

CANADA / JUDGMENT

Milne v. Canada

2025 FC 893

COURT

Federal Court

DECIDED

15 May 2025

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Milne v. Canada

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Decision Content

Date: 20250515

Docket: T-967-16

Citation: 2025 FC 893

Ottawa, Ontario, May 15, 2025

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

SHAWN SOMERVILLE MILNE

Plaintiff

and

HIS MAJESTY THE KING

Defendant

JUDGMENT AND REASONS

I. Overview [1] This is the redetermination of the relief to which the Plaintiff, Shawn Somerville Milne, is entitled following the expropriation of a 0.64-acre strip of his property (the “Required Lands”) for the expansion of the Marysville Rail Corridor (the “Project”) on January 24, 2012, pursuant to section 15 of the Expropriation Act, RSC 1985, c E-21 (the “Act”).

[2] The scope of this redetermination is to assess the quantum of relief to which the Plaintiff is entitled, in light of the Federal Court of Appeal’s conclusion that “the noise impact on [the Plaintiff’s] residence following the expansion was severe and mitigation is recommended under the Health Canada Guidelines” (Milne v Canada, 2023 FCA 137 at para 85 (“Appeal Decision”)).

[3] This redetermination also considers the issue of costs (Milne v Canada, 2023 FCA 138 at para 5 (“Costs Appeal”)). Although the Plaintiff did not deliver oral submissions on costs during the redetermination hearing – requesting instead to make submissions following the determination of the relief to which he is entitled in light of the Appeal Decision – I find that the Court’s judgment in this matter is conclusive on the issue of costs.

[4] The Plaintiff seeks to be compensated for the cost of constructing a new house or relocating his current house to a point 100 metres from the railway. In the alternative, the Plaintiff seeks compensation for injurious affection and personal damages.

[5] For the reasons that follow, I do not find that additional compensation is warranted. The Plaintiff is not entitled to the cost of constructing a new house or relocating his current house, as this would result in an improvement relative to his circumstances at the time of the expropriation. I similarly do not award damages for injurious affection, as I find the Plaintiff has brought insufficient evidence to justify such an award. Consequently, I find no basis for varying the costs award in Milne v Canada, 2022 FC 63 (the “Costs Decision”), as the relief to which the Plaintiff is entitled has not changed as a result of this redetermination proceeding.

II. Background A. Facts [6] In 2003, the Plaintiff purchased a 95-acre parcel of land in Belleville, Ontario. He operates a farm and resides with his family in a house on the property.

[7] The Marysville Rail Corridor runs along the northern edge of the Plaintiff’s property. Noise from the railway corridor affected the Plaintiff for several years before the commencement of this proceeding. In May 2004, the Plaintiff circulated a petition for train whistles to be prohibited at the Mitchell Road railway crossing.

[8] In July 2009, the Defendant launched the Project, which included plans to expand the Marysville Rail Corridor by constructing a third line of track near the Plaintiff’s property. To construct the Project, the Defendant sought to expropriate the Required Lands.

- [9] In August 2009, the Plaintiff submitted a complaint to the Canadian Transportation Agency (the “Agency”), requesting that a sound barrier be constructed and his house relocated to mitigate the noise impacts of the Project.
- [10] In April 2010, the Plaintiff submitted a further complaint on behalf of a community group, again requesting that sound barriers be constructed and nearby houses relocated due to the anticipated noise impacts of the Project.
- [11] In May 2010, the parties engaged in settlement negotiations, with the Defendant offering the Plaintiff \$610,250 to construct a replacement home elsewhere on his property. Negotiations ended in September 2010. In September 2011, the Defendant registered a Crown Notice of Intention to Expropriate against the Required Lands.
- [12] In January 2012, the Agency determined that noise and vibration impacts from the Marysville Rail Corridor were reasonable and would remain reasonable after the Project was complete, pursuant to section 95.1 of the Canada Transportation Act, SC 1996, c 10.
- [13] On January 24, 2012, the Defendant expropriated the Required Lands, offering the Plaintiff \$1,000 in compensation. The Plaintiff filed a Statement of Claim for further compensation pursuant to section 31 of the Act in June 2016.
- [14] The hearing for this matter took place in 2021. *Milne v Canada*, 2021 FC 765 (the “Trial Decision”) and the Costs Decision were issued in 2021 and 2022, respectively.
- [15] Both decisions were appealed. The Appeal Decision and Costs Appeal were issued in 2023.
- [16] In the Appeal Decision, the Federal Court of Appeal determined that “the noise impact on [the Plaintiff’s] residence following the expansion was severe and mitigation is recommended under the Health Canada Guidelines,” based on a pre-expansion noise level of 71.4 dBA (at paras 85, 70). This matter was therefore “returned to the Federal Court for re-examination on the basis that [the Plaintiff] is entitled to relief, the issue being the quantum of that relief” (at para 83).

