IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Springman v. Surrey (City),*
2021 BCSC 1804

Date: 20210914
Docket: S227335
Registry: New Westminster

Between:

Springman and Springman Limited and 498198 B.C. Ltd.

Plaintiffs

And

City of Surrey

Defendant

- and -

Docket: S227336
Registry: New Westminster

Between:

Larry Visco

Plaintiff

And

City of Surrey

Defendant

Before: The Honourable Madam Justice Iyer

Reasons for Judgment

Counsel for Plaintiffs:	C.E. Hanman A. Faulkner-Killam
Counsel for Defendant:	E.A. Cooke A. Schleichkorn
Place and Date of Trial:	Abbotsford, B.C. March 22-26, 29-31, 2021 April 6-8, 12 and 13, 2021

Place and Date of Judgment: New Westminster, B.C.
September 14, 2021

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OVERVIEW

[1] Dan and Reuben Springman are brothers who operated a car dealership on the Langley Bypass in Surrey, British Columbia, through their company, Springman and Springman Limited ("Springmans"). Springmans leased the land on which the dealership was located under a long-term commercial lease. The owners of the land were 498198 BC Ltd., the Springman brothers' holding company ("498198"), and their friend, Larry Visco. Springmans, 498198 and Mr. Visco are the plaintiffs in these two actions, which I heard together. Mr. Visco has assigned his rights in these actions to the Springman brothers.

[2] In March 2012, the City of Surrey ("Surrey") expropriated part of the land on which Springmans operated in order to construct an overpass as part of the Roberts Bank Corridor Project ("Overpass Project"). Part of the expropriation was to be permanent and part was to be temporary.

[3] Construction of the Overpass Project began in the spring/summer of 2012 and completed in October 2013. The temporarily expropriated lands were returned to the plaintiffs at that time. The plaintiffs sold the land and the dealership at the end of October 2013.

[4] The *Expropriation Act*, R.S.B.C. 1996, c. 125 [*Act*] governs expropriations made by BC government bodies. As the plaintiffs are all "owners" within the meaning of the *Act*, they are entitled to the compensation set out in the statute. The dispute between the parties is over whether Surrey compensated the plaintiffs for the expropriations to the extent required by the *Act*. The plaintiffs say it failed to do so. Surrey says that it has, except that it agrees to a consent order paying Mr. Visco and 498198 a "top-up" on account of the Temporary Right of Way of $26,032 plus interest.

[5] I set out the uncontroversial background facts in the next section. Following that, I discuss the compensation provisions of the *Act*, and summarize the plaintiffs' claims. I then assess each of those claims in light of the evidence.

BACKGROUND FACTS

Evolution of the Dealership

[6] Mr. Visco and 498198 purchased the land at issue in these actions in 1997. The street address is 19550 Langley Bypass, Surrey, BC, and the legal description is:

> Parcel Identifier: 019-096-038
> Lot 2, Section 10, Township 8, New Westminster District Plan LMP20535
> Except Plans 64588
> ("Property").

[7] At the time of purchase, the Property was undeveloped and appeared to measure 6,080 m^2. However, the Property was actually 368 m^2 smaller than it appeared. That 368 m^2 area had previously been reserved to the province for future road use by way of a gazette plan that had been filed in 1982 ("Gazette Area"). Apparently, no one was aware of the Gazette Area at the time of purchase. The Property also had a "no build" covenant registered on title, consisting of 1,646 m^2 along its eastern edge, of which the purchasers were aware. The Gazette Area falls within the "no build" area.

[8] Shortly after the purchase, Mr. Visco and 498198 leased the Property to Springmans, which obtained a development permit and built a Saturn brand auto dealership on it. The building was designed to meet Saturn's specifications and, with Ministry of Transportation ("MoT") permission, the parking lot/car display area was sited on the "no build" area.

[9] Springmans sold new Saturns and used vehicles. The business operated successfully until the recession of 2008-2009. In 2009, General Motors ("GM") stopped production of the Saturn brand.

[10] The combination of the recession and the end of Saturn adversely effected the profitability of Springmans. It sold off its inventory of Saturn vehicles at a loss.

[11] In August 2010, Springmans became a Saab dealership, which included a Saab servicing arrangement. It had a limited inventory of new Saab vehicles and continued to sell used vehicles. Unfortunately, Saab went into bankruptcy in December 2011. As a result, Springmans had to sell off its new Saab vehicle inventory at a loss in 2011-2012.

[12] Springmans intended to continue on as a used car dealership, with GMAC flooring financing, a contractual relationship with a wholesale dealer giving Springmans access to parts inventory, among other changes.

Events Leading Up to Expropriation

[13] The Overpass Project was announced publicly in March 2011.

[14] In mid-July 2011, Doug Fourchalk contacted the Springman brothers on behalf of Surrey. He told them about the Overpass Project and the expropriations it would entail, including expropriation of some of the Property. He provided them with plans for the proposed overpass. He explained that some of the land would be expropriated permanently and some temporarily. Mr. Fourchalk estimated that the Overpass Project would start in early 2012 and continue until the end of 2014.

[15] The Springman brothers communicated with Mr. