Court File No. CV-22-00000074-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

ELSIE KALU

Plaintiff / Respondent

- and -

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF ONTARIO represented by THE ATTORNEY GENERAL OF ONTARIO

Defendant / Moving Party

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE RESPONDENT
(Motion Returnable September 22, 2023)

August 24th, 2023

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PART I – OVERVIEW

1. This motion arises from a yet to be certified class proceeding brought by the Plaintiff ("Elsie"), claiming compensation for *de facto* expropriation.

2. Elsie claims the defendant ("the Crown") has used its power to regulate land use in such a manner that accrues a benefit to itself and removes all reasonable uses of her property and the properties of potential class members, thereby effecting a *de facto* expropriation of their lands.

3. The Crown's motion, brought under rules 21.01(1)(a), and 21.01(1)(b), asks for the summary striking of Elsie's Statement of Claim, without leave to amend.

4. Rule 21 authorizes a motion for the determination of a question of law disclosed in a pleading when the determination of that question may dispose of all or part of the action, substantially shorten the trial, or result in substantial cost savings, and / or for the striking of a pleading for failing to disclose a cause of action.

5. The Crown asks this Honourable Court to determine whether the claim as drafted can establish the basis for a claim of *de facto* expropriation as against the Crown. Further, the Crown requests this Honourable Court review whether the claim should be struck due to the application of Rule 25.06(9), and the notice requirements contained in section 18 of the Crown Liability and Proceedings Act.

6. Elsie states her claim pleads the essential elements of *de facto* expropriation, that such an action does lie against the Crown for its actions as outlined in the claim, that Rule 25.06 does not apply to this matter, and that section 18 of the CLPA is either inoperative or inapplicable.

PART II – STATEMENTS OF LAW AND ARGUMENT

A. THE TESTS UNDERLYING RULE 21

7. As discussed in the case of *Beaudoin*, there is a well-established approach for a motion under Rule 21.01(1)(a)[1]:

> (1) The test is whether the determination of the issue of law is "plain and obvious";
>
> (2) The facts pleaded in the statement of claim are assumed to be true, unless they are patently ridiculous or manifestly incapable of proof; and
>
> (3) The statement of claim should be read as generously as possible to accommodate any drafting inadequacies in the pleading.

8. As in *Imperial Tobacco*, the test for a motion under Rule 21.01(1)(b) is as follows: The court must rather ask whether, assuming the facts pled are true, there is a reasonable prospect the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.[2]

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[1] *Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57 [*Beaudoin*]. At para 14
[2] *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42 (CanLII), [*Imperial Tobacco*]. At para 21

9. For the purposes of this motion, the questions to be determined in accordance with the test under Rule 21.01(1)(a) are as follows:

a. Does the claim comply with Rule 25.06(9)?; and

b. Is Section 18 of the *CLPA* applicable to the claim, and if so, was there proper notice?

B. *De Facto* Expropriation

10. The Crown mistakenly asserts the claim has no reasonable chance of success. This error rests upon the following incorrect assumptions:

a. The claim fails to plead an acquisition by the Crown of a beneficial interest or advantage;

b. The claim does not plead "State Action"; and

c. The claim does not plead that all reasonable uses have been removed.

11. Elsie states, and the fact is, there is a reasonable prospect the claim will succeed, and a prima facie case of *de facto* expropriation has been pled.

C. The Crown Has Acquired a Beneficial Interest or Advantage

12. *Annapolis* summarizes the test for *de facto* expropriation as follows – Does the impugned conduct result in:

a. An acquisition of a beneficial interest or advantage, by the state, in the property or flowing from it; and

b. all reasonable uses of the properties being removed.[3]

13. If both of these branches are satisfied, a common law right to compensation is triggered.[4]

14. *De facto* expropriation is about government action that affects a property owner's rights. The first branch of this test is fact specific, and involves a balancing of several factors, focused on whether government action crosses the threshold from ordinary regulation in the public interest, to the exercise of control in a manner more consistent with the hallmarks of private ownership.

15. The test does not require an actual acquisition of the subject property. As stated by the Supreme Court in *Annapolis*, this interpretation "gives effect to the Court's acknowledgment of a common law right to compensation where the two-part *CPR* test is satisfied. It accords with imperatives of justice and fairness, which underpin the court's assessment of expropriation claims, and remedies situations where cases do not neatly fit within the expropriation legislative framework and would otherwise "fall between the cracks"".[5]

16. In the case of *Manitoba Fisheries*, the federal government granted a crown corporation a commercial monopoly on the export of fish from Manitoba, and delegated power to that corporation to grant licenses to private enterprises to continue operation. It was determined the

[3] *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36 (CanLII), [*Annapolis*]. At para 25
[4] *Annapolis.* At para 23
[5] *Annapolis*. At para 44

loss of "goodwill" by the plaintiff, which had been acquired by the corporation, amounted to an *advantage* flowing to the state.

> "[Goodwill] is the whole advantage, whatever it may be, to the reputation and connection of the firm", and that the monopoly "completely extinguished" the appellant's goodwill, leaving customers with no choice but to do business with the corporation.[6]

17. Further, this loss of goodwill was held to be akin to the deprivation of *property* from the plaintiff, on the basis the government had acquired an advantage through the acquisition of a statutory monopoly that entitled it to benefits that would otherwise have flowed to the company.

> Until the creation of the Corporation by the Act, persons wishing to purchase freshwater fish from Manitoba could purchase such fish from the Plaintiff [Manitoba Fisheries] or other firms in the industry. After the creation of the Corporation such purchases could be made only from the Corporation or its agents.[7]
>
> Once it is accepted that the loss of the goodwill of the appellant's business which was brought about by the Act and by the setting up of the Corporation was a loss of property and that same goodwill was by statutory compulsion acquired by the federal authority, it seems to me to follow that the appellant was deprived of property which was acquired by the Crown.[8]

18. The beneficial interest or advantage is therefore also based on the *effect* of the government action, and should not be subject to a narrow interpretation. This was further emphasized through *Annapolis's* discussion of *Tener*. In *Tener* it was found the *effect* of the regulation of a property's mineral rights secured an *advantage* by confining all reasonable uses of the property to British Columbia's preferred uses.

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[6] Quotation drawn from *Annapolis* at para 29, however the Court is quoting *Manitoba Fisheries Ltd. v. The Queen*, 1978 CanLII 22 (SCC), [*Manitoba Fisheries*].
[7] *Manitoba Fisheries*. At p. 109
[8] *Manitoba Fisheries*. At p.110

19. While in *Tener* the plaintiffs still had the opportunity to remove the minerals from their property, the Province had, through their regulation of Tener's ability to extract minerals, effectively recaptured the rights of the plaintiffs. This was deemed to be an *advantage* accruing to the Crown:

> There has been no regulation *qua* minerals which reduced the value of these minerals or the opportunity of the respondents to remove them. The denial of access to these lands occurred under the *Park Act* and amounts to a recovery by the Crown of a part of the right granted to the respondents in 1937. This acquisition by the Crown constitutes a taking from which compensation must flow.[9]

20. Elsie's claim outlines the beneficial interest or advantage in this matter as resulting in the furthering of the defendant's public purpose, being those outlined in section 1 of the *Residential Tenancies Act*. These purposes can be summarized as the protection of residential tenants from unlawful conduct by landlords, the regulation of residential rents, to balance the rights and responsibilities of landlords and tenants, and to provide for the adjudication of disputes and other processes to informally resolve disputes.

21. The *effect* of the legislation is that the Crown has assumed many of the rights of private ownership which accrue to private property owners. As stated in *Tener*:

> In my view, this is a case of expropriation… I reach this conclusion on the basis that the absolute denial of the right to go on the land and sever the minerals so as to make them their own deprives the respondents of their profit a prendre. Their interest is nothing without the right to exploit it. The minerals *in situ* do not belong to them. Severance and the right of severance is the essence of their interest.[10]

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[9] R. v. Tener, 1985 CanLII 76 (SCC), [*Tener*]. At para 59
[10] *Tener*. At para 31

22. In the case at bar, the enactment and maintenance of the regulation of private lands which are subject to otherwise private tenancy agreements has resulted in Elsie, and class members like her, being denied all, or virtually all of the rights which flow from private property ownership. Their properties, while occupied, essentially do not belong to them, because of the regulation. This subverts the reasonable expectations of Canadians, who may be used to reasonable, even extensive regulation of their property, but not the complete, uncompensated alienation of their rights for indefinite periods of time.

23. It is therefore, as understood in *Annapolis*, and in light of *Manitoba Fisheries* and *Tener*, that the *effect* of the Crown's regulations on landowners such as Elsie is such that the first branch of the test is fulfilled.

24. Read generously, and erring on the side of permitting a novel but arguable claim, as is required in the context of a motion under Rule 21.01(1)(b), the claim pleads both an acquisition of a beneficial interest or advantage by the Crown, and identifies, generally, said beneficial interest or advantage.

25. It is the case that evidence will be proffered at trial to show benefits and advantages accruing to the Crown through the regulation of rental properties, beyond the *effect* on the landowners. For example, a full factual record at trial will show the following benefits and advantages accruing to the Crown:

a. A reduction in the cost of providing public housing due to the barriers landlords face in obtaining eviction orders;

b. Alleviation of spending on public health due to reductions in persons living on the street;
c. A reduction in the burden on homelessness outreach programs, due to the increased numbers of people not being evicted;
d. A reduction in the total cost of welfare programs as tenants are not required to pay rent during the periods wherein parties are waiting for eviction application hearings to be scheduled, and orders issued;
e. A decrease in the costs of administering the Superior Courts, as matters under the RTA generally must be brought before the Landlord and Tenant Board;
f. Freeing up policing resources, as the RTA acts to prevent landlords from exercising their property rights during periods wherein their properties are occupied by tenants, a landlord cannot for instance, call the police to have a tenant charged with trespassing, even if their tenant breaches their rental agreement;
g. Improved political reputation and image, as governments often prioritize the rights of tenants due to the calculus of there being more voting tenants than voting landlords;

26. As is stated in *Annapolis*, the test focuses on *effects* and *advantages*. As a result, substance, and not form, prevails. This means the Court must also undertake a holistic, generous analysis of the first branch, considering both tangible and intangible advantages, advantages that may be different in form and substance to that which is alleged to have been taken, and even advantages that do not accrue to the government directly, but to the advantage of the public generally. In these situations, where government action forces the property owner to bear an excessive and disproportionate social burden, that could otherwise be borne by the government and public generally, *de facto* expropriation has occurred.

27. The Claim therefore pleads the requisite state action, and the resulting accrual of a beneficial interest or advantage to the Crown.

D. THE CROWN HAS REMOVED ALL REASONABLE USES

28. The second branch of the test looks to whether the state action has removed all reasonable uses of the property.

29. The Crown's argument on this point rests on the incorrect assumption that since Elsie and the potential class members may apply to the LTB for orders which may eventually allow them to use their property, they cannot be said to be deprived in a substantial or unreasonable way. This is wrong.

30. In *Annapolis* the Supreme Court emphasized that it is not the regulation alone that effects a constructive taking, but the *application* of that regulation to the land. In quoting from *Mariner*, the Court summarized this point as follows:

> In sum, "[w]hen… the claim is that the impact of a regulatory scheme has, in effect, taken away all rights of ownership, it is not the existence of the regulatory authority that is significant, but its actual application to the lands".[11]

31. The claim asserts, and it is assumed to be true for the purposes of this motion, that the average wait time for having a hearing scheduled with the LTB is 10 months, and the average wait time for receiving a decision following a final hearing is an additional 2.5 months. This does not account for situations where multiple hearings are required.

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[11] *Annapolis*. At para 71

32. It is a longstanding principle of the English legal tradition, originating from the Magna Carta, that "justice delayed is justice denied". As explained by Sir Edward Coke in his commentary on that document in *Institutes of the Laws of England*:

> …the common laws of the realme should by no means be delayed, for the law is the surest sanctuary that a man can take, and the strongest fortresse to protect the weakest of all…[12]

33. This principle manifests itself in various mechanisms within our modern legal system, in such forms as filing deadlines, limitation periods, and section 11(b) of the *Charter*.

34. These delays have the effect of essentially requiring a notice period of 1 year for a landlord to evict a non-paying tenant. In the case of a rental unit with a monthly rent of $1,500.00 this results in the landlord being forced to effectively loan their tenant $18,000.00, and expend legal and filing fees in order to avail themselves of their rights in their property. In the interim, the landlord is barred from making any reasonable use of their property beyond potentially selling it "as is", or leveraging it as collateral for a loan, despite the non-paying tenant, both uses which were present in *Annapolis,* and which the Supreme Court did not find as disqualifying the appellant from potentially being successful in claiming all their reasonable uses had been alienated.

35. This results in many landlords in Ontario being unable to access a Court of competent jurisdiction to avail themselves of their rights within a reasonable period of time. There will undoubtedly be some who are unable for various reasons to endure the period wherein their tenant

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[12] (Coke, II Institutes of the Laws of England (W. Clarke & Sons, 1817), at p. 55.) (as cited in *Rahey* at para 118)

is allowed to stay in their property rent-free, resulting in an effective permanent or indefinite denial of their rights.

36. The Crown further alleges that the claim's assertion that reasonable uses have been eliminated for "indefinite" and "indeterminable" periods are bald and conclusory, and should be struck.

37. "Indefinite" is defined by Merriam-Webster's online dictionary as "not precise, vague, having no exact limits, typically designating an unidentified, generic, or unfamiliar person or thing"[13], and "indeterminable" is defined as "incapable of being definitely decided or settled, incapable of being definitely fixed or ascertained[14]". As the Claim asserts and is assumed to be true for the purposes of this motion, the LTB had published its service standards for hearings being scheduled within 25-30 days, and decisions being issued within 4-10 days following a final hearing. If a landlord, being aware of these service standards is in fact forced to wait upwards of 10 months for the scheduling of their initial hearing, it is not "bald and conclusory" to assume the delay before they are able to exercise their rights will be lasting for an unidentified or vague length of time, that is incapable of being definitely ascertained.

38. Indeed, this uncertainty is precisely what Elsie, and people like her have been forced to face.

[13] https://www.merriam-webster.com/dictionary/indefinite
[14] https://www.merriam-webster.com/dictionary/indeterminable

39. It is therefore neither plain nor obvious that Elsie's Claim does not disclose a "permanent or indefinite denial of access to property", or that evidence could not be adduced to prove this at trial.

40. The claim does therefore plead that all reasonable uses of the property have been removed, as a result of the impugned regulation.

41. The government action in this case leaves landlords (the rights holder), with only notional uses of their land. Read generously and erring on the side of permitting a novel but arguable claim, as is required in the context of a motion under Rule 21.01(1)(b), it is neither plain nor obvious that this argument could not succeed.

E. LEAVE TO AMEND SHOULD BE GRANTED

42. As discussed, there is a reasonable prospect that the claim will succeed as it is neither plain nor obvious the pleading discloses no reasonable cause of action. If, however, this Court deems that these propositions have not been adequately outlined in the claim as drafted, leave to amend should be granted.

43. The *Rules* state that the court *shall* grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.[15]

[15] R.R.O. 1990, Reg. 194: RULES OF CIVIL PROCEDURE. At section 26.01

44. As stated in *South Holly Holdings*, leave to amend is denied only in the clearest of cases:

> A litigant's pleading should not lightly be struck without leave to amend. To the contrary, leave to amend should be denied only in the clearest of cases. This is particularly so where the deficiencies in the pleading may be cured by an appropriate amendment, as in this case.[16]

45. In the present circumstances, the Crown has not delivered a Defence, despite the timelines set out in the *Rules*. It is therefore clear the Crown would not be prejudiced by an amendment to allow the pleading to speak more specifically to the relevant legal test, as they have had, and will have ample time to consider any issues which would be raised in any amendments made hereafter.

F. THE CLPA NOTICE REQUIREMENT IS UNCONSTITUTIONAL

46. Section 18 of the CLPA should be struck down as it is an unconstitutional restriction on the core, inherent jurisdiction of the superior courts.

47. Section 96 of *The Constitution Act, 1867* restricts the legislative competence of the provincial legislatures from enacting measures which infringe on the core jurisdiction of the Superior Courts. As stated in *Trial Lawyers*, measures which prevent persons from bringing their issues to court are at odds with the basic function of Superior Courts.[17]

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[16] South Holly Holdings Limited v. The Toronto-Dominion Bank, 2007 ONCA 456 (CanLII), [*South Holly Holdings*]. At para 6

[17] Trial Lawyers Association of British Columbia v. British Columbia (Attorney General), 2014 SCC 59 (CanLII), [*Trial Lawyers*]. At para 32

48. In the case of Section 18 of the CLPA, if evidence can be proffered that notice has not been properly given, there is no ability for the court to exercise its inherent jurisdiction and control its own process. When the government creates a procedural barrier that not only bars good-faith litigants who may have tripped up on procedural grounds, and prevents the Court from exercising **any** judicial discretion, it has stepped outside of its legislative competence.

49. As explored in *Trial Lawyers*, there is a historical context and tradition in the common law underlying the exercise of judicial discretion with respect to procedural barriers, going back to the *Statute of Henry VII* of 1495.[18] This ancient law provided the Court with the discretion to waive and reduce fees for the impecunious.

50. While a notice requirement is not identical to a hearing fee, the two are analogous. These are both procedural measures aimed at preventing frivolous and vexatious claims from coming to Court, and encouraging the efficient use of court resources. These procedural barriers, when instituted in a constitutionally compliant manner, are not the issue.

51. Clearly, as in *Trial Lawyers*, it is within the province's power to impose notice periods. This power, however, is not unlimited.

> It follows that the province's power to impose hearing fees cannot deny people the right to have their disputes resolved in the superior courts. To do so would be to impermissibly impinge on s. 96 of the Constitution Act, 1867. Rather, the province's powers under s. 92(14) must be exercised in a manner that is consistent with the right of individuals to bring their cases to the superior courts and have them resolved there.

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[18] A Mean to help and speed poor Persons in their Suits (Eng.), 11 Hen. 7, c. 12 [Statute of Henry VII]. Cited in para 48 of *Trial Lawyers*.

> This is consistent with the approach adopted by Major J. in Imperial Tobacco. The legislation here at issue — the imposition of hearing fees — must conform not only to the express terms of the Constitution, but to the "requirements . . . that flow by necessary implication from those terms" (para. 66). The right of Canadians to access the superior courts flows by necessary implication from the express terms of s. 96 of the Constitution Act, 1867 as we have seen. **It follows that the province does not have the power under s. 92(14) to enact legislation that prevents people from accessing the courts.**[19]

52. In the case of *Poorkid Investments*, the Ontario Court of Appeal stated:

> Section 96 does not require that all tort claims be treated alike, much less litigation in general, and it has nothing to say about whether any particular claim should survive a preliminary screening process conducted by the court. The core jurisdiction of superior courts under s. 96 is impermissibly infringed **only if the superior courts are prevented from serving as courts of inherent general jurisdiction**. Nothing in s. 17 of the CLPA has this effect. [Emphasis added][20]

53. Notice periods can serve an important purpose to ensure that both litigants and the Court are not ambushed with arguments, motions, and procedures that they are not prepared for. Section 18 of the CLPA, read generously, appears to be aimed at allowing the Crown additional time to prepare to defend itself from claims for damages.

54. In situations where the purpose of a procedural barrier, such as a notice period, is able to be fulfilled without strict compliance, the *Rules* allow for the Court to cure non-compliance as an irregularity. For instance, in situations where a document is served late, the Court, as part of its inherent jurisdiction, may "grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute."

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[19] *Trial Lawyers*. At paras 36-37
[20] *Poorkid Investments Inc. v. Ontario (Solicitor General), 2023 ONCA 172 (CanLII)*. At para 45

55. Especially in these circumstances, where the Crown was served in early January of this year, and the Crown has still not served a Statement of Defence, there is no question the Crown has had adequate time to prepare to defend itself from this claim, despite it not being a claim for damages. The removal of the Court's ability to waive such a procedural barrier, where it is clear the spirit and purpose of the notice period are not relevant to the real matters in dispute, is therefore an unconstitutional infringement on this Court's inherent, unimpeachable, core jurisdiction.

56. In the case of MacMillan Bloedel Ltd. v. Simpson - the Court in discussing the nature and history of the inherent jurisdiction cited the seminal article on the subject, I. H. Jacob's "The Inherent Jurisdiction of the Court"- stating:

> . . . the superior courts of common law have exercised the power which has come to be called "inherent jurisdiction" from the earliest times, and . . . the exercise of such power developed along two paths, namely, by way of punishment for contempt of court and of its process, and by way of regulating the practice of the court and preventing the abuse of its process.
> . . . the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent." This description has been criticised as being "metaphysical" [cite omitted], but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law. [sic.][21]

[21] MacMillan Bloedel Ltd. v. Simpson, 1995 CanLII 57 (SCC). At para 30.

57. Underlying this claim is the struggle Canadians face when attempting to access justice. When government enactments render that forum inaccessible or ineffective, this undermines the rule of law. As stated by Justice Karakatsanis in *Hryniak v Mauldin*, "without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined."[22]

58. In the alternative, should this court find the notice requirement in the CLPA constitutionally sound, it is clear that the notice requirement should not apply in this case, as this claim is not a claim for damages.

59. The Crown's factum states, quite accurately, that damages are pecuniary compensation awarded by the courts for loss, detriment, or injury to a person or their property flowing from unlawful acts. There is a misunderstanding, however, in that the Crown infers there is an assertion that the Crown is alleged to have done something unlawful. This is not the case.

60. The claim refers to the *de facto* expropriation of land through regulation. This is something the Crown has the right to do. The Crown undertaking something it is fundamentally allowed to do within the law cannot be said to be unlawful. A claim for the recognition and enforcement of a presumptive right to compensation flowing from the Crown's lawful expropriation is therefore separate and distinct from a claim for damages and should not be subject to the CLPA notice requirement.

[22] Hryniak v. Mauldin, 2014 SCC 7 (CanLII)– At para 26

61. In *Annapolis*, it is emphasized that the "taking of property by the state triggers a presumptive right to compensation, which can be displaced only by clear statutory language showing a contrary intention".[23] Further, this has been deemed to be a rule inherent to statutory construction, as Lord Atkinson stated in the case of *Attorney-General v. De Keyser's Royal Hotel*, [1920] A.C. 508 (H.L.), "The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation".

62. The *Expropriations Act* itself specifically delineates between damages and compensation. Section 13(1) states "Where land is expropriated, the expropriating authority shall pay the owner such **compensation** as is determined in accordance with this Act." [Emphasis added]

63. The *Expropriations Act* also makes several explicit references to damages, for example, in section 1:

> "injurious affection" means,
> (a) where a statutory authority acquires part of the land of an owner,
> (i) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and
> **(ii) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute,**

64. This passage itself makes inherent reference to the reality that the statutory authority is not liable for damages for "construction or use" done under the authority of a statute, and instead, is only required to compensate those disaffected. While this calculation may take place in similar

[23] *Annapolis*. At para 21

fashion to the calculation of damages, it is a process well-delineated from "a claim for damages" as referenced in the CLPA.

G. RULE 25.06(9) HAS BEEN COMPLIED WITH

65. Section 25.06(9) of the *Rules* sets out the following:

> **Claim for Relief**
>
> 25.06(9) Where a pleading contains a claim for relief, the nature of the relief claimed shall be specified and, where damages are claimed,
>
> (a) the amount claimed for each claimant in respect of each claim shall be stated; and
>
> (b) the amounts and particulars of special damages need only be pleaded to the extent that they are known at the date of the pleading, but notice of any further amounts and particulars shall be delivered forthwith after they become known and, in any event, not less than ten days before trial.

66. The Crown incorrectly asserts that the prayer for relief of "compensation in a sum to be determined, or such sum as this Court finds appropriate for the *de facto* expropriation of the lands owned by the Class members" does not comply with Rule 25.06(9) as it does not specify the nature of the relief claimed and fails to specify any amount of damages.

67. In the case of *Lysko v Braley* *Lysko v. Braley,* (S.C.J.) Justice Low eloquently described the importance of proper pleadings:

> The purpose of pleadings is to define the issues for the parties and for the Court. The pleadings govern the trial and the interlocutory proceedings. A case properly pleaded permits an efficient use of judicial resources and the parties' resources. Bad pleadings do the opposite and more. They are instruments of potential mischief in the litigation process. One of the functions of pleadings is to govern discovery. If a matter is pleaded, it may be discovered upon. Where a pleading is replete with evidence or irrelevant material ... it is calculated to open the door to prolonged and potentially abusive discoveries which do not address the real issues between the parties . . .

68. As stated above, damages are not claimed, as a result of the principle of statutory interpretation that there is no expropriation without compensation, unless it is explicitly denied.

69. Therefore, all that is required to comply with Rule 25.06(9) is to specify the "nature" of the relief, in order to define the issues for the parties and for the Court.

70. The plain meaning of the word "nature", read in the context of the rule, refers to the "the inherent character or basic constitution of a person or thing." [24]

71. The nature of the prayer for relief is specified as compensation. As stated in *Manitoba Fisheries*:

> The appellant's claim is for "compensation" and in my view full compensation cannot be determined without taking into account the loss to the appellant of the use of the assets of its business since 1969, and I think it to be only fair and equitable that this loss should be reflected in the amount of compensation awarded to the appellant hereunder. [25]

72. It is clear based on this authority that there is a basis in law for the calculation of compensation, by taking into account the loss to the of the use of the expropriated assets. This provides a basis for the parties to explore the quantum of compensation that has accrued to both Elsie, and the potential class members. This pleading sufficiently narrows the scope of discoveries such that this would be the focus of the potential amount awarded at trial.

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[24] https://www.merriam-webster.com/dictionary/nature
[25] *Manitoba Fisheries.* At p.118

73. In the alternative, leave to amend should be granted to allow for a more specific formula to be pled. As stated above, the status of the claim is such that virtually no prejudice can result due to an amendment at this early stage in the proceedings.

PART III – REQUESTED RELIEF

74. Based on the preceding submissions, Elsie respectfully requests that this Honourable Court grant Orders:

a) dismissing the Crown's motion in its entirety;

b) awarding the Respondent the costs of this motion, on a substantial indemnity basis; and

c) granting such further and other relief as counsel may request and this Court may deem just.

All of which is respectfully submitted this 24th day of August, 2023.

Marshall Law Group Professional Corporation
For: Matt Marshall
T. David Marshall
Matthew Jarrett
Rankin Lutz

Schedule "A"

Authorities

1. *Beaudoin Estate v. Campbellford Memorial Hospital*, 2021 ONCA 57;
2. *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (CanLII);
3. *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36 (CanLII);
4. *Manitoba Fisheries Ltd. v. The Queen*, 1978 CanLII 22 (SCC);
5. *R. v. Tener*, 1985 CanLII 76 (SCC);
6. *South Holly Holdings Limited v. The Toronto-Dominion Bank*, 2007 ONCA 456 (CanLII);
7. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 (CanLII);
8. *Poorkid Investments Inc. v. Ontario (Solicitor General)*, 2023 ONCA 172 (CanLII);
9. *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC); and
10. *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII).

Schedule "B"

Statutes and Regulations

1. R.R.O. 1990, Reg. 194: RULES OF CIVIL PROCEDURE
2. Expropriations Act, R.S.O. 1990, c. E.26
3. Crown Liability and Proceedings Act, 2019, S.O. 2019, c. 7, Sched. 17

ELSIE KALU and HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF ONTARIO represented by THE ATTORNEY GENERAL OF ONTARIO

Plaintiff/Respondent Defendant/Moving Party

Court File No. CV-22-00000074-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Cayuga, Ontario

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