The Respondent did not compensate him for this out-of-pocket expense. In addition, the Claimant spent considerable time and expense providing the background evidence required to migrate the Subject Property;
>
> (d) He was required to remove all of his possessions from the Subject Property. The Claimant did this himself at considerable personal difficulty given his disability (the Claimant lost his right hand). Additionally, he was required to move some of his possessions a second time when his storage accommodation became unavailable to him; and
>
> (e) He had the task of finding alternate residential accommodations.

[72] During the hearing, these and other items of compensation were addressed.

VI FINDINGS

1. Outline

[73] The Board will first address a preliminary matter and then provide a Summary of its Findings. It will review general principles of legislation interpretation and the following central issues, before determining the specific claims:

1. When does the *Expropriation Act* apply to a mining company?

2. When does the shadow period begin in this case?
3. Is compensation for an owner's disturbance limited to pecuniary losses? and
4. Is compensation for an owner's disturbance limited to actionable wrongs?

[74] Finally, the Board will review the issue of Mr. Oakey's credibility in advancing these claims, before setting the compensation for his disturbance.

[75] When speaking of a single "owner" or the person's disturbance, the Board is generically referring to any person or all people. However, as this case involves Mr. Oakley, the Board will generally use the masculine pronouns in this Decision.

2. Preliminary Matter

[76] Gold's Reply disclosed details of the offer of settlement between the parties, contrary to s. 52(2) of the *Expropriation Act.* The facts about Mr. Oakley's counsel requesting these offers be removed from the Reply are properly left for any future cost hearing and will not be reviewed here. As the offer was not removed from Gold's Reply, both parties have provided similar information to the Board.

[77] At the commencement of the hearing on its merits, Mr. Oakley's counsel requested the disclosure of the offers not prejudice Mr. Oakley's requests for compensation for his disturbance under s. 27(3)(b)(ii) of the *Expropriation Act*.

[78] Gold argued that it has raised issues regarding Mr. Oakley's credibility and his motive for bringing the disturbance claim which necessitates a consideration of the settlement offers.

[79] The Board advised the offers would not prejudice Mr. Oakley's claims.

3. Evidence-General

[80] The Board finds both witnesses were honest.

[81] When there is conflicting evidence or a different recollection of the same events or conversations, the Board accepts the evidence of Mr. Oakley. This is not a finding that Mr. Bucknell was not truthful. Rather, he was involved in many activities and negotiations such that his recall of a specific conversation was not as clear. Throughout Mr. Bucknell's testimony he often stated: "I guess we did", "I may have", "I don't think I did" (Transcript pp. 191, 217, 218, respectively).

[82] Mr. Bucknell's numerous activities included negotiations, sales, conversations, and other tasks for the development of this mine as well as being involved with other boards. For example, immediately after their March 2008, meeting Mr. Bucknell decided he could not take their proposed settlement to the Board of Directors. When asked why he did not get back to Mr. Oakley as promised, he stated:

> Q. Why didn't you get back to him? Yeah.
>
> A. I don't know. I was back in Australia. I don't know. I was juggling other Boards. I should have. I should have been -- but... [End of answer] [Emphasis added]
>
> [Transcript, p. 194]

[83] In contrast, this was a significant and singular event for Mr. Oakley.

[84] Furthermore, Mr. Bucknell submitted a document which he stated contained his notes after various meetings with or in relation to Mr. Oakley. It included statements allegedly spoken by Mr. Oakley, in particular, about his wants or needs. Once again, it included phrases like "I think he mentioned" … "there was something that suggested" … [Exhibit O-4, Tab 24, p. 638]. These notes were not provided to Mr. Oakley at the time, to enable him to comment on its accuracy or to correct any miscommunication. Where

these statements differ from Mr. Oakley's testimony, the Board accepts Mr. Oakley's evidence over these notes.

[85] The Board finds Mr. Oakley was in occupation of the Lands on the date of the expropriation. The Board finds that at all material times to these proceedings, the Lands included his home. When he temporarily resided with his daughter to care for her and his grandchild, he did not relinquish his home on the Lands.

4. Summary of Findings

[86] The Board's Findings are summarized in this section. The reasons are explained throughout the remainder of the Decision.

[87] This is a test case. This is the first time in Nova Scotia that compensation for an owner's disturbance has been considered for a person whose entire property and home were expropriated.

[88] Mr. Oakley's counsel advised there are no precedents in Nova Scotia or the other two jurisdictions with similar statutes, (Northwest Territories and Nunavut). Cases cited from other jurisdictions relate to different provisions in different statutes and are not always helpful. Text quotes, without considering the Nova Scotia legislation, are equally inapplicable. All cases provided from Nova Scotia related to the disturbance of a business. These are subject to additional provisions under the *Expropriation Act* and do not specifically relate to the loss of a home. In some Nova Scotia cases, they were a partial taking of the property and, therefore, the damages were for injurious affection. Consequently, legislation interpretation is central to the issues before the Board.

[89] The Board has carefully considered the facts, legislation, pre-hearing briefs and oral arguments of counsel. The Board thanks counsel for their work.

[90] The Board finds the *Expropriation Act* applies *mutatis mutandis* to a mining company. When given the privilege and right to expropriate a person's property, there is an equal responsibility to pay all compensation under the *Expropriation Act.* This includes the losses experienced before the expropriation, often referred to as the "shadow period". A mining company is put in the same position as the Crown engaged in a public work.

[91] The parties agree, and the Board concurs, that to receive compensation for an owner's disturbance there must be an expropriation, causation must exist, there cannot be double recovery, it does not include those issues relating to costs or interest, and cannot be for punishment or punitive damages.

[92] The Board finds that under the *Expropriation Act* in Nova Scotia, compensation for an owner's disturbance is not limited to pecuniary losses and does not require there to be an actionable wrong.

[93] The ordinary meanings of the words "losses" and "disturbance" are very robust. The former includes the loss of virtually anything. Its wide-range in an expropriation context may encompass being deprived of one's property and home; losing the calm, rest, order, and quiet of one's life; losing time which could have been spent on other matters; having an interruption in their life; being agitated, worried, unsettled; or experiencing a disadvantage or detriment. As with other broad terms, the Board has not attempted to determine an exhaustive list of losses. Rather, the types of losses will be dependent upon the facts and circumstances of each individual case.

[94] While the types of compensable losses are virtually limitless, they are confined by the maximum award of up to 15% of the market value of the Lands. They must also meet the criteria of being reasonable and arising out of or incidental to the owner's disturbance.

[95] Regarding credibility, the Board finds Mr. Oakley to be credible and, furthermore, finds he did not pursue compensation for the disturbance caused to him to obtain recovering of his costs and interest in these proceedings under s. 52.

[96] Under the facts and circumstances of this case, the Board finds no compensation is to be provided to Mr. Oakley for Mr. Bucknell not taking their 2008 proposed settlement to Gold's Board of Directors, his half-truth spoken in 2010 stating 'the Board of Directors did not agree to those terms', nor for any bad faith in his negotiations with Mr. Oakley. What is compensable are the reasonable costs, expenses and losses arising out of or incidental to the disturbance caused to Mr. Oakley because Gold, either through Mr. Bucknell, himself, or Gold's staff, never advised Mr. Oakley the proposal was dead until almost two years later.

[97] It does include the loss of enjoyment of Mr. Oakley's home in the shadow period; legal costs of migrating the land, and the loss of Mr. Oakley's time including for finding alternate residential accommodations and negotiations, all of which the Board finds arise out of or are incidental to Mr. Oakley's disturbance.

[98] Other than the legal account for the migration of the lands, Mr. Oakley does not have receipts for the expenses he incurred. The Board finds the compensable costs, expenses and losses cannot practically be estimated or determined and, therefore, in lieu thereof, the Board set a percentage of the market value. From the facts and

circumstances in this case, the Board sets the compensation at 15% of the market value of the Lands, being $45,750.

5. Interpretation – General

[99] Before addressing the specific legal issues raised by the parties, the Board will review some general principles of legislation interpretation that do not appear to be in dispute between the parties.

[100] The *Expropriation Act* is a statute of the Province of Nova Scotia and as such the *Interpretation Act*, R.S., c. 235, applies. Pursuant to s. 9, the Board is to interpret the *Expropriation Act* as remedial, always speaking, and to ensure its objects, spirit, true intent and meaning are attained. The Board may also consider various factors in reaching its conclusion such as the consequences of a particular interpretation. The most pertinent subsections read:

> **Interpretation of words and generally**
> **9** **(1)** The law shall be considered as always speaking and, whenever any matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to each enactment, and every part thereof, according to its spirit, true intent, and meaning.
> ...
> **(5)** Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;
>
> (b) the circumstances existing at the time it was passed;
>
> (c) the mischief to be remedied;
>
> (d) the object to be attained;
>
> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and
>
> (g) the history of legislation on the subject. [Emphasis added]

[101] Pursuant to s. 6(2) of the *Interpretation Act*, the Board is able to consider applicable judicial rules of construction provided they are not inconsistent with the *Interpretation Act*. It reads:

> **6 (2)** Nothing in this Act excludes a judicial rule of construction that is applicable to an enactment and not inconsistent with this Act.

[102] The Supreme Court of Canada has determined that legislation is to be read as a whole, given a broad, liberal and purposive interpretation to ensure the objects of legislation are attained, *United Taxi Driver's Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485; *Cohen v. Nova Scotia*, [2007] N.S.C.A. 118; *Rizzo & Rizzo Shoes* Ltd. (Re), [1998] 1 S.C.R. 27 (S.C.C.). The Board finds this principle is consistent with the *Interpretation Act*.

[103] The leading case from the Supreme Court of Canada on the interpretation of expropriation legislation is *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32 (*Dell Holdings*).

[104] Any entitlement to compensation must be contained within the *Expropriation Act*, *Dell Holdings* and *Johnson (Re)*, 2005 N.S.C.A. 99, para. 49 (*Johnson*).

[105] In *Dell Holdings,* the Supreme Court of Canada found that the legislation should be read in a broad and purposive manner in order to comply with the aim of the legislation to fully compensate a landowner whose property has been taken. Justice Cory, as he then was, writing the majority (6-1) decision for the Court, reviewed the following general principles of interpretation:

> B. *Interpretation of Expropriation Statute*
>
> 20. The expropriation of property is one of the ultimate exercises of governmental authority. To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the power of

> an expropriating authority should be strictly construed in favour of those whose rights have been affected. This principle has been stressed by eminent writers and emphasized in decisions of this Court… .
>
> 21. Further, since the *Expropriations Act* is a remedial statute, it must be given a broad and liberal interpretation consistent with its purpose. Substance, not form, is the governing factor… . In *Laidlaw v. Municipality of Metropolitan Toronto*, 1978 CanLII 32 (SCC), [1978] 2 S.C.R. 736, at p. 748, it was observed that "[a] remedial statute should not be interpreted, in the event of an ambiguity, to deprive one of common law rights unless that is the plain provision of the statute".
>
> 22. The application of these principles has resulted in the presumption that whenever land is expropriated, compensation will be paid. This has been the consistent approach of this Court. In *The Queen in Right of British Columbia v. Tener*, 1985 CanLII 76 (SCC), [1985] 1 S.C.R. 533, at p. 559, Estey J. writing for the majority, relied on a passage of Lord Atkinson in *Attorney-General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508 (H.L.), at p. 542:
>
> > …unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.
>
> Although Wilson J. wrote a separate concurring opinion in *Tener*, she agreed with the majority on this point. Writing for herself and Dickson C.J., she stated at p. 547:
>
> > Where expropriation or injurious affection is authorized by statute the right to compensation must be found in the statute….
> >
> > Where land has been taken the statute will be construed in light of a presumption in favour of compensation (see Todd, *The Law of Expropriation and Compensation in Canada*, pp. 32-33)...
>
> 23. It follows that the *Expropriations Act* should be read in a broad and purposive manner in order to comply with the aim of the Act to fully compensate a land owner whose property has been taken. [Emphasis added]

[106] After citing the charging section 13 in the *Ontario Expropriation Act* (similar to s. 26 in the Nova Scotia statute, but not identical), the Supreme Court of Canada stated:

> 26. This then is a charging section which provides that compensation is to be awarded on the total of the amounts calculated under each of the four components. I agree with the view expressed by K. J. Boyd in *Expropriation in Canada* (1988), at p. 109, that the objective of these provisions is to ensure "that on the one hand double recovery does not occur, and on the other hand that no legitimate item of claim is overlooked". Indeed, the overriding objective of the entire Act is to provide fair and proper indemnity for the owner of the expropriated land. … [Emphasis added]

[107] The Supreme Court of Canada found that in interpreting the disturbance damages provisions, the words should be given their ordinary meaning in the context of the purpose of the legislation to provide fair indemnification to the expropriated owner for losses suffered and, once again, noting the statute should be interpreted in a broad, liberal

and flexible manner in considering the damages flowing from expropriations. Specifically, the Court stated:

> D. *How Should the Provisions as to Disturbance Be Interpreted?*
>
> 27. The words of the section should be given their natural and ordinary meaning in the context of the clear purpose of the legislation to provide fair indemnity to the expropriated owner for losses suffered as a result of the expropriation. In *Laidlaw, supra, Spence J.*, on behalf of the Court, attached particular importance to three factors; first, the legislative intent to provide indemnity for losses suffered; second, that the right to disturbance damages is conferred in broad, inclusive language and, third, that the legislature chose to illustrate, but not to define the term "disturbance". At pages 744-45 he further observed:
>
> > ... I turn to s. 18 of the *The Expropriation Act*. It will be seen that this section, in so far as it applies to the facts here present, is the further delineation of disturbance the "element of compensation" prescribed in s. 13(2)(b) which I have just quoted. It should be noted that the direction to pay is of "such reasonable costs as are natural and reasonable consequences of the expropriation including" (the underlining is my own). It has been established that when the statute employs the word "including" or "includes" rather than "means" the definition does not purport to be complete or exhaustive and there is no exclusion of the natural ordinary meaning of the words. [Citations omitted.] Therefore, if the sum of $16,000, the difference between the $26,000 cost of the extension and the $10,000 by which it increased the market value of the property, were a "reasonable cost of the natural and reasonable consequence of the expropriation", the effect of s. 18(1) would be to direct that sum to be added to the compensation whether or not it could be fitted into the words of paras. (a), (b), or (c) which follow the general words of the said s. 18(1). The appellant proved that the improvement cost $26,000. It was the unanimous opinion of the appraisers that the expenditure of that sum only increased the market value by $10,000. Therefore, I am of the opinion that the appellant's loss of the difference of $16,000 was a "cost" and was the natural result of the expropriation. The appellant had spent the $26,000. Due solely to the expropriation, she could not enjoy the fruits of that expenditure. If she could only recover the market value she would only be reimbursed to the extent of $10,000. The balance of $16,000 was a loss to her and a direct cost of the expropriation. I am of the view that the appellant is entitled to succeed on this interpretation of the section without the use of the questioned para. s. 18(1)(a)(ii). [Emphasis added by the Court.]
>
> Thus it is clear that the Act should be interpreted in a broad, liberal and flexible manner in considering the damages flowing from expropriations. [Emphasis added]

[108] There are two matters the Board will address ahead of the other issues raised by the parties. The charging section in the Nova Scotia *Expropriation Act* includes under s. 26(b):

> **Aggregate of items to be compensated**
>
> 26 The due compensation payable to the owner for lands expropriated shall be the aggregate of
>
> ...

(b) the reasonable costs, expenses and losses arising out of or incidental to the owner's disturbance determined as hereinafter set forth; [Emphasis added]

[109] Further, expanding upon the owner's disturbance, s. 27(3)(b)(ii) reads:

Value

...

27 (3) Where the owner of land expropriated was in occupation of the land at the time the expropriation document was deposited in the registry of deeds and, as a result of the expropriation, it has been necessary for him to give up occupation of the land, the value of the land expropriated is the greater of

...

(b) the aggregate of

...

(ii) the costs, expenses and losses arising out of or incidental to the owner's disturbance including moving to other premises but if such cannot practically be estimated or determined, there may be allowed in lieu thereof a percentage, not exceeding fifteen, of the market value determined as set forth in subclause (i),

[110] The word "reasonable" in s. 26(b) is not repeated in s. 27(3)(b)(ii). The Board finds that in reading the *Expropriation Act* as a whole, the Board is to award compensation for the "reasonable costs, expenses, and losses" as further outlined in s. 27(3)(b)(ii).

[111] The parties agree undefined words are to be given their ordinary meaning. Critical to the analysis in this case are the ordinary meanings of the following words in s.27(3)(b)(ii) as defined by the *Canadian Oxford Dictionary,* 2nd Edition, 2004, Oxford University Press:

loss *noun* **1a** the act or an instance of losing; the state of being lost. **b** the fact of being deprived of a person by death, estrangement, etc. **2** a person, thing, or amount lost. **3** the detriment or disadvantage resulting from losing ...

disturbance *noun* **1** the act or an instance of disturbing; the process of being disturbed. **2** a tumult; an uproar. **3** agitation; worry. **4** an interruption ....

disturb *transitive verb* **1** break the rest, calm, order, or quiet of; interrupt. **2** agitate; worry, unsettle ... . **3** move from a settled position, disarrange ...

incidental *adjective* **1** ...**a** having a minor role in relation to a more important thing, event, etc. **b** not essential. **2** ... liable to happen. **3** ... following as a subordinate event. **4** ... incurred apart from the main sum disbursed. ... [Emphasis added]

6. Losses After the Expropriation

[112] After the expropriation, Mr. Oakley was required to move from his Lands and home, but this time he was not permitted to take his buildings with him. Ultimately, his counsel was able to secure his ability to remain in his home until January 2013.

[113] After receiving 75% of the settlement offer, Mr. Oakley commenced the construction of his new home in October of 2012, on the Cooper Corner Road property he had secured in 2008. Mr. Oakley moved his personal items, but this time secured storage in the sheds of his mother and a friend for which he was not charged. Until his home was completed, Mr. Oakley stayed in various residences including with his mother and children.

[114] When his home was completed, Mr. Oakley moved his personal possessions again from the sheds to his new home. Mr. Oakley incurred expenses such as the gas and wear and tear on his truck for moving his personal items twice.

[115] The other losses arising out of or incidental to his disturbance of moving from his Lands and home are noted under Other Losses and Lost Time.

7. When Does the *Expropriation Act* Apply to a Mining Company?

[116] The parties' arguments in this section and the next few general issues overlap. They are, therefore, somewhat cumulative and should also be considered in the subsequent sections of the Decision.

(A) Gold's Arguments

[117] Gold argued that compensation for an owner's disturbance only begins on the date of the expropriation, June 18, 2012. A mining company must have the statutory

authority to expropriate before it can be held responsible for any compensation under the *Expropriation Act*. As a result, there is no compensation for any disturbances that arise before the date of expropriation often referred to as the "shadow period".

[118] Under the *MR Act,* Gold does not become the expropriating authority until the Vesting Order from the Minister is filed at the Registry of Deeds (s. 70(5)). This registration is also deemed to be the date the expropriation documents are deposited under the *Expropriation Act* and, therefore, is the date of the expropriation (*MR Act* s. 70(4) and *Expropriation Act* s. 25(2) respectively).

[119] Gold argued if the Board chooses a date prior to when Gold has the statutory authority to expropriate, then the Board is exposing Gold to damages and compensation under the *Expropriation Act* for a time period when the expropriation may or may not occur.

[120] In the alternative, Gold argued three other dates from which loss arising from the owner's disturbance may be compensable. However, Gold repeatedly emphasised throughout, that these are alternate arguments and the above (after the date of expropriation) is the correct interpretation of the legislation.

[121] The first alternative is the date of the Vesting Order (June 12, 2012) as it is only through the Vesting Order that Gold has been granted the right to expropriate the Lands (s. 70(3)). Damages cannot begin under the *MR Act* until there is an ability to make the threat of expropriation a reality.

[122] The second alternative is the date Gold made its Application to the Minister under s. 70 of the *MR Act* (August 5, 2011), as there is no real intent to engage the expropriation processes until Gold has applied for such authority. Prior to its Application,

all that is occurring are private negotiations for which a mining company should not be held responsible for any owner's disturbance during that time.

[123] Gold argued that if the Board considers a date prior to the Application, there must be a real threat of expropriation or "Objectively seen as a reasonable concern. … that the expropriation will occur", (Transcript, p. 375). Gold argued there is no evidence the word "expropriation" was ever mentioned through the negotiation process or prior to the Vesting Order Application.

[124] Gold also argued *Dell Holdings* findings about the shadow period are distinguishable. In that case, the municipality froze the property from development while the Authority determined the route of the Go-train. The owner was restricted from doing anything with its property and, therefore, its use of the land was interfered with by the Municipality.

(B) Oakley's Arguments

[125] Mr. Oakley's counsel argued the Supreme Court of Canada found in *Dell Holdings* that compensation under expropriation legislation applies to the whole "expropriation process" and, therefore, encompasses a shadow period before the expropriation. Under the *MR Act* s. 71(c), the mining company is deemed by the legislation to be the statutory authority under the *Expropriation Act*. Consequently, a mining company is subject to all the same provisions of the *Expropriation Act* as any statutory authority.

[126] Furthermore, a mining company cannot hide behind the process of a Vesting Order, such that it is able to cause a disturbance to a landowner for a number of

years prior to the expropriation and then only be required to compensate for damages occurring after the Vesting Order has been filed, signed, or applied for.

(C) Board's Findings

[127] In general, the Board concurs with Mr. Oakley's counsel.

[128] Stated simply, s. 71(a) states that the *Expropriation Act* applies *mutatis mutandis* to an expropriation under the *MR Act*. It reads:

> 71 In connection with the proceedings pursuant to Section 70,
> (a) the Expropriation Act applies mutatis mutandis to the expropriation;

Section 70 is the Vesting Order provisions.

[129] The Board finds s. 71(a) is clear and unambiguous language. The *Expropriation Act* equally applies to a mining company as it does the Crown.

[130] Consequently, the Board finds that when a mining company is given the privilege and right to take a person's property, it is equally responsible for all compensation to be provided to an owner as if the expropriation were done by the Crown. The Board finds there is nothing in the *MR Act* that says a mining company is to be treated any differently than any other statutory authority that is permitted to take property from its owner.

[131] Having found that there is a shadow period, the Board will review when it begins in the next section.

[132] The Board will only touch on a few of Gold's arguments.

[133] The main argument of Gold that damages are compensable only after the Lands are taken, is similar to the dissenting opinion of Justice Iacobucci in *Dell Holdings,*

which was not supported by the majority of the Supreme Court of Canada, being the other six of seven Justices hearing the Appeal.

[134] Rather, the Supreme Court of Canada found that damages are awarded for losses during the expropriation process, the "shadow period", for all expropriations and is not dependent upon the specific facts in the *Dell Holdings* case. Thus, it is not distinguishable by its facts for this principle. This will be discussed in more detail below.

8. When does the shadow period begin?

[135] Mr. Oakley's Lands and home were expropriated for the purpose of the development of Gold's mine. He has sought compensation for various costs, expenses and losses arising out of or incidental to his disturbance commencing before the expropriation date. From what date are those compensable?

[136] For ease of reference, s. 27(3)(b)(ii) of the statute reads:

> (ii) the costs, expenses and losses arising out of or incidental to the owner's disturbance including moving to other premises but if such cannot practically be estimated or determined, there may be allowed in lieu thereof a percentage, not exceeding fifteen, of the market value determined as set forth in subclause (i), [Emphasis added]

[137] In *Dell Holdings,* the Supreme Court of Canada confirmed damages are awarded for losses occasioned as a result of the process of expropriation. The Court found the term "expropriation" was not used to merely connote the transfer of the land title, but for "**the process of taking the property for the purpose for which it is required**":

> H. *The Process of Expropriation*
>
> 37. The courts have long determined that the actual act of expropriation of any property is part of a continuing process. In *McAnulty Realty*, *supra*, at p. 283, Duff J. noted that the term "expropriation" is not used in the restrictive sense of signifying merely the transfer of title but in the sense of the process of taking the property for the purpose for which it is required. Thus whether the events that affected the value of the expropriated

> land were part of the expropriation process, or, in other words, a step in the acquisition of the lands, is a significant factor for consideration in many expropriation cases. See *Tener, supra*, at pp. 557-59. Here there can be no doubt that Dell's land would have come on stream for sale as developed lands in 1981 rather than 1984 but for the process of expropriation. Damages should therefore be awarded for the losses occasioned as a result of the process of expropriation. [Emphasis added]

[138] In further expanding upon damages caused by, but occurring prior to the actual expropriation, Justice Cory stated:

> 42. …Indeed, damages caused by the expropriation can and frequently do occur prior to the actual date of expropriation. In my view, the expropriated party should be and is entitled to recover those damages. I find support for that conclusion in the reasoning and conclusions set out in *Shun Fung, supra*.
>
> 43. … The majority of the Law Lords found that the losses sustained in this period were caused by the expropriation and that damages should be awarded. Lord Nicholls of Birkenhead put forward his position in this way (at pp. 135-37):
>
> > This claim raises the question whether a loss occurring *before* resumption can be regarded, for compensation purposes, as a loss *caused* by the resumption. At first sight the question seems to admit of only one answer. Cause must precede effect. That is a truism. A loss which precedes resumption cannot be caused by it. Hence, it is said with seemingly ineluctable logic, a pre-resumption loss cannot be the subject of compensation.
> >
> > …
>
> 44. He summarized his position in this way at pp. 137-38:
>
> > ... losses incurred in anticipation of resumption and because of the threat which resumption presented are to be regarded as losses caused by the resumption as much as losses arising after resumption. This involves giving the concept of causal connection an extended meaning, wide enough to embrace all such losses. To qualify for compensation a loss suffered post-resumption must satisfy the three conditions of being causally connected, not too remote, and not a loss which a reasonable person would have avoided. A loss sustained post-scheme and pre-resumption will not fail for lack of causal connection by reason only that the loss arose before resumption, provided it arose in anticipation of resumption and because of the threat which resumption presented.
>
> It was therefore concluded that Shun Fung should be awarded compensation for the loss of profits during the "shadow period" before the expropriation. [Emphasis added]

[139] Justice Cory was in complete agreement with the reasons in the *Shun Fung* case and refers to the increased costs during the "waiting period between the announcement of a potential expropriation and the actual taking":

> 45. I am in complete agreement with these reasons. The situation described in that case is very similar to the one at bar. Dell suffered damages because its development business was curtailed for more than two years while the Authority determined which

> portion of its land was needed for the GO Station. The increased costs of Dell's development business during the waiting period between the announcement of potential expropriation and the actual taking of the land were caused by the expropriation. For the reasons set out above they are in my view compensable as disturbance damages pursuant to s. 13(2)(b) of the *Expropriations Act*. …

[140] For the reasons set out below, the Board finds that considering the Supreme Court of Canada ruling in the context of this case, the purpose for which Mr. Oakley's Lands were required, and ultimately expropriated, was the development of Gold's mine. The process of taking Mr. Oakley's Lands for that purpose began at least by the date of Gold's first Open House in August 2004 with the announcement to the community (with Mr. Oakley present) of the potential mine and Gold's need to buy the properties in the area for its development (Mr. Bucknell's testimony, supra, p.166). Costs, expenses and losses arising out of or incidental to his disturbance from that date are compensable.

[141] In support for the inclusion of compensation for an owner's disturbance in the shadow period, the Board finds the Nova Scotia legislation is even broader than the Ontario legislation considered in *Dell Holdings*. The disturbance damages in Ontario included:

> 18(1) … such reasonable costs as are the natural and reasonable consequences of the expropriation, including …[Emphasis added]

[142] In Nova Scotia, the charging provision reads:

> 27(3)(b)(ii) The cost, expenses and losses arising out of or incidental to the owner's disturbance including …[Emphasis added]

[143] In Ontario, the losses and expense are tied to the "expropriation" whereas in Nova Scotia it is in relation to "the owner's disturbance". As defined by the *Canadian Oxford Dictionary,* "disturbance" includes "the process of being disturbed". "Disturb" includes the "break in the rest, calm, order, or quiet of; interrupt". Consequently, the

language of the Nova Scotia *Expropriation Act* includes the process of the home owner's disturbance.

[144] Furthermore, the word "incidental" in the Nova Scotia *Expropriation Act* permits compensation for losses that are "liable to happen", "having a minor role in relation to a more important event", or "not essential".

[145] Although the Nova Scotia legislation differs in being connected to the "owner's disturbance", does not mean the expropriation is not essential. No compensation is due to Mr. Oakley without the expropriation. However, once it has occurred, the Board is tasked to determine what were the costs, expenses and losses arising out of or incidental to his disturbance.

[146] The Board finds the Supreme Court of Canada principle that the shadow period applies to the whole process is equally applicable to the Nova Scotia legislation. By having the *Expropriation Act* apply *mutatis mutandis* to a mining company that is given the privilege of taking someone's home, it also has the same responsibility as the Crown in compensating for the disturbances that have occurred during the process of disturbing a landowner for the development of its mine.

[147] In Nova Scotia, a mine is developed with a company acquiring the necessary land titles by either purchasing them through successful negotiations or by expropriating them with a Vesting Order issued by the Crown. Public projects by the State are similar. The Board concurs with Mr. Oakley's counsel that the process by which lands are ultimately expropriated always begins with negotiations, whether it is by the Crown or a mining company. These are no longer merely private negotiations. The Board also

concurs that a mining company is not shielded from the costs and losses caused to the owner throughout the process, including the negotiations.

[148] The Board disagrees with Gold that the commencement date is dependent upon when the word "expropriation" was first mentioned. The Board finds this wrongly focuses on the method by which the owner's lands are taken as opposed to the project for which the lands are required. It is the knowledge of the latter that causes the owner's disturbance. It is at that time that the owner is aware its Lands and home may be needed for the project. As in *Dell Holdings*, the majority of the Supreme Court of Canada found it commenced when the development of the GoTrain could potentially take part of owner's property for its route, but the specific route was still to be determined and thus affected development of the lands. The company was compensated for this period of uncertainty as to what area of its lands may be needed for the project.

[149] When does the shadow period commence in this case? The Board finds the same test used by the Supreme Court of Canada applies; being, when was there an announcement that Mr. Oakley's Lands may be required for Gold's Project?

[150] The Board finds from the facts of this case, the mine would encompass a large area of the community. As Mr. Bucknell testified, it required approximately 60 property titles and represented 35 owners.

[151] Gold announced its Project and its need to buy properties in the area at its Open House in Moose River in August 2004, and again repeated at the second on December 2005. Mr. Oakley was present at the first one. Mr. Bucknell described what the company stated at its first Open House as:

> … we had our first open house in the old, vacant, and decommissioned church at Moose River in 2004, I think it was August, … to formally explain … to the residents and anybody locally who was stakeholders, what we were doing, what our

> aspirations were, what the risks were, that we needed to buy land, the surface titles, and that we needed to get environmental permits and so on. [Emphasis added]
>
> [Transcript, p. 166]

[152] This is acknowledged in Gold's Pre-Hearing Brief at p. 6:

> **DEVELOPMENT/PUBLIC AWARENESS OF THE MINE**
>
> 21. Planning and development for the Mine had been going on for eight years or more before the Vesting Order was issued. DDV first approached the Claimant in March 2004 to ask permission to dig a test hole on the Property. … [Emphasis added]

[153] Furthermore, at footnote 39, page 15 of Gold's Brief, it stated:

> [39] As outlined previously, DDV had started exploration and investigation work for the Mine by 2004 at the latest, and had open houses in the Moose River community to discuss the project in 2004 and 2005. Public awareness of the project grew in 2007 and 2008, as DDV and the provincial government completed the environmental approval process and sought public input and comment regarding same. DDV also started buying properties for the Mine in 2005, with 2010 (as outlined above) being an especially busy year in this regard. Accordingly, it cannot be seriously disputed that the public and the Moose River community were well aware of the Mine (and were anticipating property acquisitions for same) well in advance of 2011 and 2012. [Emphasis added]

[154] In conclusion, the Board finds that under the Nova Scotia *Expropriation Act*, an owner's disturbance begins when "the process of being disturbed" started for the mine for which the owner's property and home were ultimately expropriated. In this case, the Board finds the break in the landowner's calm arose at least by the date of Gold's first Open House in August 2004, when it announced its plan to potentially develop the mine and its need to purchase properties in the area if it does so. Therefore, the Board finds that pursuant to s.27(3)(b)(ii), Mr. Oakley is entitled to compensation for the reasonable costs, expenses and losses arising out of or incidental to his disturbance beginning in August 2004.

9. Is Compensation for the Owner's Disturbance Limited to Pecuniary Losses?

[155] For ease of reference, s. 27(3)(b)(ii) of the Nova Scotia statute reads:

> (ii) the costs, expenses and losses arising out of or incidental to the owner's disturbance including moving to other premises but if such cannot practically be estimated or determined, there may be allowed in lieu thereof a percentage, not exceeding fifteen, of the market value determined as set forth in subclause (i), [Emphasis added]

Everyone agrees "costs" and "expenses" are pecuniary. Thus, the question is: are "losses" in s. 27(3)(b)(ii) also limited to pecuniary losses?

(A) Arguments of Oakley

[156] Counsel for Mr. Oakley stated only the Northwest Territories and Nunavut have statutory provisions similar to Nova Scotia and s. 27(3(b)(ii) of the *Expropriation Act*. There are no judicial or tribunal cases from any of these jurisdictions addressing compensation for an owner's disturbance when all of Mr. Oakley's Lands are taken including his home.

[157] The cases cited by Gold below are not relevant as they relate to other statutes that differ from Nova Scotia, deal with business losses, and/or compensation for injurious affection.

[158] Consequently, it requires the Board to interpret this provision within the Nova Scotia statute.

[159] "Losses" under the Nova Scotia *Expropriation Act* are not limited to pecuniary losses as other provinces have done. Defining it by examples also does not limit it to pecuniary losses. This interpretation is supported by the fact that a percentage can be given for the losses that "cannot practically be estimated or determined". A

percentage would not be necessary if it was limited to pecuniary losses. If there is any ambiguity in the statute, it is to be interpreted in favour of the owner that has lost his land and home.

[160] In the *Dell Holdings* case, the Supreme Court of Canada notes that the Ontario statute was amended after recommendations from commission reports called for the fulfillment of the state's obligation to repair the injury, minimize the loss, inconvenience and disturbance to a person's life for the public good, and to establish a flexible framework to accomplish this indemnification in various circumstances. The Court stated as follows:

> V. Analysis
> ...
>
> A. *History and Purpose of the Expropriations Act*
>
> 17. Prior to the passage of the present Act, expropriation proceedings in Ontario had been the subject of a great deal of valid criticism and just complaints. The unfortunate state of affairs was documented in the 1968 report of the Royal Commission Inquiry into Civil Rights in Ontario. The earlier 1967 report of the Ontario Law Reform Commission considered the basis of compensation for expropriation and made two principal recommendations. It stated that the primary policy consideration must be the indemnification for losses suffered by the expropriated party. At page 11 of the report the position is set out in this way:
>
> > From its examination of the development of the Canadian law, the Commission has formed the opinion that some of the difficulties with assessing compensation flow from a failure to appreciate that the true basis for it is not to be found in an imaginary haggling over the price to be paid for land in a deal between two private individuals, nor the negotiation of a normal bargain in the market place, but in the fulfilment by the state of its obligation to repair the injury caused to particular individuals for the public good, and to minimize the loss, inconvenience, and disturbance to the life of its citizens to as great an extent as possible. [Emphasis added in original]
>
> 18. The second recommendation was to the effect that an expropriation statute should provide a framework for assessment of compensation which had sufficient flexibility to allow for indemnification in various circumstances. In essence it was proposed that the statute should provide a framework for the assessment of compensation which would leave sufficient flexibility to do justice (which I take to mean to provide indemnification) in particular cases.
>
> 19. Based on the recommendations of the Royal Commission Inquiry into Civil Rights and the Law Reform Commission report on expropriation an *Expropriations Act* was passed in 1968. That Act remains in substantially the same form today. It is clearly a remedial statute enacted for the specific purpose of adequately compensating those whose lands are taken to serve the public interest.

[161] Mr. Oakley's counsel argued that the Nova Scotia *Expropriation Act* achieves these recommendations, is broader than the Ontario statute, and allows for the flexibility to fully compensate for the disturbance to Mr. Oakley's life.

(B) Arguments of Gold

[162] Gold argued that compensation provided to an owner's disturbance under the Nova Scotia *Expropriation Act* is limited to pecuniary losses. Contrary to the Claimant's submissions, there is case law which has interpreted disturbance damages and limits them to pecuniary losses. In its Pre-Hearing Brief, Gold cited the following cases in support of its interpretation: *Harrison Blueberry Enterprises Limited v. Nova Scotia*, 2004 NSUARB 121, affirmed 2006 NSCA 26; *Johnson (Re)*, 2005 NSCA 99; *Patterson v. British Columbia* (*Minister of Transportation & Highways*), 1994 CarswellBC 2739 (E.C.B.) affirmed 1997 CarswellBC 1379 (C.A.); and *Heringa v. Nanaimo (City)*, 2010 BCSC 1571; and *Houle v. Manitoba*, 2016 MBCA 76.

(C) Findings

[163] For the reasons set out below, the Board concurs with Mr. Oakley's Counsel that the Nova Scotia *Expropriation Act* does not limit compensation under s.27(3)(b)(ii) to pecuniary losses; it achieves the Ontario commissions recommendations of providing a flexible framework to fully compensate for the disturbance to an owner's life; is broader than other statutes referenced in the cases cited to the Board; and the cases do not assist in interpreting the compensable losses when all of an owner's lands are taken including his home.

[164] During its Closing Arguments, Gold acknowledged the Nova Scotia cases dealt with the expropriation of businesses and not losses for a person's home. This is significant because not only are the losses for a business different, but an additional section (s. 29) applies which specifically addresses compensation for the business losses resulting from its relocation and loss of goodwill. Consequently, the Board finds these business loss cases do not assist in interpreting the legislation for an owner's losses when it includes his home.

[165] However, Gold still relied upon the following passage from E. Todd, *The Law of Expropriation and Compensation in Canada* (2nd ed. 1992) at p. 274, cited in cases including *Harrison* at para. 607:

> Disturbance damage may be defined generally as economic loss suffered by an owner by reason of having to vacate expropriated property. [Emphasis added]

[166] In the *Harrison* case, the Board referenced this quote (but does not rely upon it for its Decision) and cites 1948 and 1949 cases, before determining that the claimant did not satisfy the necessary pre-condition of being "in occupation of the land" (para. 614) for a partial portion of one parcel of land taken; and had no costs, loss or expenses in leasing an alternate one-half acre portion of a smaller parcel of land taken. As a business, the focus on compensation was under s. 29. Furthermore, both properties were only partial takings and thus related to injurious affection and not s. 27(3)(b)(ii).

[167] Gold also stated in its Brief that this case was affirmed by the Nova Scotia Court of Appeal. However, the only three issues before the Court related to "injurious affection" and, therefore, addressed different sections of the statute than those relevant to this case.

[168] Furthermore, the above quote from *Todd* is a general definition that opens his chapter on disturbance damages. The chapter continues with an analysis of the different legislative provisions across the Country. Some are referenced in the body of the text such as the non-pecuniary loss for "inconvenience" in Ontario noting that "In most cases the [five percent] allowance is awarded without proof by an owner that inconvenience and costs have been or will be incurred or are anticipated", p. 283. Other statutory differences are footnoted, such as Nova Scotia p. 288, Footnote 89. Consequently, the relevance of this general definition at the commencement of the chapter is dependent upon the specific language of the statute in each province. Secondly, as to Todd's review of the types of "losses" that have been compensated in various cases throughout Canada under these different statutes, the Board notes Todd's 2nd edition is now more than 25 years old and was written before the Supreme Court of Canada Decisions of *Dell Holdings* and *Antrim Truck Centre Ltd v. Ontario (Transportation)*, 2013 SCC 13.

[169] The Board will first interpret s. 27(3)(b)(ii) and then compare it to the cases cited by Gold from other jurisdictions.

[170] The Supreme Court of Canada has warned against adopting the interpretation of a word or phrase from different statutes, *Re British Columbia Development Corp. et al. and Friedmann et al.* (1984), 14 D.L.R. (4th) 129. In that case, the Supreme Court of Canada was interpreting the phrase "aggrieved person" in the British Columbia *Ombudsman Act*. The Supreme Court of Canada found the issue could only be resolved by an analysis of the statute before the Court and the purpose that legislation was designed to achieve:

> I find these authorities inconclusive. Although each dealt with the meaning of the phrase "person aggrieved", none dealt with a statute remotely resembling the one at bar. Our understanding of s. 10(1) of the Ombudsman Act is not likely to be furthered by reference to different statutes containing differently worded sections dealing with different subject matters. The issue can only be resolved by an analysis of the legislation before us in this particular case and the purpose that legislation is designed to achieve. [Emphasis added]

[171] The Board, therefore, finds its responsibility is to review the Nova Scotia *Expropriation Act* as a whole, give it a broad, liberal and purposive interpretation, so that the compensation for the owner's disturbance ensures the intent and objects of the legislation are achieved.

[172] Subsection 27(3)(b)(ii) provides for an owner to receive compensation for "the costs, expenses and losses arising out of or incidental to the owner's disturbance…". The words "losses", "disturbance", and "incidental" are not defined. The ordinary meaning of "losses" may include losing anything, being deprived of something, or experiencing a "detriment" or "disadvantage". An owner's "disturbance" may include the loss of "rest", "calm", or may cause an owner to "worry".

[173] The ordinary meaning of "incidental" is also expansive and may include losses that are "liable to happen", "have a minor role in relation to a more important event", or "not essential".

[174] The Board finds the ordinary meanings of these words is not restricted to pecuniary losses.

[175] None of the words have a pecuniary adjective like "financial" or "economic".

[176] The example of "moving to other premises" does not limit the breadth of all of the types of losses that may be experienced by the owner such as the loss of calm, rest or worry associated with the move. Furthermore, this example is predicated by the

word "including" which means this is but one example and is not restricted to those types of losses.

[177] The Board concurs with Mr. Oakley's counsel that if only pecuniary losses were to be awarded there would be no need to provide for a percentage for those that could not be determined or estimated.

[178] In reading the statute as a whole, the Board finds the objects and intent of the legislation in Nova Scotia is as stated in its purpose s.2(2) to provide compensation that puts the homeowner in substantially the same position after the expropriation as before it. Although this section is often cited in reference to providing a similar home, it is equally applicable to compensating for the turmoil, upheaval, worry, agitation, etc. incidental to losing one's home. Or as the Ontario Commission Report stated: "in the fulfilment by the state of its obligation to repair the injury caused to particular individuals for the public good, and to minimize the loss, inconvenience, and disturbance to the life of its citizens to as great an extent as possible". Furthermore, the Board finds s. 27(3)(b)(ii) provides the Board the flexible framework to make the assessment. As will be described below, the compensation is limited to 15% of the market value and must also meet the other criteria including being "reasonable".

[179] At the time of the *Patterson* case, the relevant subsection for disturbance damages in the British Columbia *Expropriation Act* is cited at para. 25 of the Decision as:

> 33. (1) An owner whose land is expropriated is entitled to disturbance damages consisting of the following:
>
> (a) reasonable costs, expenses and financial losses that are directly attributable to the disturbance caused to him by the expropriation;
>
> (b) reasonable costs of relocating on other land, including reasonable moving, legal and survey costs that are necessarily incurred in acquiring a similar interest or estate in the other land. [Emphasis added]

[180] There are numerous differences between the Nova Scotia and British Columbia statutes. First, British Columbia limits disturbance damages to the "reasonable costs, expenses, and **financial losses**…" Losses is limited by its adjective "financial". The Nova Scotia Legislature did not include this pecuniary adjective. All three categories of compensation in British Columbia are pecuniary in nature.

[181] The British Columbia statute does not allow for a percentage. Nor does it recognize or provide compensation for the "inconvenience" of the owner being required to move, as is recognized in the Ontario legislation discussed below.

[182] Furthermore, British Columbia requires the losses be "**directly** attributable to disturbance caused to him [the owner] **by the expropriation**". In Nova Scotia, the wording is broader and allows for the losses "**arising out of or incidental to an owner's disturbance**".

[183] "Reasonable costs" are further limited in British Columbia to relocating on other land and must be "necessarily incurred in acquiring a similar interest or estate in the other land".

[184] In Nova Scotia, the owner's disturbance can include moving to other premises but is not limited to that loss. The legislation in British Columbia is very different such that its case law is not helpful in interpreting the Nova Scotia *Expropriation Act*.

[185] Gold also argued that any compensation for an owner's disturbance in Nova Scotia must meet the Supreme Court of Canada test in the *Dell Holdings* decision that they are "the natural and reasonable consequences of the expropriation." The Board disagrees. The above is the specific test required by the Ontario *Expropriation Act* under s. 18(1) as cited in *Dell Holdings* at para. 5:

> **18.** –(1) The expropriating authority shall pay to an owner other than a tenant, in respect of disturbance, **such reasonable costs as are the natural and reasonable consequences of the expropriation**, including,
>
> *(a)* where the premises taken include the owner's residence,
>
> (i) an allowance to compensate for inconvenience and the cost of finding another residence of 5 per cent of the compensation payable in respect of the market value of that part of the land expropriated that is used by the owner for residential purposes, provided that such part was not being offered for sale on the date of the expropriation, and
>
> (ii) an allowance for improvements the value of which is not reflected in the market value of the land;
>
> ...
>
> *(c)* relocation costs, including,
>
> (i) the moving costs, and
>
> (ii) the legal and survey costs and other non-recoverable expenditures incurred in acquiring other premises. [Emphasis added]

[186] This test was not adopted by the Nova Scotia Legislature.

[187] The legislation in Ontario and Nova Scotia differ in other respects as well. In listing the compensation an owner is entitled to receive for the expropriation, the Ontario *Act* includes "the damages attributable to disturbance" (s. 13(2)(b)), whereas the corresponding subsection in Nova Scotia states "the reasonable costs, expenses and losses arising out of or incidental to the owner's disturbance determined as herein set forth" (s. 26(b)).

[188] Although Ontario allows for a percentage, it is limited to compensation for "inconvenience and the cost of finding another residence". Once again, Nova Scotia is not restricted to these two items and its use of the word "losses" is much broader.

[189] Furthermore, the 5% in Ontario only applies to the market value of that part of the expropriated property used by the owner for residential purposes. In Nova Scotia, compensation may be awarded up to 15% of the market value as determined in s.27(3)(b)(i), which is the value of the entire property as prescribed by that subsection.

[190] Consequently, the interpretations relating to specific disturbance damages under the Ontario *Expropriation Act* are also not always applicable in interpreting the Nova Scotia legislation.

[191] Gold also referenced the *Houle* case from Manitoba and specifically emphasized the following referenced quote in para. 26 from Kenneth J. Boyd, *Expropriation in Canada: A Practitioner's Guide* (Aurora: Canada Law Book, 1988) (at pp 27-28, 95-95):

> ... Emphasis must be placed upon the word "economic" in weighing the purpose of compensation. ... [Emphasis added in original]

The Nova Scotia statute does not include the word "economic" to limit its compensation under s. 27(3)(b)(ii).

[192] The Manitoba legislation has the same subsections as s. 18(1) of the Ontario *Act* for disturbance compensation and, therefore, is similarly different from the Nova Scotia legislation. The preamble is "...such reasonable costs, expenses and losses as arise out of or are incidental to the expropriation, including... [s. 28(1)]". In Nova Scotia, the losses relate to the owner's disturbance.

[193] The Board also finds this decision is distinguishable on its facts as it was only the partial taking of the lands of the farm, related to business costs and does not specifically deal with the issues before the Board in this case. For these reasons, the Board finds this case is not helpful in interpreting the compensation for an owner's disturbance under the Nova Scotia *Expropriation Act*.

[194] The Board concurs with Mr. Oakley's counsel that the Nova Scotia legislation is much broader and more robust than the statutes in these other provinces and succeeds in achieving the recommendations of the Royal Commission in Ontario to

fully compensate for the injuries and losses for the disturbance of the owner's life for the project for which his lands were expropriated and has provided the flexible framework to enable the Board to compensate for those disruptions and losses.

[195] In conclusion, the Board finds the ordinary meaning of the word "losses" includes losing anything or may be "a detriment" or "a disadvantage". An owner's "disturbance" can include the loss of "rest" or "calm", or cause "worry". These words by themselves are not restricted to pecuniary losses. The Legislature could have restricted the word "losses" with a pecuniary adjective like "financial", as was done in British Columbia, but it did not do so. The legislation in Ontario and Manitoba, other than "inconvenience", are generally restricted to pecuniary losses. Once again, these examples were not adopted by the Nova Scotia Legislature.

[196] The Board finds the objects and intent of the Nova Scotia *Expropriation Act* in compensating for an owner's disturbance is not restricted to pecuniary losses.

10. Is Compensation for an Owner's Disturbance Limited to Actionable Wrongs?

[197] Mr. Oakley's counsel argued that in the Nova Scotia *Expropriation Act,* "costs, expense, and losses" are not limited to actionable wrongs as is required under the injurious affection provisions for a partial taking or no taking of an owner's land.

[198] Gold disagrees and says the proper interpretation is that the compensation for an owner's disturbance is limited to losses from actionable wrongs. Of concern is the breadth of losses a company may be exposed to compensating. As noted above,

throughout its arguments, Gold's counsel emphasized no damages arise until after the date of expropriation.

[199] In general, the Board concurs with counsel for Mr. Oakley.

[200] Under the Nova Scotia *Expropriation Act*, when part of a person's property is taken, "injurious affection" is limited to the personal and business damages that the statutory authority "would be liable for", if the construction were not under the authority of the statute. Liability requires an actionable wrong.

[201] In contrast, s. 27(3)(b)(ii) does not include that language. Mr. Oakley's counsel argued it could have, and the Legislature chose not to do so.

[202] In concluding, the Board finds the losses, costs and expenses are not limited to actionable wrong.

11. Types of Losses

[203] Mr. Oakley's counsel argued that "losses" in s. 27(3)(b)(ii) is even broader than, but may encompass, the types of losses compensable under private nuisance for injurious affection, as outlined by the Supreme Court of Canada in *Antrim*, while the specific proof of private nuisance is not required. The Supreme Court of Canada described some of the compensable types of nuisance as follows:

> [23] ... Nuisance may take a variety of forms and may include not only actual physical damage to land but also interference with the health, comfort or convenience of the owner or occupier: *Tock*, at pp. 1190-91. ...

[204] Gold's counsel disagreed and furthermore, says that in this case, there was insufficient evidence from Mr. Oakley on any health implications.

[205] To examine the types of losses compensable under s. 27(3)(b)(ii), the relevant definitions are recited for ease of reference:

> **loss** *noun* **1a** the act or an instance of losing; the state of being lost. **b** the fact of being deprived of a person by death, estrangement, etc. **2** a person, thing, or amount lost. **3** the detriment or disadvantage resulting from losing …
>
> **disturbance** *noun* **1** the act or an instance of disturbing; the process of being disturbed. **2** a tumult; an uproar. **3** agitation; worry. **4** an interruption ....
>
> **disturb** *transitive verb* **1** break the rest, calm, order, or quiet of; interrupt. **2** agitate; worry, unsettle … . **3** move from a settled position, disarrange … [Emphasis added]

[206] The Board finds the ordinary meaning of the word, in particular, "losses" is very robust and may include losing virtually anything. In addition to the things lost (property and home), it may embrace all feelings and frame or state of mind associated with that loss and disturbance. In reading s. 27(3)(b)(ii) as a whole, the Board finds the subsection permits every type of loss or disturbance.

[207] Like other broad terms, it is not for this Board Member to attempt an exhaustive list. Rather the losses awarded will be dependent upon the specific facts and circumstances of each individual case.

[208] Examples of the types of compensable losses for an owner's disturbance may include being deprived of one's property and home; losing the calm, rest, order, and quiet of one's life; losing time which could have been spent on other matters; having an interruption in their life; being agitated, worried, unsettled; or experiencing a disadvantage or detriment. It may encompass the losses noted by the Supreme Court of Canada for public nuisance including loss of one's health, such as the exacerbation of one's blood pressure.

[209] In reading this section within the *Expropriation Act* as whole, the Board finds the Nova Scotia Legislature intended to provide some compensation to an owner in an

effort to place them in a position as if their lands and home had never been taken. In other words, there would be some award for all of the various aspects of the disturbance, worry, agitation, disruption in a person's life in facilitating a public work which, in this case, includes the Project of the development of a mine.

[210] While the types of losses that are compensable are virtually limitless, the legislation confines the compensation a statutory authority or mine will be exposed to mainly by setting a maximum value that may be awarded. At most, a Board may award up to 15% of the market value of the property in lieu of every type of cost, expense and loss. In this case, the maximum payable is $45,750. Furthermore, each one must also meet the other requirements of being both reasonable and arising out of or incidental to the owner's disturbance.

[211] The Board will now review the specific losses claimed by Mr. Oakley. Throughout this review, the main arguments of Gold were that there cannot be a shadow period and only pecuniary and actionable losses are compensable. As these issues have been decided by the Board above, they will not be repeated in the following sections.

12. Is Mr. Oakley Entitled to Compensation for Gold not Fulfilling a Promise, Lies/Half-truths, Bad Faith?

[212] The relevant facts are that on March 18, 2008, Mr. Bucknell and Mr. Oakley reached a proposed settlement which required approval from Gold's Board of Directors. Mr. Bucknell stated he would get back to Mr. Oakley in a few days. Mr. Murphy would be the local contact person for all arrangements. (Further particulars are described in the next section).

[213] Mr. Bucknell did not take the proposed settlement to Gold's Board of Directors as promised. He made that determination as he was driving away from Mr. Oakley's home shortly after reaching the proposed agreement on March 18, 2008. The next time Gold provided any information to Mr. Oakley was almost two years later when Mr. Bucknell, again, attended at Mr. Oakley's home on February 14, 2010. Specifically, Mr. Bucknell did not get back to Mr. Oakley, he did not provide any information to Mr. Murphy for Mr. Oakley, and did not do so after receiving Mr. Murphy's messages and requests from Mr. Oakley when the latter attended at Gold's offices.

[214] In February 2010, Mr. Bucknell told Mr. Oakley the Board of Directors had not approved the previous deal. He apologized for not getting back to him.

[215] Counsel for Mr. Oakley argued the claim for disturbance damages includes compensation for Mr. Bucknell not fulfilling his promise to take the proposed settlement to the Board of Directors and if he had, it would have reduced Gold's costs. Second, he lied to Mr. Oakley when he returned in 2010. Third, Gold acted in bad faith in its dealings with Mr. Oakley.

[216] Gold acknowledged there were no communications about the proposed settlement between March 14, 2008 and February 12, 2010. Gold argued Mr. Bucknell's comment that the Board of Directors did not accept the settlement is technically correct and not a lie. Mr. Bucknell apologized. No damages should be provided to Mr. Oakley, otherwise, the Board is compensating him for an aggravation, irritation, and/or a sense of outrage for being ignored. Furthermore, if the Board compensates him for these, then compensation would "add a premium for that sense of outrage" (Transcript p. 406).

[217] All parties agree the *Expropriation Act* does not allow the Board to provide any type of punitive damages.

[218] In summary, the Board finds there is no compensation due to Mr. Oakley for not taking the proposal to the Board of Director's, advising in 2010 that they had not approved it, and generally, negotiating in bad faith.

[219] Regarding the proposed settlement, Mr. Bucknell, as a Director of the parent company and General Manager of the local company, has the right to fulfill those roles to the Board of Directors as he thinks best. He has the right to re-think the proposed settlement, consider his credibility and relationship with the Board of Directors, and decide, ultimately, it is not a proposal he will take to and/or recommend to the Board of Directors.

[220] The argument that had he done so, it would have sped up this process, is not an issue for determining compensation. Rather, it may relate to the issue of costs which are not before the Board at this time.

[221] Mr. Bucknell's statement to Mr. Oakley in 2010, that the Board of Directors had not agreed to the proposed settlement, is described by Mr. Oakley's counsel as a lie and by Gold as being technically correct. The Board finds its characterization is not relevant to determining compensation under the *Expropriation Act*. Rather, Mr. Oakley was not aware of this until after disclosure of documents during these proceedings well after he was relocated. Thus, the Board finds the 2010 statement, regardless of its characterization, has not led to any further losses to Mr. Oakley's disturbance and for that reason no compensation is payable.

[222] The Board also finds bad faith in the negotiations, in and of itself, is not a separate factor for which compensation should be granted in this case.

[223] However, what is relevant under s. 27(3)(b)(ii) are the reasonable costs, expenses and losses arising out of or incidental to Mr. Oakley's disturbance caused by no one from Gold providing any information to Mr. Oakley at any time during the almost two years between Mr. Bucknell's attendances at his home. Thus, although Mr. Bucknell had every right not to take the proposed settlement to the Board of Directors, Mr. Oakley is entitled to compensation for the losses caused by Gold failing to inform him the proposed settlement was dead.

[224] These are reviewed in the following sections.

13. Disturbance After March 2008 Meeting

[225] Gold argued that because the proposed settlement was not approved, there was no agreement and, therefore, no compensation is due to Mr. Oakley for any costs or expenses he incurred immediately following their meeting on March 18, 2008. The Board disagrees.

[226] The Board finds the facts in this case are unique and that some of the costs, expenses and losses Mr. Oakley incurred in his efforts to prepare to relocate his home and shed, following the proposed settlement with Mr. Bucknell, were reasonable and arose out of or were incidental to his disturbance of losing his Lands and home for Gold's mine. In this section, the Board is only considering the costs and expenses. Losses for the disruption to his life, including loss of calm, worry, frustration, etc. are considered

under Other Losses, while Mr. Oakley's time to do these tasks will be addressed under Lost Time.

[227] The unique facts include that although there was not a confirmed settlement, if Mr. Oakley wanted to keep his home and shed, he had to make all arrangements, move them, and pay all costs. The first cheque was to arrive within two weeks of their meeting.

[228] Furthermore, the Board believes Mr. Oakley's evidence that when Mr. Bucknell spoke of his influence over the Board of Directors, he stated: "…I feel safe telling you now that we have a deal" [supra]. Mr. Bucknell was not a low-level employee within either company. Rather, he was the General Manager of the local company and a Director of the parent company. This does not mean there was a settlement, but for a person wanting to protect and keep his home and buildings, the Board finds it provided Mr. Oakley with some assurances to begin that protection process.

[229] Under those facts and circumstances, including that the first payment would be received within two weeks, the Board finds it was reasonable for Mr. Oakley to take initial steps to prepare for the move of his home and shed to another property.

[230] Mr. Oakley's costs and expenses included his efforts in securing another property to relocate his home and shed; clearing and levelling the property; purchasing, delivering and placing timbers in the area where they would rest. It also included him locating and meeting with a company to move his home, taking the company over the route the buildings would travel, and determining what prep work was required. This resulted in Mr. Oakley cutting approximately six feet of trees, brush and vegetation on either side of the road on the property. He also moved his personal belongings to a

storage facility in Halifax for three or four months, before moving them back to his home on the Lands.

[231] Mr. Oakley does not have the receipts for these costs and expenses.

[232] One may argue Mr. Oakley should not have continued in his efforts nor advanced as far as he did. The Board finds that without Gold ever getting back to him, as promised, left Mr. Oakley in a conundrum.

[233] The Board finds all expenses and costs arose out of or were incidental to Mr. Oakley's disturbance for the development of Gold's mine for which his Lands were ultimately expropriated and, in particular, from Gold's failure to communicate with him. Had Mr. Bucknell informed Mr. Oakley on the day he decided the proposed settlement was dead and he would not take it to the Board of Directors, being the very day the proposed settlement was reached, Mr. Oakley would not have done any of these tasks nor incurred the associated costs, expenses or losses.

[234] As the property secured in 2008 was eventually used by Mr. Oakley when his Lands and home were expropriated in 2012, the Board finds all costs and expenses in finding, clearing and levelling the property are reasonable and compensable. In deciding what compensation is reasonable for the other costs and expenses, the Board will take into consideration the fact that it was a proposed settlement. This will be addressed in the Compensation Award section.

14. Land Migration

[235] This claim is described in the Claimant's Pre-Hearing Brief as:

> 15 (c) At the urging of Mr. Bucknell, the Claimant incurred the legal costs for having his land migrated into the Registry. The Respondent did not compensate him for this out-of-pocket expense. In addition, the Claimant spent considerable time and

> expense providing the background evidence required to migrate the Subject Property;

[236] There are two components to this claim: the legal costs and Mr. Oakley's time and expenses obtaining the background evidence for the migration. The latter will be addressed under the section of Lost Time.

[237] Gold argued that because Mr. Oakley had the Lands for sale in the early 2000s, migration would be necessary if he sold his Lands at some time in the future. Consequently, there is no causal connection to the expropriation.

[238] For the reasons set out below, the Board disagrees.

[239] First, the Board accepts Mr. Oakley's testimony that Mr. Bucknell agreed to pay the legal costs for migrating his Lands. Mr. Bucknell did not recall and did not think he agreed Gold would pay. He testified he advised Mr. Oakley that Gold required clear title and discussed migration. He stated Gold had paid the legal costs to migrate the properties of other homeowners in the area. Mr. Bucknell stated Gold did so to ensure it was done correctly.

[240] The Board finds Gold agreed to pay the legal account and, therefore, Mr. Oakley is entitled to receive for costs of $1500.

[241] As to a causal connection, the language of the Nova Scotia *Expropriation Act* is expansive. Unlike jurisdictions like British Columbia, the expenses and costs do not have to be "directly attributed to the disturbance caused to him by the expropriation." Rather, the language in Nova Scotia includes "incidental to the owner's disturbance." Incidental, as noted above is defined as "apart from the main, not essential, a subordinate event". Consequently, in Nova Scotia an expense can be incidental to the owner's

disturbance without being the only reason or major reason for the expense occurring. In this case, however, the Board finds it is the main reason for it occurring in June 2011.

[242] The Board finds the fact that Mr. Oakley had his Lands for sale for a few months in 2004 is irrelevant to the migration in 2011. In 2011, it was done for the development of Gold's mine. Ultimately, Gold would acquire his property either through a sale or expropriation.

[243] Finally, there was no evidence before the Board that a purchaser would have required Mr. Oakley to migrate his Lands for the period between 2004 and the migration in 2011. It is equally plausible, as Gold was assembling properties to develop the mine during this period, that a person may have purchased Mr. Oakley's Lands without the migration on the speculation of a resale to Gold for more money.

[244] The Board finds that Mr. Oakley was advised that to complete the migration of the Lands a further witness had to be located, other than a family member of the previous owners, who could testify to the ownership and use of the property. Mr. Oakley's property counsel did not conduct that search. Had he done so, it is likely the legal account would have been higher. Rather, Mr. Oakley spent time searching and speaking to different individuals to locate a person who could testify to the above facts. In addition to his time, which will be discussed below, he incurred expenses for the wear and tear on his vehicle and gas for the travel to locate a witness, and after doing so, taking her to his counsel. The Board finds those are reasonable costs and expenses incidental to Mr. Oakley's disturbance for the mine and, therefore, are compensable under s. 27(3)(b)(ii).

15. Loss of Time

[245] In this section, the Board will consider all claims of the loss of Mr. Oakley's time arising out of or incidental to his disturbance, exclusive of his time involved in the litigation of these proceedings which may be addressed in any future costs hearing.

[246] In addition to its major arguments above, Gold argued that all cases state time lost by an owner is not compensable and, specifically, referenced the Nova Scotia Court of Appeal's decision in the *Johnson* case.

[247] Mr. Oakley's counsel argued s. 27(3)(b)(ii) is broad enough to include the loss of a homeowner's time. All cases cited by Gold dealt with the owner's time in the litigation proceedings, and specifically referenced para. 279 of the Board's decision for *Johnson,* as an example. Furthermore, the cases do not address the facts and applicable statutory provisions for this case.

[248] The Board concurs with Mr. Oakley's counsel.

[249] Owner's time during the expropriation litigation proceedings as costs is not before the Board at this time.

[250] Gold extensively reviewed the *Johnson* case. The Court of Appeal noted the properties were all partial takings and, therefore, the claims were considered under the sections for injurious affection and not the sections applicable to this case. Furthermore, the Court's findings only addressed the owner's times for costs.

[251] Amongst the paragraphs referenced by Gold is paragraph 202. The Board finds the following paragraph, 203, is also relevant to understanding the Court's decision. These read:

> [202] In my view, the case law does not clearly establish that a claim for owner's time is compensable as injurious affection or as disturbance damages in the sense maintained by the Johnsons. Even if I had accepted disturbance damages under s. 26(b) as urged by the

> Johnsons, which I have not, such damages are only applicable where an entire parcel of land has been taken. That is not the case here where the Province acquired only portions of each of the four parcels taken from the Johnsons.
>
> [203] Consequently, any recovery of owners' time as damages must be as injurious affection as defined in s. 3(h)(i)(B) which encompasses "personal and business damages, resulting from the construction or use, or both, of the work." [Emphasis added]

[252] Gold underlined the first portion of para. 202 down to the phrase "which I have not".

[253] The Court noted the lack of case law for this type of compensation. However, the second sentence recognized that even if owners' time for disturbance damages were accepted (which the Court did not), it stated: "such damages are only applicable where an entire parcel of land has been taken". The Court found that was not the case before it, as the expropriations were all partial takings and, therefore, compensation was determined under the provisions for injurious affection.

[254] As compensation of an owner's time for his disturbance when his entire property is taken was not before the Court of Appeal, this issue was not decided by it.

[255] However, that is the case currently before the Board in these proceedings. The lack of case law continues to exist. The Board, therefore, must interpret the *Expropriation Act* to properly determine the claims before it.

[256] In interpreting s. 27(3)(b)(ii), the Board finds the ordinary meaning of the word "losses" is broad enough to include the time an owner has lost to address his disturbance of having to leave his Lands and home for Gold's mine. This is time an owner could otherwise have used to do different activities in his life.

[257] Once again, the types of tasks an owner has spent time doing because of his disturbance that are compensable will be dependent upon the facts and circumstances of each individual case.

[258] In this case, the Board finds Mr. Oakley lost time doing the following tasks, which the Board finds arose out of or were incidental to his disturbance of Gold's mine and are compensable under s. 27(3)(b)(ii):

- Attending at Gold's offices after their meeting on March 18, 2008;
- Finding another property;
- Initial steps to relocate his home, shed and personal items in 2008;
- Negotiations with Gold;
- Migrating the Lands; and
- Moving after the Vesting Order.

[259] Mr. Oakley spent time finding another property. Although in Mr. Oakley's case this was nominal, it was still time lost arising out of his disturbance for the development of Gold's mine for which his Lands and home were ultimately taken.

[260] Having found that Mr. Oakley's actions in taking the initial steps to relocate the buildings (his home and shed) and personal items in 2008, arose out of or were incidental to his disturbance, the Board finds the time he lost engaged in doing those activities are losses compensable under this section for the same reasons as outlined above. Once again, in setting the award, the Board has taken into consideration the fact this was a proposed settlement and not an agreement.

[261] Mr. Oakley lost time attending at the offices of Gold on a number of occasions following their March 2008 meeting to obtain the cheque and in his efforts to fulfill the proposed settlement. The Board finds these attendances were a reasonable loss of time that arose out of his disturbance for Gold's mine.

[262] While the *Expropriation Act* encourages negotiations, it does not prohibit compensation for the time an owner loses in those negotiations for the taking of his entire property and home for the mine. The *Expropriation Act* does not limit the types of losses but does severely restrict the compensation for them by setting the maximum award at 15% of the market value.

[263] Furthermore, in assessing the reasonableness of the lost time, once again, the number of compensable hours of lost time under s. 27(3)(b)(ii) will be dependent upon the facts of each case.

[264] In this case, the Board finds the time Mr. Oakley lost in his negotiations with Gold included time spent with his daughter preparing an offer; and meetings with Mr. Bucknell on March 18, 2008, and February 12, 2010. During the former meeting, the parties reached a proposed agreement. As a result of Gold changing its mind, which it had every right to do, the February 2010 meeting occurred. The Board finds the time Mr. Oakley lost for negotiations was approximately four (4) hours. The Board finds this loss of time was reasonable under the circumstances of this case. It was also incidental to Mr. Oakley's disturbance. But for the mine, he would not have lost this time. Consequently, the Board finds these four (4) hours also meet the test of s. 27(3)(b)(ii).

[265] Having found the expenses of the migration were incidental to his disturbance for the development of the mine, the Board also finds Mr. Oakley's lost time in trying to locate a person who could provide the necessary evidence, speaking with individuals, and taking the Affiant to his property lawyer's office, is also compensable under s. 27(3)(b)(ii).

[266] Mr. Oakley lost time moving from his Lands and home after the expropriation. This included time spent to move his personal items to store in sheds at his mother's and a friend's and then moving them, again, when his new home was constructed. The Board finds having one hand, Mr. Oakley lost additional time to complete some of these tasks he did himself. The Board notes that had Mr. Oakley not moved these items himself, the cost of a moving company and storage would have been reasonable expenses compensable under s. 27(3)(b)(ii). The Board finds all of his time for moving these items is a reasonable loss.

16. Loss of Enjoyment

[267] Mr. Oakley claims compensation for having lost the full enjoyment of his property and home from 2004 to the date of the expropriation in June 18, 2012 as outlined in the Pre-Hearing Submission at paragraph 15(a):

> 15(a) He was kept in a state of abeyance from developing his property to fully enjoy if from 2004 to the date of expropriation (June of 2012). During this time, the Claimant was unsure of if and when his land would be acquired by the Respondent and what compensation he would receive from it;

[268] At the time of the expropriation, Mr. Oakley's home was 90% completed. Projects he did not complete included connecting the water, installing indoor plumbing, and placing log style wood over the outside plywood.

[269] Mr. Oakley's counsel argued that when all of a person's property and home are taken, it is the loss of fully enjoying one's home that arises out of or is incidental to one's disturbance. The *Expropriation Act* fully compensates for the business losses from the disturbance of the move. Using those same principles in the context of the

disturbance of having to move from one's home, it is the loss of fully enjoying one's home that is compensable.

[270] Gold argued the reasons Mr. Oakley did not continue the improvements to his property were (a) this was only a cottage; and (b) he was doing the repairs as he had money to do so. Neither were the result of the expropriation.

[271] The Board finds that when all of a person's property and home are taken that the loss of fully enjoying them fall within the types of losses compensable under s.27(3)(b)(ii).

[272] From the facts and circumstances of this case, the Board finds that Mr. Oakley's loss of fully enjoying his property commenced at the beginning of the shadow period in August of 2004.

[273] The Board finds it was reasonable that Mr. Oakley did not expend further monies to complete the various projects on his home that he otherwise would have done as funds became available, as it could be taken at anytime for the mine. Instead, Mr. Oakley only used the materials he had already purchased.

[274] The Board finds, for example, that rather than purchasing a second-hand truck for the purposes of moving his home and shed after the proposed settlement in 2008, he could have used that money towards finishing his residence. Similarly, when he sold the property on Herring Cove Road in the same year, funds were available to complete his home.

[275] As noted above, in discussing the concept of being "incidental to his disturbance", the Board finds this loss is not completely eradicated because the loss varied throughout the eight (8) years as funds were available.

[276] The Board finds Mr. Oakley lost the full enjoyment of his home from April 2008, and of his Lands from August 2004, to the date when he resettled in his new home.

17. Other Losses

[277] As noted above, the Board has found that the types of losses an owner may receive compensation for under s. 27(3)(b)(ii) may include the personal experiences and feelings of being deprived of the calm, order, and quiet of one's life; being agitated, worried, and/or unsettled; experiencing a disadvantage or detriment; having an interruption in their life; and losing one's property and home.

[278] The Board finds that from the facts and circumstances of this case, that Mr. Oakley experienced all of these at different stages and at varying degrees throughout the shadow period from August 2004 when his life became unsettled. The Board finds these losses and disturbances were exacerbated by Gold not communicating with Mr. Oakley for almost two years after their proposed settlement between March of 2008, and February 2010. As Mr. Oakley stated it was not two weeks, but two years. The duration of time his life was disturbed (eight (8) years) also increases the losses and, therefore, similarly the amount of compensation.

18. Credibility

[279] Gold argued the Board should find Mr. Oakley is not credible in seeking compensation for his disturbance and that this was just an attempt by Mr. Oakley:

> … to push his total claim over the amount of DDV's September 2012 statutory offer, and avoid the potential costs consequences under the *Expropriation Act*. …
>
> [Respondent's Pre-Hearing Brief, p. 27]

[280] The Board has been asked by Gold to consider the offer of settlement solely for the purposes of analyzing these issues. The Board will do so at this stage of its Decision.

[281] At issue is that pursuant to s. 52(5), if the Board awards compensation below the settlement offer, then Mr. Oakley will have to bear his own costs after the date of the offer.

[282] On March 8, 2012, Gold received its Appraisal Report that the market value of the Lands was $305,000. The Lands were expropriated June 18, 2012. On September 12, 2012, Gold made an all-inclusive offer of $312,000 which Mr. Oakley rejected. Mr. Oakley commenced these proceedings on February 1 [17], 2016, for all compensation payable under the *Expropriation Act*. Shortly before the hearing, he accepted $305,000 as the market value of his Lands.

[283] Specifically, in this Decision, the Board will not consider the comments of either party that relate to the issues of costs under s. 52 of the *Expropriation Act*, including the various negotiations, settlement offers and subsequent appraisal reports.

[284] As noted above, the Board found Mr. Oakley was honest and forthright in his evidence before the Board.

[285] The Board finds that deducting the $1,500 for the migration legal fees, Gold's settlement offer is $310,500. After deducting the market value of the Lands, the amount offered for all other costs, expenses and losses for the disturbance of losing his Lands and home is reduced to $5,500. This is 1.8% of the market value of the Lands. Mr. Oakley's disturbance included all costs, expenses, and losses noted in the previous

sections. The Board finds his credibility in advancing these claims is not diminished by him rejecting $5,500 for the above.

[286] The Board finds Mr. Oakley was credible and that his claims, including for his disturbance, were legitimate and not raised to receive his costs after the date of Gold's settlement offer.

19. Compensation Award

[287] In summary, the Board has found that between August of 2004 until Mr. Oakley was resettled in his new home after the expropriation of 2012, he experienced reasonable costs, expenses and losses arising out of or incidental to his disturbance caused by the development of Gold's mine for which his Lands and home were ultimately expropriated. These included:

- Expenses and losses to move after the expropriation;
- Legal costs of migrating the Lands;
- Loss of fully enjoying his home and property;
- Other losses including:
  - Having his life interrupted;
  - Losing his Lands and home;
  - Being deprived of the calm, order and quiet of his life;
  - Being agitated, worried and unsettled; and
  - Experiencing disadvantages and detriments;
- Expenses and losses for the initial steps to relocate after 2008 meeting; and
- Lost time:
  - Attending at Gold's offices after March 2008 meeting;
  - Finding another property;
  - Initial steps to relocate his home, shed and personal items in 2008;
  - Negotiations with Gold;
  - Migrating the Lands; and
  - Moving after the Expropriation.

[288] Other than the legal account for the migration of the Lands, Mr. Oakley does not have the receipts for the expenses and costs he incurred. The Board finds the compensable costs, expenses and losses cannot practically be estimated or determined and, therefore, in lieu thereof, the Board will award a percentage of the market value of his Lands.

[289] Mr. Oakley has requested 15% of the market value of the Lands which is $45,750. The Board finds that for all of the above, including a reduction for the fact that the proposed settlement of 2008 was not an agreement, the Board would have awarded Mr. Oakley an amount in excess of this sum. However, the maximum the Board may award is 15%, therefore, the Board awards that percentage.

[290] The compensation payable by Gold to Mr. Oakley, inclusive of the agreed market value for the Lands at $305,000, is $350,750. This is exclusive of interests and costs which the Board has retained jurisdiction to determine, if the parties are unable to agree.

VII CONCLUSION

[291] Mr. Oakley's entire property and home were expropriated by D.D.V. Gold Limited (now Atlantic Mining NS Corp.) for the development of its gold mine in Moose River Gold Mines, Nova Scotia. It was expropriated pursuant to a Vesting Order issued under s. 70(1) of the *Mineral Resources Act.*

[292] This is the first case to determine compensation for an owner's disturbance under s. 27(3)(b)(ii) of the *Expropriation Act* when the entire property of the owner is taken including her/his home. It reads:

Value

27 (3) Where the owner of land expropriated was in occupation of the land at the time the expropriation document was deposited in the registry of deeds and, as a result of the expropriation, it has been necessary for him to give up occupation of the land, the value of the land expropriated is the greater of

(b) the aggregate of

(i) the market value thereof determined on the basis that the use to which the land expropriated was being put at the time of its taking was its highest and best use, and

(ii) the costs, expenses and losses arising out of or incidental to the owner's disturbance including moving to other premises but if such cannot practically be estimated or determined, there may be allowed in lieu thereof a percentage, not exceeding fifteen, of the market value determined as set forth in subclause (i),

[293] The Board finds that pursuant to s. 71(a) of the *MR Act*, the *Expropriation Act* applies *mutatis mutandis* to a mining company. With the privilege and right to expropriate another person's property, is the equal responsibility to provide all compensation granted under the *Expropriation Act*.

[294] To receive compensation for an owner's disturbance, there must be an expropriation, causation must exist, there cannot be double recovery, it does not include those issues relating to costs or interest, and cannot be for punishment or punitive damages.

[295] The Board finds that under the *Expropriation Act* in Nova Scotia compensation for an owner's disturbance is not limited to pecuniary losses and does not require there to be an actionable wrong. Compensation is payable throughout the process of being disturbed for which the owners' lands were ultimately taken, which in this case is Gold's mine. The shadow period applies to lands taken under the *Mineral Resources Act* and began in this case in August of 2004, after Gold's Open House, through to the date of the expropriation in June 2012.

[296] The Board has read s. 27(3)(b)(ii) and the *Expropriation Act* as a whole and given it a broad, liberal and purposive interpretation. Included in its review are the ordinary meanings of the words "losses", "disturbance", "disturb" and "incidental". The Board finds "losses" includes losing virtually anything. The types of losses, therefore, is very robust. Examples of the types of losses for which an owner may receive compensation can include being deprived of the calm, order, and quiet of one's life; losing one's property and home; being agitated, worried, unsettled; having an interruption in their life; experiencing a disadvantage or detriment. The types of losses compensable will be dependent upon the facts and circumstances of each individual case.

[297] While the types of losses is expansive, compensation is limited by the Legislature's maximum award of 15% of the market value of the property and the other criteria including being "reasonable" and "arising out of or being incidental to the owner's disturbance".

[298] The Board finds Mr. Oakley to be credible and, furthermore, finds he did not pursue compensation for his disturbance to recoup his costs and interest under s. 52.

[299] The Board finds that from August of 2004 to when Mr. Oakley was resettled in his new home after the expropriation of 2012, he experienced reasonable costs, expenses and losses arising out of or incidental to his disturbance caused by the development of Gold's mine for which his Lands and home were ultimately expropriated. These included:

- Expenses and losses to move after the expropriation;
- Legal costs of migrating the Lands;
- Loss of fully enjoying his home and property;

- Other losses including:
  - Having his life interrupted;
  - Losing his Lands and home;
  - Being deprived of the calm, order and quiet of his life;
  - Being agitated, worried and unsettled; and
  - Experiencing disadvantages and detriments;

- Expenses and losses for the initial steps to relocate after the 2008 meeting; and

- Lost time:
  - Attending at Gold's offices after the March 2008 meeting;
  - Finding another property;
  - Initial steps to relocate his home, shed and personal items in 2008;
  - Negotiations with Gold;
  - Migrating the Lands; and
  - Moving after the Expropriation.

[300] The Board awards 15% of the market value of the Lands ($305,000) as compensation for the above, being $45,750, for a subtotal of $350,750.

[301] The Board retains jurisdiction to consider interest and costs, if the parties are unable to agree.

[302] An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 23rd day of February, 2018.

Dawna J. Ring