B. Statutory Framework [17] The Act establishes a framework for compensating individuals whose lands are expropriated by the federal government. Pursuant to subsection 25(1) of the Act, compensation is equal to the sum of “the value of the expropriated interest or right” and the “decrease in value of the remaining property.”

- [18] Section 26 of the Act outlines how “the value of the expropriated interest or right” is calculated (the Act, s 26(1)). If an individual is forced to “give up occupation of the land” due to expropriation, they may be compensated for “the costs, expenses and losses arising out of or incidental to the owner’s or holder’s disturbance, including moving to other premises” (the Act, s 26(3)(b)(ii)). These “costs, expenses and losses” are termed disturbance damages, as they arise from the disturbance caused by expropriation (the Act, s 26(3)(b)(ii)).

- [19] The threshold requirement for relief pursuant to subparagraph 26(3)(b)(ii) of the Act is that the “owner or holder” is “required to give up occupation.” In *Patterson v British Columbia (Minister of Transportation and Highways)*, 1997 CanLII 4109 (BC CA) (“Patterson”), the British Columbia Court of Appeal observed that a similar threshold in the Expropriation Act, SBC 1987, c 23 may be met even if an individual’s home is not expropriated, so long as “the effect of the taking [is] to effectively oust the owners from their home” (at para 35).
- [20] If the threshold requirement is met, the Court looks to two factors to determine whether disturbance damages are compensable: remoteness and causation. In the context of the Expropriations Act, RSO 1980, c 148, the Supreme Court of Canada determined that disturbance damages must be “a reasonable and natural consequence of the expropriation,” and are recoverable regardless of whether they occur on expropriated or remaining land (*Toronto Area Transit Operating Authority v Dell Holdings Ltd*, 1997 CanLII 400 at para 29 (SCC) (“Dell Holdings”)).
- [21] Whereas disturbance damages pertain to “the value of the expropriated interest or right,” injurious affection addresses any “decrease in value of the remaining property” (the Act, s 25(1)).
- [22] The statutory formula for injurious affection is provided in subsection 27(1) of the Act. Injurious affection is equal to the difference between the value of the property immediately before the taking and the combined value of the expropriated property and remaining property immediately after the taking (the Act, s 27(1)).

III. Preliminary Issues [23] The Plaintiff brings new arguments in this redetermination proceeding. He seeks disturbance damages for the personal impact of the excessive noise on himself and his family. If he is granted the cost of constructing a new house or relocating his current house, he seeks \$119,275 in damages for the period of 2012 to 2025. If he is not granted the costs of constructing a new house or relocating his current house, he seeks \$394,525 in personal damages for the period of 2012 to 2055, “based on a life expectancy of 80 for [the Plaintiff].” The Plaintiff also seeks an inflation adjustment, requesting an additional \$260,718.72 or \$55,213.36 to account for inflation on the cost of constructing a new house or relocating his current house, respectively.

- [24] The Defendant submits that the Plaintiff’s new arguments should not be considered, as they were not pleaded in his Statement of Claim and were not argued before the Court during the hearings for the Trial Decision or the Costs Decision.
- [25] I agree with the Defendant.
- [26] The Plaintiff’s claim for personal damages was not sought in his Statement of Claim nor argued before the Court during the hearing for the Trial Decision. It will therefore not be considered in this redetermination. In any event, the case law is clear that disturbance damages address economic, rather than non-economic, loss (*Shute v Paradise (Town)*, 2024 NLCA 19 at para 74 (“Shute”); *Houle v Manitoba*, 2016 MBCA 76 at para 28). As a result, “[n]o

Canadian court or tribunal has interpreted disturbance “losses” as non-pecuniary” (Atlantic Mining NS Corp (DDV Gold Limited) v Oakley, 2019 NSCA 14 at para 17, cited in Shute at para 74).

- [27] The Plaintiff’s claim for an inflationary adjustment will also not be considered. An inflationary adjustment was not requested in the Plaintiff’s Statement of Claim. This relief was also not requested at trial in 2021 or at the hearing for costs in 2022, when the passage of time would have made inflation a live issue for the Plaintiff. Relying on Harley-Davidson Motor Company Group, LLC v Manoukian, 2013 FC 193 (“Harley-Davidson”), the Plaintiff submits that this Court has the authority to adjust compensation to account for inflation. However, Harley-Davidson concerned minimum compensatory damages for trademark infringements, a nominal award unique to the intellectual property context with a value set in 1997 (Harley-Davidson at para 40; Louis Vuitton Malletier SA v Yang, 2007 FC 1179 at para 43). I do not find that Harley Davidson is applicable given the very different circumstances of this case. The Plaintiff’s claim for an inflationary adjustment will therefore not be considered.

