Federal Court  Cour fédérale

Date: 20210719

Docket: T-967-16

Citation: 2021 FC 765

Ottawa, Ontario, July 19, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

SHAWN SOMERVILLE MILNE

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

I. Overview

[1] The Plaintiff, Mr. Shawn Milne, is the owner of a rural property. On the north end of the property is a house, where the Plaintiff resides with his wife and four children. A busy railway corridor runs along the entire north side of the Plaintiff's property, near to the Plaintiff's residence.

[2] The railway corridor was expanded in 2012. To complete the expansion, the Defendant expropriated a 0.64-acre strip of the Plaintiff's property (the "Required Lands"). The Required Lands are directly south of the railway corridor and thinly span the entire northern border of the Plaintiff's property. The Plaintiff was compensated $1,000 for the expropriation of the Required Lands.

[3] The railway corridor expansion resulted in the construction of a third train track immediately south of the existing two tracks and the addition of approximately eight passenger trains per day. The expansion thus increased railway traffic along the corridor and brought that traffic closer to the Plaintiff's residence.

[4] The Plaintiff claims he is entitled to further compensation for the expropriation under the *Expropriation Act*, RSC 1985, c E-21 (the "*Act*"). The Plaintiff asserts he can no longer live in the residence located on his property due to the increase in noise, light, and pollution caused by the railway expansion. The Plaintiff therefore seeks $967,534 in disturbance damages to relocate his residence and its ancillary improvements away from the railway corridor, towards the southern end of his property. In the alternative, the Plaintiff seeks $247,100 in injurious affection damages for the decrease in value to his remaining property caused by the railway corridor expansion. The Plaintiff also claims that he is entitled to an additional $1,100 in compensation for the Required Lands.

[5] In my view, the Plaintiff has not established his claims for disturbance damages or injurious affection. Both of those claims hinge upon the notion that the railway corridor

expansion caused a perceptible increase in sound, which I find the Plaintiff has failed to establish. I accept, however, that the value of the Required Lands was $2,100 at the time of taking, thus entitling the Plaintiff to an additional $1,100 in compensation.

II. Facts

[6] The parties submitted an Agreed Statement of Facts, dated February 2, 2021, which I have attached in "Annex A" of this judgment. Additionally, attached in "Annex B" is a glossary of terms that are used frequently throughout this judgment.

A. *The Plaintiff's property and the railway corridor*

[7] Since the mid 1800s, the Canadian National Railway Company ("CN") has operated a double track railway corridor running between Montreal and Toronto. The segment of this corridor that abuts the north side of the Plaintiff's property is known as the Marysville Corridor, which runs between the cities of Belleville and Napanee. At the Plaintiff's property and surrounding area, the Marysville Corridor runs directly south of a road named Airport Parkway.

[8] The Plaintiff's property is a 95-acre parcel of farmland, municipally known as 464 Mitchell Road, Belleville, Ontario. He bought the property for $220,000 upon returning to the Belleville area in 2003. The Plaintiff resides on his property and uses it for his organic farming operations.

[9] The residence on the Plaintiff's property was built in 1867. The Plaintiff significantly renovated the residence upon its purchase.

[10] Construction to expand the railway corridor began on or about April 24, 2012. The third railway track went into service on November 24, 2012.

[11] Prior to the expansion of the railway corridor ("pre-expansion"), the Plaintiff's residence was located approximately 34.14 metres from the southern most railway track and approximately 25.3 metres south of the railway corridor. After the expansion was completed ("post-expansion"), the Plaintiff's residence is approximately 29.87 metres south of the new railway track and approximately 14.6 metres south of the expanded railway corridor. In other words, the railway corridor expansion resulted in the Plaintiff's residence becoming approximately 4.5 metres closer to the nearest railway track.

[12] There is a small slope north of the Plaintiff's residence that leads down to the railway corridor. The Plaintiff's residence sits atop the slope, and it is thus located approximately 3 metres higher than the railway corridor. The slope begins to decline where the railway corridor begins. The slope starts closer to the Plaintiff's residence post-expansion than it did pre-expansion.

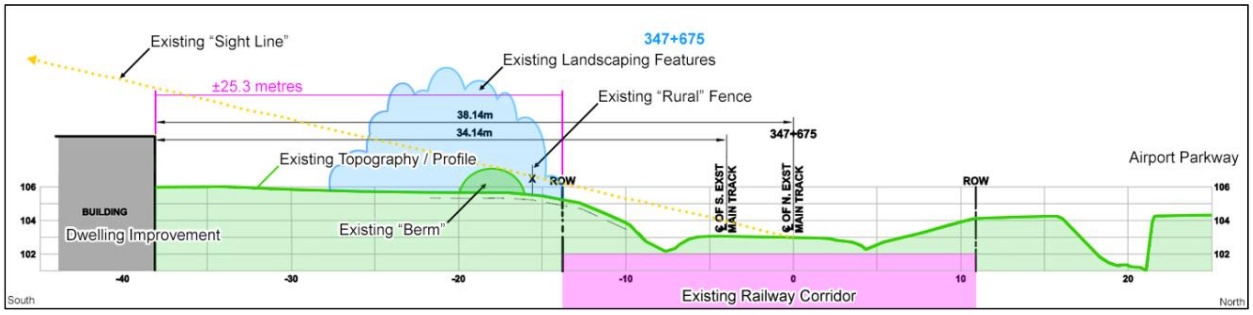
[13] Post-expansion, the line of sight between the Plaintiff's residence and the railway corridor is now more exposed. The Plaintiff claims that the expansion resulted in the removal of a berm made primarily of hay located at the apex of the slope north of the Plaintiff's property. In

addition, soil and vegetation were removed from the slope, further exposing the Plaintiff's residence to the tracks.

[14] The Plaintiff asserts that the berm, topography, and vegetation all acted as a natural barrier between his residence and the railway corridor. With their removal, the Plaintiff claims the noise, light, and pollution from the railway corridor at his residence have increased.

[15] The following diagrams are contained in the evidence of Mr. Ward Lansink, an expert witness called by the Plaintiff. These diagrams are displayed here for demonstrative purposes only, not for the truth of their contents, as Mr. Lansink did not author the diagrams himself.

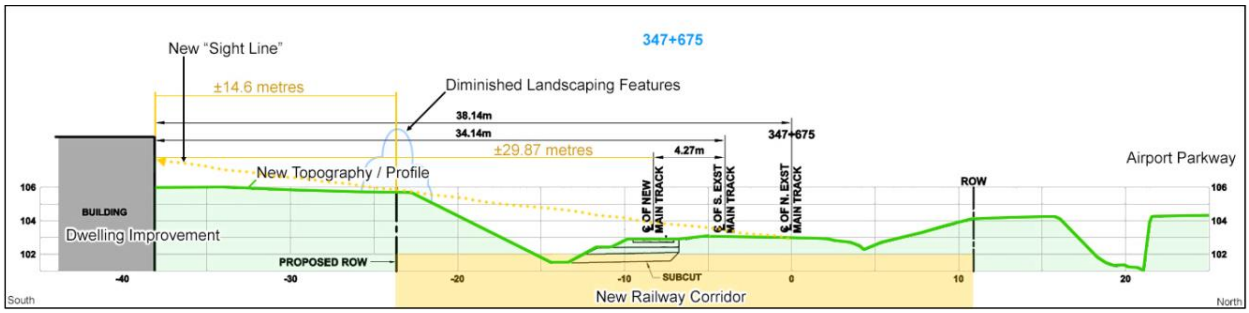
[16] The first diagram displays the railway corridor and the northern portion of the Plaintiff's property, including his residence, **pre-expansion**:



Description: a cross-section diagram displaying the land north of the Plaintiff's residence pre-expansion. The x-axis represents distance, with the south to the left and the north to the right. The Plaintiff's residence is furthest to the south and Airport Parkway is furthest to the north. In the approximate middle of the x-axis is the railway corridor, with the berm immediately to the south. The y-axis represents topography. It displays the berm rising slightly higher than the land north of the Plaintiff's residence, thus blocking the line of sight between the Plaintiff's residence and the

northernmost track on the railway corridor. The slope leading down to the railway corridor begins to steeply decline approximately 25 metres north from the Plaintiff's residence. Vegetation also sits adjacent to the berm, rising high above the Plaintiff's residence.

[17] The second diagram displays the same subjects but **post-expansion**:



Description: a cross-section diagram displaying the land north of the Plaintiff's residence post-expansion. The x-axis represents distance, with the south to the left and the north to the right. The Plaintiff's residence is furthest to the south and Airport Parkway is furthest to the north. In the approximate middle of the x-axis is the railway corridor, which has been expanded further south with the addition of the third track. The y-axis represents topography. It displays that the berm has been removed and no longer blocks the line of sight between the Plaintiff's residence and the northernmost track on the railway corridor. The slope leading down to the railway corridor begins to decline approximately 15 metres north from the Plaintiff's residence and is now cut at a 45-degree angle. The vegetation at the apex of the slope is now diminished.

B. *Previous proceedings*

[18] The Plaintiff has been involved in disputes concerning the railway corridor for nearly as long as the Plaintiff has owned his property.

(1) City of Belleville and Canadian Transportation Agency proceedings

[19] In a petition dated May 1, 2004 to the city of Belleville, the Plaintiff requested a prohibition on the use of train whistles at the railway crossing on Mitchell Road and attached the signatures of other community members. The Plaintiff stated under cross-examination that subsequent to the May 1, 2004 petition, it is no longer mandatory for trains to use their whistles at Mitchell Road crossing, thus reducing the day-to-day sound of train whistles at the Plaintiff's residence.

[20] Upon learning of the proposed railway corridor expansion, the Plaintiff submitted an individual complaint dated August 18, 2009 to the Canadian Transportation Agency (the "Agency"). In his complaint, the Plaintiff claimed the expansion would increase the sound levels along the railway corridor if no mitigation measures were implemented. He requested that a sound barrier be constructed and his house be relocated away from the railway corridor, among other things.

[21] The Plaintiff submitted a further complaint dated April 26, 2010 to the Agency, this time on behalf of a community group. That complaint reiterated the potential increase in sound levels and proposed that the railway corridor expansion be cancelled, sound barriers be constructed, and/or nearby houses be rebuilt or relocated, among other things.

[22] In a decision dated January 19, 2012, the Agency found the pre-expansion noise and vibration caused by the railway corridor was reasonable under section 95.1 of the *Canada*

Transportation Act, SC 1996, c 10 (the "*CTA*"). Additionally, the Agency anticipated the post-expansion noise and vibration caused by the railway corridor, once expanded, would remain reasonable. In coming to those conclusions, the Agency relied upon the findings contained in the *Sound and Vibration Assessment* prepared by Stantec Consulting Ltd. ("Stantec"), dated February 12, 2010 (the "2010 Stantec Report"). The 2010 Stantec Report predicted that the increase in noise and vibration caused by the railway corridor expansion would be largely imperceptible along the Marysville Corridor.

(2) Settlement negotiations

[23] Prior to the expropriation, the Plaintiff and CN attempted to settle the Plaintiff's dispute with respect to the railway corridor expansion to avoid litigation. The Plaintiff proposed that his residence be demolished and a replacement be built elsewhere on his property. In a letter dated May 7, 2010, CN made an offer in accordance with that approach.

[24] The Plaintiff testified under direct-examination that he and CN agreed in July and August of 2010 that $610,250 in compensation would be paid to the Plaintiff to allow him to build an equivalent residence away from the railway corridor. The parties, however, were unable to agree on the restrictive covenants on the Plaintiff's property pertaining to the future operations of the railway.

[25] In a letter dated September 1, 2010, CN ceased negotiations with the Plaintiff, stating that settlement efforts had failed. The Plaintiff testified this letter was "very shocking" as he believed they were "very close to getting a deal done."

(3) Expropriation proceedings

[26] On September 21, 2011, subsequent to the dissolution of settlement negotiations, Public Works and Government Services Canada (as it then was) registered a "Crown Notice of Intention to Expropriate" on the Plaintiffs' property. On January 23, 2012, the Minister of Public Works signed the "Notice of Confirmation of Intention to Expropriate." On January 24, 2012, the Defendant expropriated the Required Lands.

[27] On or about January 24, 2012, the Defendant offered the Plaintiff $1,000 in statutory compensation for the Required Lands pursuant to section 16 of the *Act*. In a letter dated June 13, 2016, the Plaintiff accepted the Defendant's offer of compensation.

[28] The Plaintiff required a new driveway and fencing along the perimeter of the railway corridor due to the expropriation of the Required Lands, for which the Plaintiff was compensated $40,341 and $5,618, respectively.

(4) Summary judgment motion

[29] On June 20, 2016, the Plaintiff filed his Statement of Claim for this action. Subsequently, the Defendant brought a motion for summary judgment pursuant to subsection 215(1) of the *Federal Courts Rules*, SOR/98-106 (the "*Rules*").

[30] The Defendant argued that because the *Act* did not prescribe a limitation period within which a claimant must pursue an entitlement to compensation, the basic two-year limitation

period prescribed under Ontario's *Limitations Act*, SO 2002, c 24, Schedule B, applied to the Plaintiff's claim by virtue of subsection 39(1) of the *Federal Courts Act*, RSC 1985, c F-7. The Defendant therefore asserted that the Plaintiff's claim was statute-barred because the claim was commenced more than two years after it was discovered, when the "Notice of Confirmation of Intention to Expropriate" was registered in January 2012.

[31] In a decision dated June 9, 2017 (2017 FC 569), Justice Gleeson found that subsection 31(1)(a) of the *Act* provides a limitation period for the Plaintiff's action:

Proceedings to determine compensation	**Procédure en vue de déterminer l'indemnité**
31 (1) Subject to section 30,	31 (1) Sous réserve de l'article 30:
(a) a person entitled to compensation in respect of an expropriated interest or right may,	a) une personne qui a droit à une indemnité pour un droit ou intérêt exproprié peut :
(i) at any time after the registration of the notice of confirmation, if no offer under section 16 has been accepted by him, and	(i) après l'enregistrement de l'avis de confirmation, si elle n'a accepté aucune offre faite en vertu de l'article 16,
(ii) within one year after the acceptance of the offer, in any other case,	(ii) dans un délai d'un an à compter de l'acceptation de l'offre, dans tout autre cas,
commence proceedings in the Court by statement of claim for the recovery of the amount of the compensation to which he is then entitled; or	engager des procédures devant le tribunal par voie d'exposé de la demande pour le recouvrement du montant de l'indemnité à laquelle elle a alors droit;

[32] Justice Gleeson therefore dismissed the Defendant's motion. As the *Act* provided for a limitation period, he held that the two-year limitation period under Ontario's *Limitations Act* did not apply to the Plaintiff's action. Rather, the applicable limitation period is under 31(1)(a)(ii) of the *Act*, which requires the Plaintiff's action to commence within one year of the Plaintiff accepting the Defendant's statutory offer of compensation. As the Plaintiff filed his Statement of Claim approximately one week after he accepted the Defendant's offer of compensation, the Plaintiff's action was not statute-barred.

[33] In a decision dated June 6, 2018 (2018 FCA 113), the Federal Court of Appeal upheld Justice Gleeson's decision.

(5) Collateral attack motion

[34] On the night before the commencement of this trial and in its oral submissions on March 23, 2021, the Defendant objected to the admissibility of the entirety of the parties' expert evidence pertaining to the assessment of noise and vibration on the Plaintiff's residence caused by the railway corridor. The Defendant argued that such evidence collaterally attacks the Agency's January 19, 2012 decision, which found that the noise and vibration caused by the railway corridor post-expansion would be reasonable under section 95.1 of the *CTA*, among other things.

[35] A collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of an order or judgment (*Toronto (City) v C.U.P.E., Local 79*, 2003 SCC 63 ("*C.U.P.E.*") at para 33). In other words, the doctrine

of collateral attack prevents a party from circumventing the effect of a decision rendered against it (*Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 at para 61). Evidence that attempts to collaterally attack a finding of another court or tribunal may be inadmissible (*Dankiewicz v Sullivan*, 2021 ONSC 485 at para 14).

[36] In an Order dated March 24, 2021, I dismissed the Defendant's motion.

[37] As discussed in detail below, the Plaintiff submitted noise and vibration evidence to establish that the 2010 Stantec Report, as relied upon by the Agency in its decision, miscalculated the noise levels adjacent to the railway corridor. Stantec admitted to this error in a letter dated July 30, 2019.

[38] Noting the Supreme Court of Canada's decision in *C.U.P.E.* at paragraph 34, I held the Plaintiff did not submit the noise and vibration evidence to collaterally attack the Agency's decision, as that evidence did not seek to overturn the Agency's decision, but to contest, for the purposes of a different claim with different legal consequences, whether the Agency's decision was correct. In my March 24, 2021 Order, I stated:

> [7] The Plaintiff does not dispute that the Agency's decision has legal force, nor does the Plaintiff seek to nullify the effects of the Agency's decision by obtaining compensation under the [*Act*]. Rather, the Plaintiff attacks the correctness of the factual basis of the Agency's decision by asserting that the Agency relied upon faulty evidence. The Supreme Court of Canada in *C.U.P.E.* confirmed that this approach is not a collateral attack. Furthermore, the Defendant made no submissions on whether such an approach constitutes an abuse of process, as was held by the Court in *C.U.P.E.*

[39] I further noted that the Agency's conclusion is not determinative of the impacts the railway corridor expansion may have on the Plaintiff's property and how such impacts may require further compensation under the *Act*. The former is concerned with the need to maintain viable railway infrastructure, whereas the latter is concerned with the impact of the expropriation on the Plaintiff's property. Indeed, the Agency found that it does not have jurisdiction to address land acquisition and expropriation issues under section 95.1 of the *CTA*.

[40] In light of my determination that the Plaintiff was not attempting to avoid the consequences of the Agency's decision, and that the Agency refused to consider in its decision the issue of compensation for the expropriation of the Required Lands, I found the Plaintiff's submission of noise and vibration evidence did not constitute a collateral attack.

III. Witnesses & Evidence

A. *The Plaintiff*

[41] The Plaintiff testified as a witness regarding his property, the impact of the railway corridor expansion, and the expropriation of the Required Lands, among other things.

[42] I found the Plaintiff was credible. He did not exaggerate his testimony and answered honestly when asked about information that he did not know or remember.

[43] The Plaintiff explained that he was born and raised on a farm located approximately one kilometer from his current residence. According to the Plaintiff, he bought the property in 2003

because it contained productive agricultural land and was located close to his father's farm, allowing the family to share equipment and labour. His wedding in 2006 was held at the property, and he and his wife have since had four children, all of whom were raised on the property. The Plaintiff also testified to the extensive renovations that he made to his residence between approximately 2003 and 2012.

[44] Pre-expansion, the Plaintiff claimed that the only issue he had with the nearby railway traffic was with respect to the use of train whistles. After the expansion of the corridor was announced, the Plaintiff explained that he represented a community group and submitted complaints to the Agency regarding the predicted impacts of the development.

[45] Near the end of 2012, prior to the third railway track coming into operation, the Plaintiff explained that he and his family moved in with his brother in Belleville to "buy [them] some more time to get the issues resolved." The Plaintiff stated that they stayed with his brother for 13 months, although the move was initially intended to be temporary.

[46] The Plaintiff explained that he eventually made a berm using hay bales to block the line of sight between his residence and the railway corridor. According to the Plaintiff, the berm was relatively effective at attenuating the noised caused by the railway corridor for the first floor of the residence, but not for the second floor. The Plaintiff testified that the berm initially stood eight feet tall but shrank overtime as the hay rotted.

[47] The Plaintiff stated that the expansion of the railway corridor adversely affected his family due to the increase in noise, light, and pollution. He provided several videos of traffic along the railway corridor that he recorded in January and February 2021. He also provided pictures that he took of his property and the railway corridor, both pre- and post-expansion.

B. *Noise and vibration experts*

[48] The parties each called one expert witness for the purposes of assessing the levels of noise and vibration caused by the railway corridor expansion at the Plaintiff's residence.

[49] The Plaintiff called **Mr. Paul Kirby**. Mr. Kirby is an environmental scientist with extensive experience in conducting noise assessments, including for several railway infrastructure developments. Mr. Kirby is currently the vice president of Independent Environmental Consultants ("IEC"). Since the Plaintiff initially retained him in 2012, Mr. Kirby has authored five reports and replies concerning the noise and vibration caused by the railway corridor expansion at the Plaintiff's residence.

[50] I found Mr. Kirby was credible: he answered questions with clarity and declined to make assumptions when asked about matters for which he did not have direct or immediate knowledge.

[51] The Defendant called **Mr. Frank Babic** as its noise and vibration expert. Mr. Babic is an engineer who, like Mr. Kirby, has conducted numerous noise and vibration assessments. He has

assessed railway, highway, and residential developments, often acting in the capacity of technical lead. Mr. Babic is currently employed by Stantec.

[52] I found Mr. Babic was credible: he answered questions frankly, conceded propositions when he thought it right to do so, and admitted to errors made by his predecessors at Stantec.

(1) Terminology

[53] The experts discussed two variables in particular in their noise and vibration evidence: the day-night sound level ("Ldn") and the percentage highly annoyed ("%HA").

[54] The Ldn is a unit of measurement that represents the average level of sound during a 24-hour period. It is expressed in "A-weighted" decibels ("dBA"), a unit that measures the volume of sound adjusted for the perception of human hearing.

[55] For reference, the experts agree that an increase of 3 dBA or less is an imperceptible change. Conversely, an increase of 10 dBA results in a doubling of volume.

[56] The Ldn is calculated by combining the daytime sound level ("Ld"), which measures the levels of sound from 7:00am until 10:00pm, and the night-time sound level ("Ln"), which measures the level of sound from 10:00pm until 7:00am. Since noise is more disturbing to residents at night, a +10 decibel penalty is applied to the Ln.

[57] The %HA is the percentage of people based on survey data who are predicted to be highly annoyed by sound levels at a particular Ldn.

(2) Expert reports

[58] There are two noise and vibration expert reports at issue in this action, from which several replies emanate: (a) the 2010 Stantec Report; and (b) the April 2015 *Noise and Vibration Measurement and Modelling Program*, reviewed by Mr. Kirby, then operating in his capacity as an employee of ARCADIS (the "2015 ARCADIS Report"). I shall address each report respectively before stating my conclusions on their findings.

(a) *2010 Stantec Report*

[59] Underlying the noise and vibration experts' evidence is the 2010 Stantec Report, which was commissioned by CN for the purposes of assessing the predicted impacts of the railway corridor expansion. Although authored by Stantec, Mr. Babic did not contribute to the 2010 Stantec Report. The report is not tendered for the truth of its contents because its authors were not called to testify at trial.

[60] The 2010 Stantec Report measured the pre-expansion sound levels at various locations along the Marysville Corridor and predicted how those levels may change post-expansion. The report did not directly measure the sound levels at the Plaintiff's property. It is the only evidence to measure the pre-expansion sound levels near the Plaintiff's property.

[61] Stantec found that **the pre-expansion Ldn at 20 meters from the railway track was 73.8 dBA**, which resulted in a %HA of 34% (these numbers were originally lower and later corrected in a letter from Mr. Babic, dated July 30, 2019). The parties essentially agree that this figure is correct.

[62] The 2010 Stantec Report predicted the post-expansion sound levels using a modelling program. Modelling programs receive information and use predictive tools to estimate sound levels for situations that cannot easily be measured, such as future scenarios. In this case, Stantec used a modelling program named STEAM, which predicts a reasonable worst-case scenario of sound levels propagating from the railway corridor both pre- and post-expansion.

[63] Stantec used STEAM to predict that the **pre-expansion** Ldn at 29 meters from the track along the Marysville Corridor would be 80 dBA, which results in a %HA of 55%. Stantec then predicted that the **post-expansion** Ldn at that distance would increase by only 0.13 dBA, which entails an increase of %HA of 0.42%.

(b) *2015 ARCADIS Report*

[64] The 2015 ARCADIS Report measured the post-expansion sound levels at the Plaintiff's property. It is the only evidence of such measurements.

[65] Using the measurement data from the 2010 Stantec Report, the 2015 ARCADIS Report calculated that the **pre-expansion Ldn at 20 meters from the railway track was 73.6 dBA** — a finding only 0.2 dBA less than Stantec's corrected Ldn calculation.

[66] Using its own measurement data from a site slightly west of the Plaintiff's residence, the 2015 ARCADIS Report found that **the post-expansion Ldn at 20 meters from the railway track is 78.7 dBA.** Mr. Kirby explained he measured the sound levels at this location to replicate the receptor location used in the 2010 Stantec Report for the Marysville Corridor, which was approximately one kilometer west of the Plaintiff's property.

[67] The 2015 ARCADIS Report then used its measurement data, and through a modelling system named Cadna-A, projected the sound levels to 33 metres from the railway track at the most exposed façade of the Plaintiff's residence, which is located at the top floor on the northern face of the Plaintiff's residence. In a letter dated March 17, 2021, Mr. Babic agreed the most exposed façade is an appropriate assessment location.

[68] Based on Cadna-A modelling, the 2015 ARCADIS Report found the **pre-expansion Ldn at the Plaintiff's residence was 71.4 dBA, and the post-expansion Ldn at that location is 76.5 dBA.** Accordingly, the 2015 ARCADIS Report found the expansion of the railway corridor resulted in an increase in Ldn at the Plaintiff's residence of 5.1 dBA, entailing an increase in %HA of 16.2%.

(i) The berm

[69] The 2015 ARCADIS Report attributed the increase in sound at the Plaintiff's residence primarily to the removal of the berm between the Plaintiff's residence and the railway corridor. It found the berm reduced the Ldn at the Plaintiff's residence by approximately 4 dBA. If the berm was not accounted for in the pre-expansion Ldn, the post-expansion Ldn was predicted to

be only approximately 1 dBA greater than the pre-expansion Ldn. In other words, without the presence of the berm pre-expansion and its removal post-expansion, the increase in sound caused by the railway corridor expansion would be imperceptible at the Plaintiff's residence.

(ii) The third track

[70] Mr. Kirby also alleged that the 2010 Stantec Report's modelling of the post-expansion sound levels applicable to the Plaintiff's property erroneously presumed the new third rail was located to the north of the existing tracks, when in fact it was located to the south.

[71] In its closing submissions, the Defendant asserted, "Mr. Babic rebutted Mr. Kirby's assertions that the Stantec 2010 Report's modelling contained errors with respect to track configuration and the location of the [third] track."

[72] I find the Defendant's submission is inaccurate. The section of the railway corridor adjacent to the Plaintiff's property is an anomaly. Adjacent to the Plaintiff's property and surrounding area, the third track exists to the south of the existing tracks; for the Marysville Corridor generally, it exists to the north of the tracks. The 2010 Stantec Report failed to account for this detail in modelling the propagation of sound from the railway corridor.

[73] Mr. Babic did not concede that Stantec's omission was an error *per se*, as the 2010 Stantec Report sought to address sound levels along the entire Marysville Corridor and was not concerned with the Plaintiff's property specifically. However, Mr. Babic agreed that the modelling of sound levels adjacent to the Plaintiff's property was "misaligned at best," and he

accordingly advised Mr. Kirby on how to readjust Stantec's modelling to make it accurate for the area adjacent to the Plaintiff's property. The notion that Mr. Babic "completely rebutted" Stantec's alleged error, as asserted by the Defendant, thus misconstrues Mr. Babic's evidence.

(3) Conclusion

[74] The 2015 ARCADIS Report determined both the pre- and post-expansion sound levels at the Plaintiff's residence. These two findings are essential to the Plaintiff's claim and hence fiercely disputed by the parties. Such findings determine whether sound levels at the Plaintiff's residence increased due to the expansion, and as a result of this increase, whether the Plaintiff is entitled to further compensation under the *Act* for disturbance damages and injurious affection. I shall address these two findings respectively.

(a) *Pre-expansion sound levels*

[75] The 2015 ARCADIS Report relied upon the data in the 2010 Stantec Report to determine the pre-expansion sound levels, as the 2015 ARCADIS Report was authored post-expansion. Using measured data, Stantec ultimately found the pre-expansion Ldn at 20 meters from the railway track was 73.8 dBA at a location approximately one kilometer west from the Plaintiff's property and north of Airport Parkway. The parties essentially agree that this figure is correct.

[76] Using the measured data in the 2010 Stantec Report, the 2015 ARCADIS Report modelled the pre-expansion Ldn at the Plaintiff's residence (33 meters from the railway track) to be 71.4 dBA. The Defendant asserts this finding is unreliable for three reasons: (i) the 2010

Stantec Report is not admitted for the truth of its contents; (ii) the measurement data is taken at a different receptor location and is therefore inapplicable to the Plaintiff's residence; and (iii) the 2015 ARCADIS Report's modelling incorrectly relied upon the finding that there was a 3 metre berm on the Plaintiff's property pre-expansion.

[77] I am only convinced by the third argument raised by the Defendant, but I shall address each of them.

(i) Hearsay evidence

[78] The 2010 Stantec Report is not admissible for the truth of its contents because its authors were not called to testify at trial, thus rendering it hearsay. I do not find, however, that this inadmissibility precludes the experts from relying on the data contained in the 2010 Stantec Report. Both Mr. Kirby and Mr. Babic were subject to cross-examination regarding the veracity of the data and how it was used in their respective evidence. While the experts disputed how that data was used in modelling, neither contested the reliability of the measurements themselves, nor were such questions put to them upon cross-examination. I therefore find the calculations in the 2015 ARCADIS Report that relied upon the data from the 2010 Stantec Report are admissible for the truth of their contents.

(ii) Receptor location

[79] The Defendant asserts that because the receptor at issue in the 2010 Stantec Report was in a different location with different topography than the receptor used in the 2015 ARCADIS

Report, the data it collected is inapplicable to the Plaintiff's residence. However, the receptor location used by Mr. Kirby in the 2015 ARCADIS Report was selected to replicate the receptor location used in the 2010 Stantec Report, entailing a similar distance from the railway track and similar topography.

[80] I find the receptor location used by Mr. Kirby does not render the findings in the 2015 ARCADIS Report unreliable. The Defendant has not established why the differences in receptor locations are so fundamental that they render the measurements in the 2010 Stantec Report inapplicable to the Plaintiff's property. For example, the Defendant notes that Stantec's monitoring location is closer to Airport Parkway, but there is no evidence to suggest how busy Airport Parkway was at the time of Stantec's measurements or the extent to which this proximity inflated Stantec's measurements.

(iii) Modelling the berm

[81] Mr. Kirby's calculations relied upon the notion that pre-expansion, there was a 3-metre berm north of the Plaintiff's residence that attenuated noise from the railway corridor. For the reasons that follow, I find the Plaintiff has not established that such a berm existed at that time, thus rendering the 2015 ARCADIS Report's calculation of the pre-expansion Ldn at the Plaintiff's residence unreliable.

[82] The 2015 ARCADIS Report modelled scenarios of the pre-expansion sound levels at the Plaintiff's residence both with and without the berm. When the berm was included in the modelling, the 2015 ARCADIS Report found the pre-expansion Ldn at the Plaintiff's residence

was 71.4 dBA. When the berm was removed from the modelling, the 2015 ARCADIS Report found the pre-expansion Ldn at the Plaintiff's residence was 75.8 dBA. (I note that under the Cadna-A modelling, the pre-expansion Ldn at 20 metres from the railway track was 78.3 dBA, thus explaining why the pre-expansion Ldn of 75.8 dBA at the Plaintiff's residence without the berm as modelled is greater than the pre-expansion Ldn of 73.6 dBA at 20 metres from the railway track as measured).

[83] The berm in the 2015 ARCADIS Report's modelling is approximately 3 metres high, blocking the line of sight almost entirely between the Plaintiff's residence and the track. The ARCADIS Report contains the following image from the Cadna-A modelling, depicting the berm pre-expansion and its subsequent removal post-expansion:

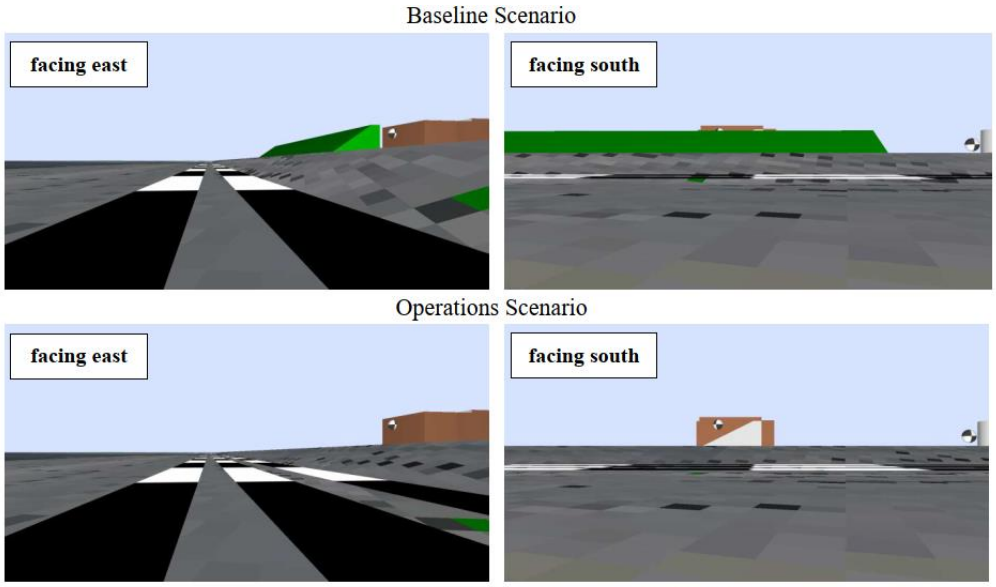


Figure 5.2: Cadna-A Model Configuration (3D View)

Description: Basic three-dimensional rendering images from Mr. Kirby's Cadna-A model configuration. Of note are the two images of the Plaintiff's residence seen from the north of the railway corridor, facing south. The top image represents the pre-expansion

> *scenario, wherein the earth berm almost entirely blocks the line of sight between the Plaintiff's residence and the track. The bottom image represents the post-expansion scenario, wherein the earth berm is removed and almost the entire line of sight between the Plaintiff's residence and the track is visible.*

[84] I find the Plaintiff has failed to establish that the berm relied upon in the 2015 ARCADIS Report existed pre-expansion.

[85] Mr. Kirby provided no evidence of the berm. Mr. Kirby admitted under cross-examination that he did not visit the Plaintiff's property before he conducted the measurements for the 2015 ARCADIS Report in 2014. He therefore took no measurements or saw the berm as it existed pre-expansion, ostensibly relying upon the Plaintiff for the measurement.

[86] The Plaintiff's documentary evidence of the berm is lacking. The Plaintiff submitted a brief of photographs he took of his property both pre- and post-expansion that he claims display the berm. However, none of those photographs display a 3-metre high earth berm existing pre-expansion as relied upon in the 2015 ARCADIS Report. At most, the photographs show a series of shrubs along the perimeter of the Plaintiff's property, including a few trees and some decomposing hay bales. While much of this vegetation was removed due to the railway corridor expansion, thus visually exposing the Plaintiff's residence to the tracks, this vegetation is not the same as the 3-metre berm in the 2015 ARCADIS Report's modelling.

[87] One picture from the Plaintiff's brief is worth noting in particular. The Plaintiff explained he took that picture in early 2012 from the north side of his residence on the front lawn looking towards the railway corridor. If the berm existed at that time, one would expect a 3-

metre barrier of hay rising from the lawn that obstructs most, if not all, of the photograph. In the photograph, however, the horizon is clearly visible; there are some shrubs in the foreground, but they do not rise above the height of the photographer, let alone a height of 3 metres.

[88] If the berm existed pre-expansion, the Plaintiff must therefore have constructed the berm sometime between early 2012 and when the Required Lands were expropriated in late 2012. However, the Plaintiff's testimony regarding such details is lacking. While the Plaintiff discusses growing and harvesting hay to build an eight-foot (approximately 3 metre) berm, he describes doing so after returning from living with his brother for 13 months beginning in late 2012, post-expansion. In particular, the Plaintiff stated under direct-examination:

> So, you know, after 13 months, it was obvious that there wasn't a solution coming any time soon, and we had to figure out a better option. So that's when I planted a hay crop to harvest to use as a temporary hay bale sound barrier. […] So I put up a hay bale barrier the best I could. It was pretty impressive at the time. It was, you know, quite long and quite tall, but unfortunately, since it had to be so close to the house, it didn't, it didn't provide adequate protection, certainly not to the second floor, just because it was too close to the house. It did provide some protection for the first level. And certainly when the kids were playing outside, it did help the noise level at ground level. But, again, meant to be temporary to buy us some more time, get us back into the house.

[89] In light of the above, I afford little weight to the 2015 ARCADIS Report's finding that the pre-expansion Ldn at the Plaintiff's residence was 71.4 dBA, as this calculation relied upon the existence of a 3-metre berm. Instead, I afford greater weight to the 2015 ARCADIS Report's finding that the pre-expansion Ldn at the Plaintiff's residence was 75.8 dBA, as this calculation reflects the pre-expansion sound levels without a berm.

(b) *Post-expansion sound levels*

[90] I accept the 2015 ARCADIS Report's finding that the post-expansion Ldn at the Plaintiff's residence is approximately 76.5 dBA. This finding is uncontradicted.

[91] The 2015 ARCADIS Report is the only expert evidence to measure the sound and vibration levels at the Plaintiff's property post-expansion. The Defendant has not asserted that the measurement data for this figure is incorrect, nor has the Defendant provided any of its own measurements to contradict such findings. When asked about Mr. Kirby's modelling of the post-expansion sound levels at Plaintiff's residence, Mr. Babic stated he was not "contracted" to provide a response to this crucial finding. In addition, Mr. Babic acknowledged under cross-examination that measurements are the "gold standard," as measurements generally provide more accurate representations of sound levels than modelling.

(c) *Increase in sound*

[92] The difference between the pre- and post-expansion Ldn at the Plaintiff's residence represents the increase in sound levels at that location caused by the expansion of the railway corridor.

[93] I find the increase in sound at the Plaintiff's residence is an Ldn of approximately 1 dBA, an imperceptible change. I make this determination in light of the finding that the pre-expansion Ldn at the Plaintiff's residence was 75.8 dBA, whereas the post-expansion Ldn at that location is

76.5 dBA. This determination reflects the finding in the 2015 ARCADIS Report that the increase in sound at the Plaintiff's residence would be approximately 1 dBA without the berm.

[94] In summary, the berm was integral to the 2015 ARCADIS Report's finding that the railway corridor expansion resulted in a perceptible increase in sound at the Plaintiff's property. As the Plaintiff has not established such a berm existed at that time, I find there was no perceptible change in sound.

(4) Guidelines

[95] The expert reports considered two guidelines in particular: Health Canada's *National Assessment for Environmental Assessment: Health Impacts of Noise*, dated May 2005 (the "Health Canada Guidelines"), and the United States Federal Transit Agency's *Transit Noise and Vibration Impact Assessment*, dated May 2006 (the "FTA Guidelines").

(a) *Health Canada Guidelines*

[96] Both the 2010 Stantec Report and the 2015 ARCADIS Report considered the Health Canada Guidelines. The Health Canada Guidelines recommend that "mitigation should be proposed" if a project:

(a) exceeds an Ldn of 75 dBA; or

(b) results in an increase in %HA of 6.5% or greater.

[97] Mr. Kirby explained the former criterion is “absolute” because it does not consider changes in sound levels, whereas the latter criterion is “relative” because it only considers changes in sound levels.

(b) *FTA Guidelines*

[98] The 2015 ARCADIS Report also relied upon the FTA Guidelines. According to the FTA Guidelines, a “severe impact” occurs if a project results in an increase of approximately 2 dBA or more to an existing sound environment with an Ldn of approximately 75-77 dBA. Noise projections causing a “severe impact” represent the most compelling need for mitigation.

[99] While the parties disagree on the application of the FTA Guidelines to the Plaintiff’s property, Mr. Babic conceded under cross-examination that they are a “resource that can be considered.” I therefore accept that both the Health Canada Guidelines and the FTA Guidelines are applicable in assessing the impact of the sound levels at the Plaintiff’s property caused by the railway corridor expansion.

(c) *Other guidelines*

[100] Mr. Kirby asserted that the railway corridor expansion breached other regulatory guidelines, to which Mr. Babic provided compelling reasons for why those guidelines should not apply. At issue in this case, however, is whether the Plaintiff is entitled to further compensation under the *Act*, not the number of regulatory guidelines that the railway corridor expansion has breached. Guidelines are only relevant insofar as they assist the Court in understanding the

impact of sound levels on the Plaintiff's property. One guideline is sufficient for this purpose; two is plenty. I shall therefore consider only the Health Canada Guidelines and the FTA Guidelines, as the parties agree that these guidelines are applicable.

(d) *Conclusion*

[101] I find mitigation was only recommended under the absolute criterion of the Health Canada Guidelines.

[102] The Ldn at the Plaintiff's residence was 75.8 dBA pre-expansion and is 76.5 dBA post-expansion. As both these figures exceed 75 dBA, the Health Canada Guidelines recommend that mitigation be considered for both scenarios under the absolute criterion.

[103] The railway corridor expansion increased the Ldn at the Plaintiff's residence by approximately 1 dBA. As the Plaintiff has not established this change results in a %HA of 6.5% or greater, I find the Health Canada Guidelines do not recommend that mitigation be considered under the relative criterion. Likewise, this increase does not cause a "severe impact" under the FTA Guidelines, as there has not been an increase of approximately 2 dBA or more to an existing sound environment with an Ldn of approximately 75-77 dBA.

[104] In light of the above, I find the applicable guidelines offer little support to the Plaintiff's argument that the increase in sound caused by the expansion of the railway corridor has negatively affected his residence. The only criterion breached was the absolute criterion under the Health Canada Guidelines. However, this criterion was breached both pre- and post-

expansion, as the Ldn at the Plaintiff's residence exceeded 75 dBA at all relevant times. I therefore find that the breach of the Health Canada Guidelines does not indicate a change in sound levels.

C. *Property appraisal experts*

[105] The Plaintiff called **Mr. Greg McCulloch** to testify as an expert witness for the purposes of estimating the cost of relocating the Plaintiff's residence further south along his property, away from the railway corridor. Since June 2002, Mr. McCulloch has worked for Laurie McCulloch Building Moving, a contracting firm that specializes in heritage relocation and façade retention. Mr. McCulloch replaced his father as president of the firm in March 2019.

[106] I found that Mr. McCulloch was credible: he answered questions in a clear and forthright manner.

[107] The Defendant objected to the admissibility of Mr. McCulloch's evidence on the basis that he was not qualified as an expert witness and that, based on the Defendant's interpretation of the *Act*, his evidence was not relevant to the Plaintiff's action. I found that Mr. McCulloch was a qualified expert given his experience in heritage relocation projects in Ontario, and that his evidence was relevant to the issues to be determined at trial.

[108] Mr. McCulloch provided an expert report entitled *Quotation for Buildings Relocation*, dated January 29, 2021 (the "2021 McCulloch Report"), wherein he estimated that the cost to relocate the Plaintiff's residence is $759,134.

[109] The Plaintiff called **Mr. Ward Lansink** to testify as an expert witness for the purposes of estimating the compensation owed to the Plaintiff for the expropriation of the Required Lands. Mr. Lansink is an accredited real estate appraiser who specializes in expropriation matters. Prior to joining Altus Group Ltd. in October 2020, Mr. Lansink had been a senior appraiser for GSI Real Estate & Planning Advisors Inc. ("GSI") since January 2011.

[110] I found Mr. Lansink was credible: he provided detailed responses to the questions asked of him and did not embellish his testimony. Under cross-examination, Mr. Lansink admitted to knowing of several errors contained in his report prior to trial. While it would have been preferable for Mr. Lansink to bring these errors to the Court's attention at the outset of his testimony, I do not find that failing to do so undermined his credibility.

[111] As a preliminary matter, the Defendant objected to the admission of a letter dated December 30, 2020, which was authored by Mr. Kenneth Stroud of GSI and co-authored by Mr. Lansink. Mr. Lansink did not sign the December 30, 2020 letter.

[112] The Defendant argued that Mr. Lansink was not competent to testify on the contents of the December 30, 2020 letter, as Mr. Lansink was not the author of the letter. The Defendant did not raise this objection until after Mr. Lansink had began to testify on the letter.

[113] I allowed Mr. Lansink to testify on the December 30, 2020 letter. In the final paragraph of the letter, it states that Mr. Lansink "assisted in the preparation of this letter and […] reached a consensus on the opinions herein." Mr. Lansink explained that he did not sign the letter because

he was no longer employed with GSI when the letter was issued, and he could therefore not sign under the GSI letterhead. Given Mr. Lansink's explanation for why he authored but did not sign the December 30, 2020 letter, I found that Mr. Lansink's testimony on the letter was admissible.

[114] The Defendant called **Mr. Stephen Rayner** to testify as an expert witness for the purposes of estimating the compensation owed to the Plaintiff for the expropriation of the Required Lands. Like Mr. Lansink, Mr. Rayner is also an accredited real estate appraiser. Mr. Rayner began his career in 1972 and opened his own firm in 1981, S. Rayner & Associates Ltd., where he is currently the president and general manager. Mr. Rayner has extensive experience acting as an appraiser in expropriation proceedings.

[115] I found Mr. Rayner lacked credibility. He was often evasive under cross-examination, providing indirect and roundabout answers to relatively simple questions:

> Q. And Mr. Lansink goes through a number of comments with regards to loss of privacy, loss of screening, additional light. You remember all of those matters?
>
> A. I'm not commenting on them, I'm commenting on noise level.
>
> […]
>
> Q. Yeah. I thank you. But so I just want to make sure I have this right. The entire extent of the discussion, the analysis about -- supporting your opinion with regard to injurious affection, is to be found on these pages, 60, 61, and 27, 28? That's where we can find it? There's nowhere else that I've missed in the report?

> A. That's the only written. All of that is based on my inspection and analysis of the home at the time. I looked at all sorts of different things.
>
> Q. I'm not asking you that, sir. I'm just asking you what I put to you about your report is where we will find the analysis?
>
> A. That is a summary of my analysis.
>
> […]
>
> Q. Okay. So what you're suggesting, sir, is that the property -- the house -- well, the structure that we see on the left-hand side of this picture, are you suggesting, sir, that that structure was at the time of the sale in question, was on 166? Is that your evidence today?
>
> A. I can't say for sure, because I can't see that in context.
>
> Q. All right. So you don't -- fair enough. You don't know from looking at that photo one way or another; is that right?
>
> A. The whole purpose of the documents for 166, just as it was for the other two sale, was that Mr. Lansink didn't follow due diligence in researching those sales; that he did not confirm whether or not there was buildings on the site, whether they were derelict, whether they were usable. He said that was a vacant site, period.

[116] Additionally, I took issue with Mr. Rayner's reliance on the evidence concerning 166 Roblin Road, discussed in detail below beginning at paragraph 146 of this judgment.

(1) 2012 Rayner Report

[117] Mr. Rayner's *Appraisal Report*, dated January 24, 2012 (the "2012 Rayner Report"), appraised the market value of the Required Lands. The 2012 Rayner Report was commissioned for the purposes of compensating the Plaintiff for the expropriation of the Required Lands. It valued the Required Lands at $1,000 at the time of taking on January 24, 2012, which the Plaintiff ultimately received from the Defendant as compensation for the expropriation.

[118] The 2012 Rayner Report used a "direct comparison approach" to calculate the value of the Required Lands. This approach entails examining sales of similar properties located in the surrounding area, otherwise known as "indices," calculating the sale price per hectare (or acre) of those indices, and then adjusting for various differences.

[119] Based on the adjusted indices, the 2012 Rayner Report concluded that the market value for land similar to the Required Lands was $4,000 per hectare. As the Required Lands are 0.259 hectares (0.64 acres), the 2012 Rayner Report concluded that its market value was $1,000 at the time of taking.

[120] The 2012 Rayner Report also found that there was no reduction in value — *i.e.*, "injurious affection" — to the remainder of the Plaintiff's property caused by the expropriation of the Required Lands and the expansion of the railway corridor. In his July 22, 2019 letter, Mr. Rayner explained that this conclusion was based on the assumption that pre-expansion sound levels at the Plaintiff's property would be maintained post-expansion by implementing noise attenuation measures if necessary. Mr. Rayner asserted under direct-examination that the cost to implement such measures does not constitute injurious affection because injurious affection

concerns permanent damage to the remainder of the Plaintiff's property, whereas the increase in sound caused by the railway corridor expansion is curable.

(2) 2019 GSI Report

[121] Mr. Lansink's evidence primarily concerns the *Retrospective Appraisal Report* that he authored with GSI, dated May 30, 2019 (the "2019 GSI Report"). The 2019 GSI Report is the only appraisal of the value of the Plaintiff's entire property, including its improvements. It considered three scenarios in which the Defendant owes the Plaintiff further compensation for the expropriation of the Required Lands.

(a) *Scenarios A and B: relocating the residence*

[122] "Scenario A" and "Scenario B" are premised on the stated assumption that the Plaintiff's dwelling is no longer habitable due to the increase in disturbances caused by the railway corridor expansion.

[123] "Scenario A" considered the option of constructing a new residence on the Plaintiff's property further south, away from the railway corridor. The 2019 GSI Report estimated this procedure to cost $1,426,100.

[124] "Scenario B" considered the option of moving the Plaintiff's existing residence away from the railway corridor. The 2019 GSI Report estimated this procedure to cost $1,003,700.

This estimate is based on Mr. McCulloch's evidence, which has subsequently been updated by the 2021 McCulloch Report.

(b) *Scenario C: Injurious affection*

[125] The majority of the 2019 GSI Report concerned "Scenario C," which considered the injurious affection to the Plaintiff's property caused by the railway corridor expansion. In particular, the 2019 GSI Report found the Plaintiff's property diminished in value $247,100 due to the expropriation of the Required Lands and the expansion of the railway corridor.

[126] Similar to the previous two scenarios, Scenario C is premised on the stated assumption that the increase in disturbances caused by the railway corridor expansion have rendered the Plaintiff's residence no longer habitable on an owner-occupied basis (*i.e.*, as a residence for the owner of the property). The value of the Plaintiff's residence was therefore assessed on a tenant-occupied basis (*i.e.*, as a rental property).

(i) Injurious affection

[127] The 2019 GSI Report, similar to the 2012 Rayner Report, utilized a direct comparison approach to estimate the value of the Plaintiff's land immediately before the expropriation as vacant ($305,000) and as improved ($655,000). The difference between those two figures is the value of the improvements on the Plaintiff's property ($350,000).

[128] To estimate the injurious affection to the Plaintiff's property, the 2019 GSI Report subtracted the value of the Plaintiff's property with improvements after the expropriation ($407,900) from the value of the Plaintiff's property with improvements before the expropriation ($655,000), for a loss of $247,100.

[129] To estimate the value of the Plaintiff's property with improvements after the expropriation, the 2019 GSI Report took the value of the Plaintiff's property as vacant ($305,000), subtracted the value of the Required Lands ($2,100), added the value of the Plaintiff's residence as a tenant-occupied residence ($60,000), and then added the value of the auxiliary structures ($45,000), for a sum of $407,900.

(ii) Value of the Required Lands

[130] The 2019 GSI Report determined that the value of the Plaintiff's property as vacant per acre was $3,200 at the time of taking. As the Required Lands are 0.64-acres, the 2019 GSI Report appraised the value of the Required Lands at $2,100 at that time.

(iii) Value of the Plaintiff's residence

[131] The 2019 GSI Report estimated that the value of the Plaintiff's residence was $305,000 at the time taking. It came to this conclusion by subtracting the estimated value of the Plaintiff's auxiliary improvements ($45,000), such as the barn and chicken coup, from the value of all the improvements on the Plaintiff's property ($350,000).

(c) *Mr. Rayner's critiques*

[132] Mr. Rayner outlined several flaws in the 2019 GSI Report. Some of these criticisms I found more convincing than others. Ultimately, I find they did not entirely undermine Mr. Lansink's appraisal of the value of the Plaintiff's property as improved and as vacant at the time of taking.

(i) Determining impediment to value

[133] Mr. Rayner submits the 2019 GSI Report did not use a proper direct comparison approach, as it did not include any properties with an impediment to value that were analogous to the one on the Plaintiff's property caused by the railway corridor. While the 2019 GSI Report adjusted downwards to account for the railway corridor, Mr. Rayner asserts this adjustment is mere speculation without using comparators of similarly impeded properties to estimate how much the railway corridor actually detracts from the value of the Plaintiff's property. In his July 22, 2019 letter, Mr. Rayner stated:

> […] there needs to be some market supported evidence to quantify the impact of the rail corridor in comparison to the sales when estimating the before value. It is not sufficient, in our view, to simply state that there is a downwards adjustment required to the comparables for this factor as it is of great significance in the overall appraisal process for this property.

[134] I am persuaded by Mr. Rayner's argument, but I do not find it entirely undermines Mr. Lansink's findings. While relying on properties containing similar impediments to value would

have been preferable, I do not find it was impossible for Mr. Lansink to adjust for such concerns. As Mr. Rayner affirmed, adjustments are matters of discretion and judgment. Further, Mr. Lansink was operating under the constraint of finding comparator properties that were similarly situated in location, time of sale, and condition to the Plaintiff's residence. Mr. Rayner, in contrast, did not provide an alternative appraisal to discount Mr. Lansink's findings.

(ii) Determining rental value

[135] Mr. Rayner further submits that the 2019 GSI Report did not adequately substantiate its finding that the value of the Plaintiff's residence as a rental property was $60,000. The 2019 GSI Report's calculation is based on the finding that the Plaintiff's residence is worth $600 per month as a rental property — a figure that Mr. Rayner aptly describes as "insulting" in light of the renovated condition of the Plaintiff's residence. In particular, Mr. Rayner asserts that the 2019 GSI Report erred by:

(a) not discussing the sample size of the comparators nor the process by which the average value of rent was determined;

(b) not using specific rental comparators or listing the details of the comparators used;

(c) using a two month vacancy rate, an adjustment unsubstantiated by evidence;

(d) using a 10% capitalization rate, an adjustment unsubstantiated by evidence; and

(e) discounting the rental value of the residence by 50% because it is a "rural house" instead of an "urban house," an adjustment unsubstantiated by evidence.

[136] I am persuaded by Mr. Rayner's criticisms and therefore give little weight to Mr. Lansink's determination of the value of the Plaintiff's residence as a rental property. Mr. Lansink's methodology contains numerous assumptions that are not supported by evidence. Further, Mr. Lansink's calculation of rental value lacks the level of detail found in his calculation of property value as vacant and as improved.

(iii) Determining size of indices

[137] Mr. Rayner notes several errors in the indices used in the 2019 GSI Report to estimate the value of the Plaintiff's property.

[138] The 2019 GSI Report considered four indices of property sales to estimate the value of the Plaintiff's property **as vacant**. Mr. Lansink incorrectly calculated the size of the property sold for two of those indices: 341 Casey Road, Belleville and 843 Mapleview Road, Quinte West.

[139] With respect to 341 Casey Road, the sale price of $275,000 included two lots, one approximately 200 acres and another approximately 65 acres. The 2019 GSI Report, however, failed to consider the 200-acre lot in the sale, likely resulting in an inflated estimate of the property's value per acre.

[140] The 2019 GSI Report committed a similar error with respect to 843 Mapleview Road. The sale price of $600,000 for that property also included two lots, one approximately 280 acres

and another approximately 90 acres. The 2019 GSI Report, however, failed to consider the 90-acre lot in the sale, again likely resulting in an inflated estimate of property's value per acre.

[141] The 2019 GSI Report considered three indices of property sales to estimate the value of the Plaintiff's property **as improved**. Again, Mr. Lansink incorrectly calculated the size of the property sold for two of these indices: 1209 Aikins Road, Quinte West and 961 Tuftsville Road, Stirling.

[142] With respect to 1209 Aikins Road, the sale price of $600,000 included two lots, one approximately 160 acres and another approximately 45 acres. The 2019 GSI Report, however, failed to consider the 45-acre lot in the sale. Although Mr. Lansink disputes whether he failed to meet his duty of due diligence in assessing this property, he agrees that failing to account for the second lot likely affected his estimated value of improved sales. Mr. Lansink noted in the 2019 GSI Report that the 1209 Aikins Road sale was one of the indices most comparable to the Plaintiff's property.

[143] With respect to 961 Tuftsville Road, the sale price of $420,000 included two lots, one approximately 90 acres and another approximately 60 acres. The 2019 GSI Report, however, failed to consider the 60-acre lot in the sale, again likely resulting in an inflated estimate of property's value per acre.

[144] In my view, Mr. Lansink's errors in calculating the size of his indices are significant, and I reduce the weight afforded to Mr. Lansink's findings accordingly. However, I do not find these

errors entirely undermine Mr. Lansink's overall determination of property value as vacant and as improved.

[145] Mr. Lansink provided a detailed and transparent analysis of how his comparators were similar to the Plaintiff's property and his adjustments for differences. Approximately half of the indices Mr. Lansink relied upon did not contain erroneous assessments of property size. Further, Mr. Rayner did not establish the extent to which these errors affected Mr. Lansink's calculations, instead relying on the errors as a silver bullet to undermine the entirety of Mr. Lansink's findings. The Defendant's approach was akin to throwing stones at the Plaintiff's evidence, denting its reliability but providing little evidence of its own to counter the conclusions therein.

(d) *166 Roblin Road, Belleville*

[146] 166 Roblin Road, the sale of which Mr. Lansink included as a comparator for estimating the value of vacant land, contained improvements that were, based on the photographs in evidence, likely dilapidated at the time of sale. 160 Roblin Road lies directly to the east of 166 Roblin Road. 160 Roblin Road contains improvements that, based on the photographs in evidence, were likely functional at that time.

[147] During cross-examination, counsel for the Defendant put the registry search of 166 Roblin Road before Mr. Lansink, which contains photographs of the improvements on 160 Roblin Road. Counsel for the Defendant asserted that Mr. Lansink failed to account for the improvements on 166 Roblin Road in determining the property was vacant land, and that Mr. Lansink was "misled by the MLS [sale listing] to believe [166 Roblin Road] was vacant land".

[148] Mr. Lansink asserted he did not err in determining 166 Roblin Road was vacant land by relying on the sale listing, which advertised the property as farmland "suitable for a new build." Based on that information, Mr. Lansink claimed it was reasonable for him to conclude that any improvements on 166 Roblin Road were not considered in the sale price.

[149] Counsel for the Plaintiff contended that Mr. Rayner, who prepared the registry search of 166 Roblin Road, misled Mr. Lansink and the Court by suggesting the functional improvements portrayed in the registry search were located on 166 Roblin Road when they were in fact located on 160 Roblin Road. Counsel for the Plaintiff asserted that if the Defendant was to suggest to Mr. Lansink that 166 Roblin Road was vacant by relying on the registry search prepared by Mr. Rayner, it was Mr. Rayner's obligation to inquire into the condition of the improvements on 166 Roblin Road and satisfy himself that such a suggestion was supported by evidence. However, as noted by counsel, Mr. Rayner did not determine the state of the improvements on 166 Roblin Road before the Defendant suggested to Mr. Lansink that he erred in finding the property was vacant.

[150] I am persuaded by the Plaintiff's argument that it was problematic for the Defendant, and in particular Mr. Rayner, to rely on the registry search for 166 Roblin Road to suggest Mr. Lansink was misled by the sale listing of that property. While I agree with the Defendant that Mr. Lansink failed to take the "elementary step" of determining the condition of the improvements on 166 Roblin Road before concluding the property was vacant, I find Mr. Rayner also failed to make this determination. In claiming that Mr. Lansink was misled by the sale listing for 166 Roblin Road, the Defendant baselessly suggested that the improvements on the

property were of some value. The evidence displays there were no functional improvements on 166 Roblin Road at the time of sale, and Mr. Lansink therefore did not err in regarding that property as vacant.

[151] In my view, Mr. Lansink lacked due diligence in not accounting for the improvements on 166 Roblin Road in his analysis, despite that such improvements would not alter the conclusion that the property was vacant. Mr. Rayner and the Defendant, however, went a step further in suggesting that Mr. Lansink's conclusion was incorrect without first satisfying themselves that such a suggestion was supported by evidence.

[152] In light of the above, I find the Defendant's reliance on the registry search of 166 Roblin Road, which was prepared by Mr. Rayner, impugns Mr. Rayner's credibility.

(3) Conclusion

[153] I accept the 2019 GSI Report's findings with respect to the value of the Plaintiff's property, both as improved and as vacant, but I do not accept the report's calculation of injurious affection.

(a) *Value of the Plaintiff's property as improved*

[154] I accept the finding in the 2019 GSI Report that the value of the Plaintiff's property as improved immediately prior to the expropriation was $655,000. Mr. Lansink's evidence on this

matter was uncontradicted, as Mr. Lansink is the only expert to appraise the entirety of the Plaintiff's property, including its improvements.

(b) *Value of the Plaintiff's property as vacant*

[155] I further accept the finding in the 2019 GSI Report that the value of the Plaintiff's property as vacant was $3,200 per acre at the time of taking, and that the value of the Required Lands was therefore $2,100 at that time. In my view, Mr. Lansink's evidence on this matter is preferable to Mr. Rayner's, despite Mr. Lansink's errors in calculating the size of the comparator properties. The 2012 Rayner Report in many ways reads like an executive summary, stating conclusions without providing the underlying rationale. Mr. Rayner often made adjustment calculations for comparator properties without providing details to elucidate his reasoning. Take the following index from his report as an example:

> **Index 4 ($225,000 / $16,779 per hectare - $65,000 / $4,847 per hectare residual land value)** is the sale of a smaller site located on the north side of Airport Parkway East directly across from the subject. Site location on the north side of Airport Parkway is viewed as a significant advantage given the inherent hazard of crossing the CN mainline for sites located on the south side of Airport Parkway. Improvements on-site consist of an older house (179 m^2) and 3 barns containing 313m^2, 28m^2 and 19m^2 respectively.
>
> The contributory value of the improvements has been calculated in order to estimate the residual land value per hectare of this index. These values were calculated to be $135,000 and $25,000 respectively for the farm house and out buildings. The residual land value is therefore $65,000 or $4,847 per

> hectare. This requires adjusting downwards for the superior location.
>
> [emphasis added]

[156] Mr. Rayner proceeded to make adjustments for his indices based on several criteria, such as time, location, size, improvements, etc. However, his reasons for these adjustments mostly consist of brief conclusions, such as "Index 6 requires adjusting upwards for time"; "Indices 1 and 3, located north of Belleville have been adjusted upwards"; and "Indices 5 and 6, as larger sites, have been adjusted upwards."

[157] Mr. Lansink, in contrast, provided much more detailed reasons for his adjustments. His adjustment process for each index spans approximately half of a page, considering details such as the specific amount of workable land and the condition of improvements.

[158] Additionally, Mr. Rayner lacked credibility because of his evasive answers under cross-examination and his preparation of the registry search for 166 Roblin Road. When Mr. Rayner's opaque adjustment calculations in his comparator analysis are assessed in light of his lack of credibility, I find the balance tips in Mr. Lansink's favour.

(c) *Injurious affection*

[159] I afford little weight to the GSI Report's calculation of injurious affection.

[160] I was convinced by Mr. Rayner's critiques of Mr. Lansink's calculation of the rental value for the Plaintiff's residence, discussed beginning at paragraph 135 of this judgment.

[161] More importantly, Mr. Lansink's stated assumption for his calculation of injurious affection — that the Plaintiff's residence was only habitable as a tenant-occupied residence due to the railway corridor expansion — was not established by the evidence.

[162] The change in use of the Plaintiff's residence reduced the value of the Plaintiff's property by $245,000. This figure accounts for the entirety of the injurious affection losses (when the $2,100 loss that flowed from the taking of the Required Lands is not accounted for).

[163] Mr. Lansink discussed eight "impacts" caused by the railway corridor expansion that, in his view, changed the use of the Plaintiff's residence from owner-occupied to tenant-occupied. However, the thrust of these impacts was the increase in sound levels post-expansion. Without an increase in sound levels, it is unclear why the use of the Plaintiff's residence would change.

[164] The railway corridor expansion did not create a perceptible change in sound levels at the Plaintiff's residence, as discussed beginning at paragraph 92 of this judgment. Accordingly, I afford no weight to Mr. Lansink's calculation of injurious affection, as the Plaintiff has failed to establish the facts upon which it is premised.

IV. Issue

[165] The sole issue in this action is whether the Plaintiff is entitled to further compensation under the *Act*.

V. Analysis

[166] The Plaintiff seeks $967,534 in disturbance damages for the cost to relocate his residence away from the railway corridor, among other things, pursuant to subsection 25(1)(a) of the *Act*. In the alternative, the Plaintiff seeks $247,100 in injurious affection damages for the depreciation in value of his remaining property pursuant to subsection 25(1)(b) of the *Act*. The Plaintiff further seeks an additional $1,100 for the Required Lands.

[167] Subsection 25(1) of the *Act* outlines the right to compensation claimed by the Plaintiff:

Right to compensation	**Droit à l'indemnité**
25 (1) Compensation is to be paid by the Crown to each person who, immediately before the registration of a notice of confirmation, was the owner or holder of an estate, interest or right in the land to which the notice relates, to the extent of their expropriated interest or right, the amount of which compensation is equal to the aggregate of	25 (1) Une indemnité est payée par la Couronne à chaque personne qui, immédiatement avant l'enregistrement d'un avis de confirmation, était le titulaire ou détenteur d'un droit, d'un domaine ou d'un intérêt sur le bien-fonds visé par l'avis, jusqu'à concurrence de son droit ou intérêt exproprié; le montant de cette indemnité est égal à l'ensemble des sommes suivantes:

(a) the value of the expropriated interest or right at the time of its taking, and	a) la valeur du droit ou intérêt exproprié à la date à laquelle la Couronne l'a pris;
(b) the amount of any decrease in value of the remaining property of the owner or holder, as determined under section 27.	b) le montant de la diminution de valeur de ce qui reste au titulaire ou détenteur, déterminé conformément à l'article 27.

[168] The *Act* is a remedial statute that must be given a broad and liberal interpretation consistent with its purpose of fully compensating landowners whose property has been expropriated. Although interpreting Ontario's *Expropriations Act*, RSO 1990, c E.26 (the "*Ontario Act*"), the Supreme Court of Canada affirmed this principle in *Toronto Area Transit Operating Authority v Dell Holdings Ltd*, [1997] 1 SCR 32 ("*Dell Holdings*"):

> [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.
>
> […]
>
> [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.
>
> […]
>
> [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.

A. *Disturbance damages*

(1) Statutory framework

[169] Section 26 outlines how the value of the expropriated interest or right is determined under subsection 25(1)(a). Relevant to the case at hand, the Plaintiff is entitled to disturbance damages under subsection 26(3)(b)(ii) of the *Act* for the "costs, expenses and losses arising out of or incidental to" the disturbance caused by the expropriation of the Required Lands:

Rules for determining value	**Règles de la détermination de la valeur**
26 (1) The rules set out in this section shall be applied in determining the value of an expropriated interest or right.	26 (1) Les règles qu'énonce le présent article s'appliquent à la détermination de la valeur d'un droit ou intérêt exproprié.
Market value defined	**Valeur marchande**
(2) Subject to this section, the value of an expropriated interest or right is its market value, being the amount that would have been paid for the interest or right if, at the time of its taking, it had been sold in the open market by a willing seller to a willing buyer.	(2) Sous réserve des autres dispositions du présent article, la valeur d'un droit ou intérêt exproprié est la valeur marchande de ce droit ou intérêt, c'est-à-dire le montant qui aurait été payé pour celui-ci si, à la date à laquelle la Couronne l'a pris, il avait été vendu sur le marché libre par un vendeur consentant à un acheteur consentant.
If owner or holder required to give up occupation	**Lorsque le titulaire ou détenteur est requis de renoncer à l'occupation**
26 (3) If the owner or holder of an expropriated interest or right was in occupation of any	(3) Lorsque le titulaire ou détenteur d'un droit ou intérêt exproprié occupait le bien-

land at the time the notice of confirmation was registered and, as a result of the expropriation, it has been necessary for them to give up occupation of the land, the value of the expropriated interest or right is the greater of	fonds à la date d'enregistrement de l'avis de confirmation et, qu'à la suite de l'expropriation, il lui a fallu renoncer à l'occupation du bien-fonds, la valeur du droit ou intérêt exproprié est le plus élevé des deux montants suivants :
(a) the market value of that interest or right determined as set out in subsection (2), and	a) la valeur marchande de ce droit ou intérêt, déterminée conformément au paragraphe (2);
(b) the aggregate of	b) l'ensemble des sommes suivantes:
(i) the market value of that interest or right determined on the basis that the use to which the expropriated interest or right was being put at the time of its taking was its highest and best use, and	(i) la valeur marchande de ce droit ou intérêt déterminée d'après l'usage qui en était fait à la date à laquelle la Couronne l'a pris, considéré comme s'il était le plus rémunérateur et le plus rationnel,
(ii) the costs, expenses and losses arising out of or incidental to the owner's or holder's disturbance, including moving to other premises […]	(ii) les frais, dépenses et pertes attribuables ou connexes au trouble de jouissance éprouvé par le titulaire ou détenteur, y compris son déménagement dans d'autres lieux […]
[emphasis added]	[emphase ajoutée]

[170] In *Dell Holdings*, the Supreme Court of Canada was tasked with determining whether an expropriated landowner was entitled to claim compensation for losses suffered prior to the actual

expropriation due to the delay in the development of its remaining lands caused by the impending expropriation (*Dell Holdings* at paras 2-4). The claim was brought under the provisions relating to disturbance damages in the *Ontario Act*:

Compensation	**Indemnité**
13 (1) Where land is expropriated, the expropriating authority shall pay the owner such compensation as is determined in accordance with this Act.	13 (1) Lorsqu'un bien-fonds est exproprié, l'autorité expropriante verse au propriétaire l'indemnité fixée conformément à la présente loi.
Idem	**Idem**
(2) Where the land of an owner is expropriated, the compensation payable to the owner shall be based upon,	(2) Lorsque le bien-fonds d'un propriétaire est exproprié, le montant de l'indemnité à verser au propriétaire se fonde sur :
[…]	[…]
(b) the damages attributable to disturbance;	b) les dommages imputables à des troubles de jouissance;
[…]	[…]
Allowance for disturbance	**Allocation pour troubles de jouissance**
Owner other than tenant	**Propriétaire autre qu'un locataire**
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 […]	18 (1) L'autorité expropriante rembourse au propriétaire autre qu'un locataire, à l'égard de troubles de jouissance, les frais raisonnables qui sont les résultats normaux de l'expropriation […]

[emphasis added] [emphase ajoutée]

[171] Applying a broad and purposive interpretation, the Court in *Dell Holdings* rejected the argument that disturbances damages are only available if they arise in relation to the expropriated land itself, and affirmed that disturbance damages are available so long as they are not too remote:

> [29] The Authority contended that disturbances damages are only available if they arise in relation to the expropriated land itself and not to any adjoining land which the owner retained after the expropriation. I cannot accept that position. There is nothing in the words of the section to indicate that there should be such a restriction imposed on those disturbance damages which can accurately be described as the natural and reasonable consequences of an expropriation. If it is a reasonable and natural consequence of the expropriation that the owner experiences losses with regard to the remaining land then this, just as much as losses relating solely to the expropriated land, must come within the definition of disturbance damages. If it had wished to do so, the legislature could have limited disturbance damages to the expropriated land. However it chose to enact an open-ended and flexible definition. This was appropriate in legislation whose aim was to provide reasonable compensation for the losses flowing from the act of expropriation.
>
> [emphasis added]

[172] The scope of disturbance damages under the *Act* is similar to the *Ontario Act* insofar as neither provisions contain limitations except for causation. Parliament has not limited subsection 26(3)(b)(ii) of the *Act* to the expropriated land, but rather enacted an open-ended and flexible definition. I therefore find the above statements in *Dell Holdings* also apply to the *Act*: disturbance damages caused by an expropriation are compensable under the *Act* so long as they

are not too remote, regardless of whether they arise in relation to the expropriated land itself or adjoining land that the owner retained after the expropriation.

[173] This interpretation is in keeping with the jurisprudence concerning a previous iteration of the *Act*. In *Irving Oil Co Ltd v The King*, [1946] SCR 551 at paras 28-29, the Supreme Court of Canada affirmed the right of an expropriated person "to be made economically whole" by providing for damages that "cover not merely the value of land itself, but the whole of the economic injury done which is related to the land taken as consequence to cause."

[174] Finally, I am not persuaded by the Defendant's argument that the Plaintiff is not entitled to compensation under subsection 26(3)(b)(ii) of the *Act* because he was not "in occupation" of the Required Lands. In particular, the Defendant asserts that occupation requires more than mere ownership, but rather actual and physical occupation of the land expropriated.

[175] In my view, the Plaintiff occupied the Required Lands at the time of the expropriation. The Required Lands were the Plaintiff's yard and driveway before their expropriation, and the lands are located directly adjacent to the Plaintiff's residence where he lives full-time with his family.

[176] The Plaintiff's circumstances are therefore distinguishable from the cases relied upon by the Defendant. In *Bytown Lumber Co v National Capital Commission*, [1976] FCJ No 602, 10 LCR 328 (FCTD) at para 19, there had been "no physical occupation" of the Required Lands on behalf of the Plaintiff. Likewise, in *Villarboit Holdings Ltd v Canada*, [1977] FCJ No 1009, 13

LCR 196 (FCTD) at para 36, aff'd [1981] FCJ No 546, the corporate Plaintiff was found not to be in occupation of its land that was expropriated, as the land was occupied by the Plaintiff's principal shareholder, a separate legal entity.

(2) The Plaintiff's claim

[177] The Plaintiff seeks disturbance damages for the following losses:

(a) the cost to relocate his residence and the associated moving costs;

(b) the cost of relocating the Plaintiff's family for 13 months beginning in late 2012, and the increased costs of farm operations during that period;

(c) the increased cost to operate the farm once the new residence is constructed, which will be located further back from the railway corridor and the farm improvements; and

(d) the cost to build a temporary sound barrier.

[178] The Plaintiff asserts the relocation of his residence is a reasonable and natural consequence of the expropriation because the railway corridor expansion has caused "a fundamental change to the nature and character" of his residence. In particular, the Plaintiff notes the expansion resulted in the following changes: the railway corridor and train traffic are now closer to his residence; much of the protections against noise, vibration, light, and exhaust are now lost; and the sound levels caused by the railway corridor at his residence are now

excessive, as demonstrated by the requirement to consider mitigation under the Health Canada and FTA Guidelines.

[179] In my view, the Plaintiff has not established that he has been "ousted" from his residence due to an increase in sound levels caused by the railway corridor expansion. The Plaintiff has not established that the berm north of his residence, which purportedly acted as a noise attenuating feature, existed at the time of taking, at least in the manner relied upon in the 2015 ARCADIS Report (see discussion beginning at paragraph 81 of this judgment). The notion that the taking of the Required Lands resulted in the removal of the berm, and hence a perceptible increase in sound, is therefore not established. Accordingly, the need to relocate the Plaintiff's residence away from the railway corridor due to an increase in sound is not a natural and reasonable consequence of the expropriation under subsection 18(1) of the *Act*.

[180] I accept that the Plaintiff's property was altered by the expropriation even without a perceptible increase in sound. However, the Plaintiff has not established how these changes have ousted him from his residence, thus entitling him to the disturbance damages that he seeks.

[181] During direct-examination, the Plaintiff discussed the adverse effects of increased pollution and light caused by the railway corridor expansion. However, no expert evidence was tendered to establish that these impacts fundamentally changed the nature and character of his residence, thus requiring its relocation.

[182] Likewise, the Plaintiff did not tender expert evidence displaying that his residence should be relocated due to safety concerns stemming from greater proximity to the railway corridor, such as the potential risk of a train derailment. The Plaintiff notes that the Railway Association of Canada and Federation of Canadian Municipalities' *Proximity Guidelines and Best Practices*, dated August 2007 (the "FCM Guidelines"), recommends a 30-metre setback distance between a residence and mainline railway corridor and a berm of 2.5 metres. Neither of these recommendations were met with respect to the Plaintiff's residence pre-expansion, thus indicating no fundamental change to the nature of the Plaintiff's residence. Furthermore, there was no evidence displaying that a lack of strict compliance with the recommendations in the FCM Guidelines would result in a potential safety hazard that requires the relocation of the Plaintiff's residence.

[183] The cases relied upon by the Plaintiff are therefore distinguishable. Those cases concern instances where an expropriation has fundamentally altered the remaining property, which is not the case at bar.

[184] Relying on *Patterson v British Columbia (Ministry of Transportation & Highways)*, [1997] BCJ No 1642, 41 BCLR (3d) 117 (BCCA) at paras 35-36, the Plaintiff asserts that the cost of relocating his residence should be compensated for under the *Act* because the noise from the railway corridor is now "excessive," effectively ousting him from his home.

[185] I am not persuaded by the Plaintiff's argument. Pre-expansion, the Plaintiff's residence was a rural dwelling on farm land that was located next to a busy railway corridor; post-

expansion, the Plaintiff's residence is essentially the same, only the corridor is somewhat busier and the traffic somewhat closer. The Plaintiff has failed to establish that these changes necessitate the relocation of his residence, as the Plaintiff has not established that the noise from the railway corridor is perceptibly greater post-expansion.

[186] The Plaintiff further relies upon *Simpson et al v Ontario Hydro*, [1977] 13 LCR 376 ("*Simpson*") at para 23, aff'd [1979] 17 LCR 321, wherein the expropriating authority took a strip of land along the owners' property boundary and constructed a 140-foot-tall transmission tower, approximately 150 feet from the owners' dwelling. To remedy the nuisance caused by the new tower, the Ontario Land Compensation Board (the "Board") ordered the expropriating authority to compensate the owner for the cost of relocating the residence (*Simpson* at para 37).

[187] Unlike in *Simpson*, the railway corridor did not emerge out of land that was vacant prior to the expropriation, disturbing the Plaintiff's enjoyment of an otherwise "idyllic wood lot retreat" (*Simpson* at para 34). Rather, the Plaintiff's residence existed directly adjacent to an already busy railway corridor. I am therefore not persuaded that the expansion of the railway corridor has changed the nature of the Plaintiff's residence in a manner analogous to *Simpson*.

[188] The Plaintiff's reliance on *Barrick v Muskoka (District Municipality)*, [1991] 46 LCR 222 ("*Barrick*"), encounters the same difficulty as *Simpson*. In *Barrick*, the property at issue was divided into two parcels due to an expropriation. The property contained several improvements, which the landowner demolished or relocated after the expropriation (*Barrick* at paras 2-8). The Ontario Municipal Board accepted evidence that there was "no alternative" but to relocate the

residence due to the construction of the road (*Barrick* at paras 22, 29). In this case, the Plaintiff has not established that the railway corridor expansion necessitates the relocation of his residence.

[189] The Plaintiff also relies upon *Gustafson v Alberta*, [1987] 37 LCR 45 ("*Gustafson*"). In that case, the landowners had numerous agricultural projects on their property, including a tree farm and an enclosure in which they raised zebra (*Gustafson* at para 8). A portion of their property was expropriated for the purposes of expanding an adjacent highway (*Gustafson* at para 4). The landowners in *Gustafson* were compensated for the cost of building a replacement enclosure elsewhere on the property because, if the enclosure was not relocated, a bluff of trees which attenuated noise from the highway would have to be removed:

> [34] […] The only access to the portion of the tree farming operation which lies immediately to the east of the enclosure is around the north end of the enclosure. Such access will be closed by the taking and alternate access must be obtained. Unless the zebra enclosure is relocated provision for such access will result in elimination of the aforesaid bluff of trees.
>
> [35] After carefully weighing all of the evidence the board finds that the only practical and satisfactory resolution of the foregoing problem created by the taking involves relocation of the zebra enclosure.

[190] In my view, the case at hand is distinguishable from *Gustafson*. This Court is not tasked with choosing between relocating the Plaintiff's residence and a competing, adverse consequence. If the Plaintiff's residence is not relocated, the only consequence is that post-expansion sound levels shall remain perceptibly the same as pre-expansion. I therefore find that

the Board's considerations for relocating the enclosure in *Gustafson* are not analogous to the case at hand.

[191] In light of the above, I find that the Plaintiff has not established that the expropriation of the Required Lands and the expansion of the railway corridor fundamentally altered the nature and character of his property, thus requiring the relocation of his residence. I therefore dismiss the Plaintiff's claim for disturbance damages.

B. *Injurious Affection*

[192] The Plaintiff claims that the expropriation of the Required Lands and the expansion of the railway corridor have decreased the value of the Plaintiff's remaining property, thus entitling him to compensation for injurious affection under subsection 25(1)(b) of the *Act*.

(1) Statutory framework

[193] Section 27 of the *Act* determines how a decrease in value is calculated under subsection 25(1)(b):

Decrease in value of remaining property where severance	**Diminution de la valeur de ce qui reste au titulaire ou détenteur après séparation**
27 (1) The amount of the decrease in value, if any, of the remaining property of an owner or holder is the value of all of their interests in land or	27 (1) Le montant de la diminution de valeur, le cas échéant, de ce qui reste au titulaire ou détenteur est le montant obtenu en retranchant

immovable real rights immediately before the time of the taking of the expropriated interest or right, determined as provided in section 26, minus the aggregate of

de la valeur de tous les droits réels immobiliers ou intérêts fonciers qu'il avait immédiatement avant la prise du droit ou intérêt exproprié, calculée conformément à l'article 26, la somme obtenue en additionnant les sommes suivantes:

(a) the value of the expropriated interest or right, and

a) la valeur du droit ou intérêt exproprié;

(b) the value of all their remaining interests in land or immovable real rights immediately after the time of the taking of the expropriated interest or right.

b) la valeur de tout ce qui reste de ses droits réels immobiliers ou intérêts fonciers immédiatement après le moment de la prise du droit ou intérêt exproprié.

Factors to consider in determining change in value of remaining property

Facteurs à considérer dans la détermination de la valeur du reste des droits ou intérêts

(2) For the purpose of paragraph (1)(b), the value of the owner's or holder's remaining interests in land or immovable real rights immediately after the time of the taking of the expropriated interest or right is to be determined as provided in section 26, except that, in determining that value, account is to be taken of any increase or decrease in the value of any remaining interests in land or immovable real rights that immediately before the registration of the notice of confirmation were held by the owner or holder together with the expropriated interest or right, resulting from the construction or use or anticipated construction or use of any public work on the land to which the

(2) Pour l'application de l'alinéa (1)b), la valeur de ce qui reste des droits réels immobiliers ou intérêts fonciers du titulaire ou détenteur immédiatement après la prise du droit ou intérêt exproprié est déterminée conformément à l'article 26, sauf qu'il doit être tenu compte, dans la détermination de cette valeur, de tout accroissement ou de toute diminution de la valeur de ce qui reste des droits réels immobiliers ou intérêts fonciers détenus par le titulaire ou détenteur avec le droit ou intérêt exproprié immédiatement avant l'enregistrement de l'avis de confirmation, par suite de la construction ou de l'usage ou de la construction ou de l'usage prévus d'un ouvrage public sur le bien-fonds visé par l'avis ou

notice relates or from the use or anticipated use of that land for any public purpose.	de l'usage ou de l'usage prévu de ce bien-fonds à une fin d'intérêt public.
[emphasis added]	[emphase ajoutée]

[194] I am not convinced by the Defendant's argument that because the third railway track was not constructed or in operation immediately after the time of taking of the Required Lands, the effects of the railway corridor expansion are not compensable under section 27 of the *Act*. Rather, a willing buyer would view the Plaintiff's property immediately after January 24, 2012, and by virtue of subsection 27(2), would have knowledge of the anticipated construction and use of the third railway track to come later that year. The willing buyer would then account for that development in determining how much they would pay for the Plaintiff's property.

(2) The Plaintiff's claim

[195] Even with the knowledge of the anticipated railway corridor expansion, I find the Plaintiff has failed to establish that the expropriation of the Required Lands has decreased the value of the Plaintiff's property.

[196] The Plaintiff's claim for injurious affection relied upon the conclusion in "Scenario C" of Mr. Lansink's 2019 GSI Report, discussed at paragraph 125 of this judgment. Mr. Lansink's injurious affection analysis relied upon the stated assumption that the Plaintiff's residence is only suitable as a rental property due primarily to the increase in sound caused by the railway corridor expansion. The Plaintiff, however, failed to establish that the sound levels at his residence

increased perceptibly post-expansion, thus undermining the stated assumption relied upon in Mr. Lansink's injurious affection analysis.

[197] Mr. Rayner also identified several issues in Mr. Lansink's determination of rental value, discussed at paragraph 135 of this judgment, which I find are persuasive. In light of these issues, I give less weight to Mr. Lansink's injurious affection analysis, which is premised in part on his determination of rental value.

[198] Finally, I find Mr. Lansink's stated assumption that the Plaintiff's residence is only suitable as a rental property is not logically sound. The Plaintiff has not established why he is unable to live in the residence by virtue of being an owner, but an individual presumably of equal hearing capabilities and sensitivities to light and pollution is able to reside there by virtue of being a tenant.

(3) Novel defence

[199] The Defendant raised a new defence in its opening argument, claiming that any impacts on the Plaintiff's residence resulting from the railway corridor expansion are not compensable under subsection 27(2) of the *Act* because the third track was constructed within CN's existing right-of-way, not within the Required Lands. The Defendant's argument is based on the "*Edwards* Rule," a principle stemming from the England Court of Appeal's decision of *Edwards v Minister of Transport*, [1964] 2 QB 134, which the Defendant asserts is incorporated under subsection 27(2) of the *Act*. Under the *Edwards* Rule, an expropriated landowner cannot recover compensation for deleterious effects that originate from the use of land acquired from other

owners or already owned by the public authority (E. Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1992) at 338).

[200] The Defendant's argument with respect to the *Edwards* Rule was not raised in the Defendant's Statement of Defence, and I therefore decline to consider it. Rule 181(1) of the *Rules* requires pleadings to contain particulars of every allegation. It is trite law that pleadings must contain any matter upon which a party intends to rely on to prevent trial by ambush (*Midland Resources Holding Limited v Shtaif*, 2017 ONCA 320 at para 110). The Defendant in this case raised its argument with respect to the *Edwards* Rule at the dawn of trial, preventing the Plaintiff from knowing the case to meet and to structure his claim accordingly.

C. *Remaining value of the Required Lands*

[201] The Plaintiff claims he is entitled to $1,100 in further compensation for the Required Lands pursuant to subsection 25(1)(a) of the *Act*. The Defendant compensated the Plaintiff $1,000 for the Required Lands, relying upon the appraisal in the 2012 Rayner Report. The Plaintiff asserts that the value of the Required Lands at the time of its taking was in fact $2,100, relying on the appraisal in the 2019 GSI Report.

[202] I accept Mr. Lansink's appraisal of the Required Lands over Mr. Rayner's for the reasons discussed beginning at paragraph 155 of this judgment. I therefore find the Plaintiff is entitled to a further $1,100 in compensation for the Required Lands.

VI. Conclusion

[203] The Plaintiff has not established that the railway corridor expansion resulted in a perceptible increase in sound at his residence. I therefore find his claim for disturbance damages and injurious affection must fail. However, I accept that the Required Lands were worth $2,100 at the time of taking. I therefore find the Plaintiff is entitled to $1,100 in further compensation for the Required Lands.

VII. Costs

[204] The parties requested an opportunity to address costs. I encourage them to reach agreement on costs. If they are unable to do so, they may make written submissions in accordance with the following schedule:

(a) within 30 days of the date of this judgment, the Plaintiff may file submissions in letter format not to exceed 5 pages, to which he may attach a bill of costs as an appendix;

(b) within 10 days of receipt of the Plaintiff's submissions, the Defendant may file submissions in letter format not to exceed 5 pages, to which they may attach as an appendix a bill of costs and/or a submission, not to exceed 2 pages, addressing specific line items in the Plaintiff's bill of costs (if filed); and

(c) within 5 days of receipt of the Defendant's submissions, the Plaintiff may file reply submissions in letter format not to exceed 2 pages, to which he may attach as an

appendix a submission, not to exceed 2 pages, addressing specific line items in the Defendant’s bill of costs (if filed).

JUDGMENT IN T-967-16

THIS COURT'S JUDGMENT is that:

1. The Plaintiff is only entitled to $1,100 in further compensation.

2. The parties may make submissions on costs in accordance with the schedule set out in the reasons for judgment.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-967-16
STYLE OF CAUSE:	SHAWN SOMERVILLE MILNE v HER MAJESTY THE QUEEN
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN TORONTO AND OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 22, 23, 24, 25, 29, 30, 31, 2021 APRIL 1, 27, 2021
JUDGMENT AND REASONS:	AHMED J.
DATED:	JULY 19, 2021

APPEARANCES:

Ian Mathany Sean Gosnell	FOR THE PLAINTIFF
Jacqueline Dais-Visca Wendy Wright	FOR THE DEFENDANT

SOLICITORS OF RECORD:

M&H LLP Barristers and Solicitors Toronto, Ontario	FOR THE PLAINTIFF
Attorney General of Canada Toronto, Ontario	FOR THE DEFENDANT

Annex A: Agreed Statement of Facts

[1] Since the mid 1800s, the Canadian National Railway Company ("**CN**") has operated a double main line track running between Montréal and Toronto along and adjacent to the south side of Airport Parkway between Belleville and Napanee (known as the Marysville Corridor).

[2] The 'Subject Property' is a 95-acre parcel of land, municipally known as 464 Mitchell Road, Belleville, Ontario, that is adjacent to the south side of the Marysville Corridor in the Belleville area. The Subject Property is located between miles 216.01- 216.23 in the Kingston subdivision.

[3] Prior to the expropriation and the construction of the 'Project':

(a) The residence was located approximately 112 feet (34.14 metres) from the southern most rail line;

(b) The residence was located approximately 83 feet (25.3 metres) from the railway corridor / right-of-way; and

(c) The northern boundary of the Subject Property included an earth berm and vegetation that provided visual screening from the rail corridor / right-of-way to the residence.

The Project

[4] On July 16, 2009, the Government of Canada and VIA launched the Corridor Improvement Plan (the "**Project**"), the largest ever Federal passenger rail improvement program in the Montréal-Ottawa-Toronto triangle. The Project included the construction of a third line track alongside the existing CN double-tracks at several locations, including the Marysville Corridor. In order to accommodate the construction of the Project, certain lands adjacent to the existing rail corridor were required, including lands from the Subject Property.

[5] Specifically, a 0.64-acre strip of land abutting the south side of the existing rail corridor (strip along the north side of the Subject Property) was identified as being required for the Project (the "**Required Lands**").

[6] The residence was/is not located within the Required Lands.

[7] As per the Notice of Confirmation of Intention to Expropriate registered as HT117933, the Required Lands were expropriated for the purposes of the railway.

[8] A portion of the Required Lands (0.587 acres) was subject to a hydro easement registered on Part 2 on Plan 21R-23352. As per Instrument THD8282, the hydro easement was registered on title to the Subject Property on or about May 17, 1933. The purpose of the easement was to permit three poles to be installed and maintained on the easement lands. As at the date of expropriation, the easement was not being used and there were no hydro poles located on the easement lands.

Pre-Expropriation Negotiations

[9] In or around July 2009, CN approached Mr. Milne with respect to buying the Required Lands for the Project.

[10] On December 4, 2009, as reflected in meeting minutes prepared by Mr. Milne, Mr. Milne met with CN and raised his concerns about the Project. Mr. Milne's concerns included increased noise resulting from the Project, vibration damaging his house, setback and safety, creosote concentration, pollution, high beam usage, and the adequacy of the Environmental Screening done for the Project.

[11] Negotiations for the purchase of the Required Lands continued from approximately July 2009 to September 2010. As part of such negotiations, the parties exchanged offers with a view to settling the terms for the purchase of the Required Lands.

The Expropriation

[12] On September 10, 2010, VIA wrote to the Minister of Transport, Infrastructure and Communities and the Minister of State and Transport requesting the expropriation of the Required Lands ("**Request to Expropriate**"), being Parts 1, 2 and 3 on Plan 21R-23352, save and except for an easement over Part 2 on Plan 21R-23352.

[13] On November 24, 2010, Transport Canada advised Mr. Milne about VIA's request to expropriate enclosing VIA's September 10, 2010 request to Ministers Chuck Strahl and Rob Merrifield.

[14] On December 2, 2010, CN wrote to Mr. Milne pursuant to ss. 8(1) *Railway Safety Act* (Notice of Railway Works Notice) advising of the intention to construct a third line track located between mileages 216.01 and 216.23 in Belleville.

[15] In a document titled "Minister of Transport Notice of Approval – Pursuant to Subsection 10(3) of the Railway Safety Act, R.S. 1985, C. 32 (4th Supp.)", dated July 8, 2011, the Minister of Transport approved the Project on condition that CN adhered to certain terms and conditions. There is no claim being advanced in this action or at trial with respect to the conditions as set out in the Notice of Approval.

[16] On September 21, 2011, Public Works and Government Services ("**Public Works**"), now known as Public Services and Procurement Canada, registered on title to the Subject Property the "Crown Notice of Intention to Expropriate".

[17] On September 28, 2011, the Notice of Intention to Expropriate was served on Mr. Milne.

[18] Mr. Milne served on the Minister of Transport his objection in writing to the intended expropriation under s. 9 of the Expropriation *Act* and the Public Hearing, under s. 10 of the *Expropriation Act*, took place on December 13, 2011 in Belleville Ontario.

[19] On December 20, 2011, the hearing officer released his "Report of Hearing Officer" addressing Mr. Milne's objection to the expropriation of the Required Lands.

[20] On January 23, 2012, after consideration of the Report of the Hearing Officer, the Minister of Public Works, signed the Notice of Confirmation of Intention to Expropriate.

[21] On January 24, 2012, Canada registered its Notice of Confirmation of Intention to Expropriate with respect to the Required Lands on title, as Instrument No HT117933, thereby becoming the legal owner of the Required Lands (the "**Expropriation**").

[22] On or about January 24, 2012, Canada made a statutory offer of compensation to Mr. Milne under s. 16 of the *Expropriation Act* for $1,000.00 for the Required Lands based on the independent appraisal report provided by the S. Rayner & Associates Appraisal. Mr. Milne accepted the statutory offer of compensation by letter dated June 13, 2016 and the Crown made the payment to Mr. Milne by cheque dated July 25, 2018.

[23] On January 25, 2012, Public Works served Mr. Milne with the prescribed Notice of Confirmation of Intention to Expropriate, the Hearing Officer Report, and the Statement of Reasons from the Minister for not giving effect to the objections.

Construction of the Project

[24] The third rail track was constructed on the south side of the existing rail corridor and within the existing right-of-way to the North of the Subject Property.

[25] As a result of the expropriation and the construction of the Project:

(a) The residence is now approximately 98 feet (29.87 metres) south of the new third main line track after its construction;

(b) The residence house is now approximately 48 feet (14.6 metres) south of the railway corridor; and

(c) The earth berm and vegetation located on the Required Lands was removed.

[26] Project construction commenced on or about April 24, 2012.

[27] The third rail went into service on November 24, 2012.

Annex B: Glossary

Ldn	A measurement of sound levels over a single day. It is defined by the daytime level ("Ld") during the 15 daytime hours from 07:00h to 22:00h; and by the night-time level ("Ln") during the nine night-time hours of 22:00h to 07:00h. The two values are then combined as a weighted logarithmic average to give the Ldn.
%HA	The percentage of people based on survey data that are predicted to be highly annoyed by a sound at a predicted level
Required Lands	The land expropriated by the Defendant from the Plaintiff's property.
CN	Canadian National Railway Company.
Pre-expansion / post-expansion	Before / after the railway corridor expansion.
Marysville Corridor	The segment of the railway corridor that runs adjacent to the Plaintiff's property.