

ONTARIO SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

Before: Dunnet, Greer and Jarvis JJ.

MELANCTHON INVESTMENTS LIMITED (Appellant) and THE CORPORATION
OF THE CITY OF OWEN SOUND (Respondent)

The appellant appeals from the decision of the Ontario Municipal Board granting access to the respondent to conduct environmental testing of the appellant's property, pursuant to s. 10(3) of the *Expropriations Act*, R.S.O. 1990, c. E.26.

Subsection 10(3) of the Act provides that an expropriating authority may, after it has served notice of expropriation on the owner in possession of the lands expropriated, and with the consent of the owner, enter the expropriated lands "for the purposes of viewing for appraisal". The appellant submits that "viewing for appraisal" does not include environmental testing and the Board erred in law in its interpretation of s. 10(3) of the Act.

The property fronts on the Owen Sound harbour and is primarily developed as a parking lot with a large berm and public walkway traversing the waterfront portion. In the winter, the property is used as a docking facility for the Chi-Cheemaun ferry.

The property was formerly used as a parking lot for a foundry, which operated a boat propeller manufacturing facility for about 100 years. The property was used as an access port to transport items manufactured by the foundry by rail to the harbour for transportation by boat. Waste materials generated through the foundry process were also transported by rail onto the property and then loaded onto boats.

In October 2004, the respondent filed a plan of expropriation expropriating the property. The respondent's appraiser wanted to enter onto the property to conduct testing for contaminants in order to value the land in order to make an offer pursuant to s. 25 of the Act. The appellant does not object to access to the property for viewing purposes.

In January 2004, Rubicon Environmental Inc. prepared environmental site assessments for the property, which do not identify specific environmental concerns. The respondent takes issue with the assessments, because of the exclusions contained in the reports, the fact that Rew is the principal of the appellant and the sole engineer connected with Rubicon and the first assessment was signed by Rew's spouse.

On the motion before the Board, the respondent argued that for it to prepare a meaningful offer of compensation, the appraiser needed to know the degree of contamination, if any, and the cost of remediation, if required.

The Board relied on *690346 Ontario Inc. v. Town of Markham* (2002), 77 L.C.R. 161 (OMB) where environmental testing was permitted pursuant to the same provision. In its reasons, the Board stated:

To the extent that it makes good sense to have some idea whether the lands in question have been contaminated or not and whether remedial actions may be required and that the value of the lands taken may be affected by such possible remedial measures, the Board sees little distinction between this case and the Markham case.

In the case at hand, the Board is aware that the expropriated premises may have been at some time formerly used as a rail line and storage area for coal. However, the respondent counsel did make some compelling points that soil contamination may not be as certain or as readily apparent. Based on what has been presented to this panel, the case for soil contamination may not be something that can be taken as axiomatic or at least not a given. Having said that, the Board does agree that the most sensible course is to allow the testing so that the question can be put to rest.

The appellant submits that taking into account the context of the impugned provision and the Act as a whole, the plain and ordinary meaning of "viewing" can only mean a visual inspection. Further, if the legislature had intended that s. 10(3) gave the Board the power to allow environmental testing, it could have specified that such an order can include "the taking of samples, the making of observations or the conducting of tests or experiments" as in Rule 32.01(2)(c) of the *Rules of Civil Procedure*.

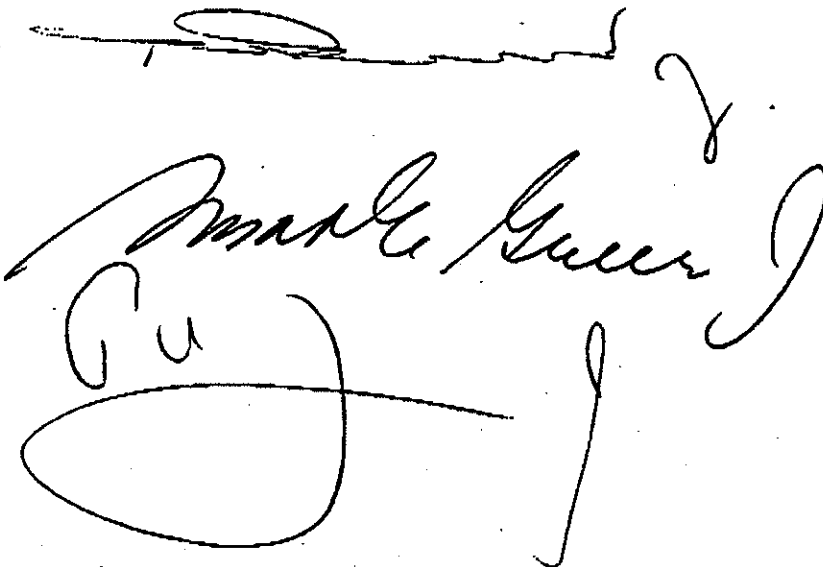
The Act provides exclusive jurisdiction to the Board in establishing compensation based upon the market value of the expropriated land, which is the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer (ss. 13, 14). Contamination of the land can affect the market value and thus the compensation.

The Act is a remedial statute and it must be given a broad and liberal interpretation consistent with its purpose. The words "viewing for appraisal" should be read in their entire context and in their grammatical and ordinary sense. Taking into consideration the scheme and the object of the Act and the intention of Parliament, we are of the view that the Board did not err in its interpretation of "viewing for appraisal" as including environmental testing.

The Board is a specialized tribunal not only in planning matters, but in expropriation matters. The standard of review when the Board is interpreting a clause in the Act is reasonableness. We are of the view that the Board's interpretation of the words "viewing for appraisal" as including environmental testing was reasonable. Even on a standard of correctness, we would not interfere with the decision.

At the outset of the appeal, the respondent took the position that he was not waiving his right to argue that this matter concerns an interlocutory order of the Board and should not be heard. See *Geneen v. Toronto (City)* (1998), 107 O.A.C. 308 (Ont. Div. Ct.). Given that both counsel argued the appeal, we make no determination on the issue of whether this is an interlocutory or final order.

The appeal is dismissed with costs fixed in the amount of \$5000 plus disbursements and GST payable out of the s. 25 offer. If there are insufficient funds to satisfy the costs order, the costs of the appeal remain payable by the appellant to the respondent. The matter is remitted to the Board for direction as to the protocol to be followed during the environmental testing.



Mark Geneen

Date of Release: July 5th, 2006.