IV. Issue [28] The sole issue in this redetermination is the quantum of relief to which the Plaintiff is entitled, based on the finding that the noise impact of the Project was severe and mitigation is recommended under the Health Canada Guidelines.

V. Analysis A. The Plaintiff is Not Entitled to the Cost of Constructing a New House or Relocating His Current House [29] The Plaintiff seeks the cost of constructing a new house or relocating his current house 100 metres away from the railway corridor. The Plaintiff submits that the noise impacts on his residence were a reasonable and natural consequence of the expropriation and therefore constitute disturbance damages recoverable under subparagraph 26(3)(b)(ii) of the Act.

- [30] The Defendant submits that the Plaintiff’s reliance on subsection 26(3)(b)(ii) is fatal to his claim. As stipulated in subsection 26(1) of the Act, “[t]he rules set out in [section 26] shall be applied in determining the value of an expropriated interest or right” [emphasis added]. Subsection 26(2) of the Act states that “the value of an expropriated interest or right is its market value.” The purpose of section 26(3) is to address externalities relevant to owner-occupiers, or factors not accounted for in a property’s market value that may be relevant if, “as a result of the expropriation, it has been necessary for [an individual] to give up occupation of the land.” These factors include moving costs and “any element of special economic advantage” that may be lost by an owner-occupier upon expropriation (the Act, ss 26(3)(b)(ii), 26(3)). According to the Defendant, the Plaintiff effectively conflates the alleged devaluation of his remaining lands with “disturbance damages” for the land actually expropriated. As a result, it is the Defendant’s position that subparagraph 26(3)(b)(ii) of the Act is not capable of grounding the Plaintiff’s claim, irrespective of the noise level at his home prior to the Project.

- [31] I disagree. The Plaintiff’s reliance on subparagraph 26(3)(b)(ii) of the Act is not fatal to his claim. However, the Plaintiff is not entitled to the relief he seeks.

- [32] In my view, the Plaintiff is not seeking compensation for the devaluation of his house, but for being required to give up occupation of his house due to the noise impacts of the railway expansion (the Act, s 26(3)). Consistent with the Supreme Court of Canada's ruling in *Dell Holdings*, "losses with regard to the remaining land" are "just as much" a component of disturbance damages "as losses relating solely to the expropriated land" (at para 29). Furthermore, I find that the Plaintiff has been constructively "ousted" from his house as a result of the expropriation, since the noise impacts at the Plaintiff's residence have been sufficiently severe to warrant mitigation under the Health Canada Guidelines (Patterson at para 35). These impacts form part of the "the natural and reasonable consequences" of the expropriation and are encompassed by section 26 of the Act (*Dell Holdings* at para 29). The Plaintiff's claim for disturbance damages with respect to his residence is therefore not foreclosed.
- [33] However, it does not follow that the Plaintiff is entitled to the cost of constructing a new house or relocating his current house. Compensation under the Act is calculated based on the owner's position "at the time of [the] taking" (the Act, ss 26(2), see also 26(3)(b)(i)). When the Required Lands were expropriated on January 24, 2012, the Plaintiff's house was located 25.3 metres from the railway corridor and had a noise level of 71.4 dBA (Trial Decision at para 11; Appeal Decision at para 62). Following the expropriation, the Plaintiff's house is now located 14.6 metres from the railway corridor and has a noise level of 76.5 dBA (Trial Decision at paras 11, 90). As a result, constructing a new house or relocating the Plaintiff's current house to a point 100 metres from the railway would result in betterment, rather than a return to "the position previously enjoyed" (*Simpson v Ontario Hydro*, 1977 CarswellOnt 1817, 13 LCR 376 at para 37 ("Simpson")). This distinguishes the present proceeding from the decisions cited by the Plaintiff, where owners were "paid neither more nor less than [their] loss" (*MacDougall v Alberta (Minister of Transportation)*, 1989 CarswellAlta 811, 42 LCR 205 at para 20; *Simpson* at para 37; *Gustafson v Alberta*, 1987 CarswellAlta 765, 37 LCR 45 at paras 34-35). Even if the noise impacts at the Plaintiff's residence were more severe and the mitigation recommended under the Health Canada Guidelines was more extensive than at present, the relief sought by the Plaintiff could not be awarded, as it exceeds the state of the Plaintiff's circumstances at the time of the expropriation.
- [34] I agree with the Defendant that the situation of the Plaintiff is more analogous to that of the owners in *Re Adams et al and Minister of Transportation and Communications*, 1980 CanLII 1637 (ON SC) ("Adams") and *Jacobsen v Alberta*, 1979 CanLII 3765 (AB LCB) ("Jacobsen"). Although the relevant findings from these cases concerned injurious affection rather than disturbance damages, the fundamental principles for which the requests for compensation were rejected in *Adams* and *Jacobsen* are nonetheless applicable here. As stated at paragraph 26 of *Jacobsen*:

...the nuisance complained of existed prior to the expropriation. The Board has found that the effect of the taking and the use to which the expropriated land is being put has been to increase such nuisance. Therefore the amount to be awarded for injurious affection must be based on the consequences directly attributable to the present taking and should not include compensation for matters which were already in existence prior to the taking.

[Emphasis added]

In this case, the “matters which were already in existence prior to the taking” included a pre-expansion noise level of 71.4 dBA. Consequently, damages for “all noise arising from the [railway]” cannot be awarded, as “there had been noise before” the taking at issue (Adams at 8).

[35] The Plaintiff rightly notes that pre-expansion noise levels were only so high due to the Defendant’s failure to mitigate the noise impact of the railway before the commencement of the Project. However, the purpose of the Act is not to cure deficiencies in prior mitigation efforts or enforce compliance with federal guidelines. The Act governs the expropriation of land by the federal government. Redress is only provided in the Act for those losses that flow from the taking itself. Longstanding deficiencies in mitigation cannot be cured through the compensation provisions of the Act, particularly when, as in this case, the disputed mitigation efforts predate the expropriation by several years.

B. The Plaintiff is Not Entitled to Compensation for Injurious Affection [36] The Plaintiff seeks damages for injurious affection pursuant to section 27 of the Act. The Plaintiff submits that the increase in noise caused by the Project has downgraded the value of his house from that of an owner-occupied property to a tenant-occupied property. He asserts that the value of his house “immediately after the time of the taking” should be determined based on its potential to produce rental income, presenting appraisal evidence which estimates the rental value of his house to be \$60,000 (the Act, s 27(1)(b)).

[37] I am not persuaded by this argument. As noted in the Appeal Decision, “factors other than noise played a role in the Court’s assessment of the appraisal evidence” (at para 83). The Plaintiff did not appeal these findings or address them in their redetermination submissions. In particular, the Plaintiff has not explained why a property that is unfit for habitation by an owner would be fit for habitation by a tenant. Furthermore, the estimate of rental value provided by the Plaintiff was given little weight in the Trial Decision, as the methodology used by the Plaintiff’s expert lacked detail and “contain[ed] numerous assumptions that are not supported by evidence” (Trial Decision at para 136). The Plaintiff has not addressed these deficiencies, simply asserting that “[t]here is no contradictory evidence on this point.”

[38] As a result, the Plaintiff has not adduced sufficient evidence to warrant an award for injurious affection. I therefore do not grant his request for compensation pursuant to section 27 of the Act. Consequently, the Plaintiff’s request for statutory interest on an award for injurious affection pursuant to section 36 of the Act must also fail.

VI. Costs [39] In the Costs Appeal, the Costs Decision was “set aside, subject to a fresh determination as to costs being made at the conclusion of the Federal Court’s redetermination of the amount of compensation to which [the Plaintiff] is entitled” (Costs Appeal at para 5).

[40] As the relief awarded to the Plaintiff in the Trial Decision has not been varied, I find no basis for disturbing the costs awarded in the Costs Decision.

VII. Conclusion [41] For these reasons, I do not find the Plaintiff is entitled to the costs of constructing a new house or relocating his current house. I am similarly not persuaded the Plaintiff is entitled to damages for injurious affection or statutory interest on an injurious affection damages award. Consequently, there are no grounds to vary the Costs Decision.

JUDGMENT in T-967-16

THIS COURT’S JUDGMENT is that:

The Plaintiff’s request for the costs of constructing a new house or relocating his current house is dismissed.

The Plaintiff’s request for damages for injurious affection and statutory interest on an award for injurious affection is dismissed.

The costs award in the Costs Decision is not varied.

“Shirzad A.”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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DATE OF HEARING:

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JUDGMENT and reasons:

AHMED J.

DATED:

May 15, 2025

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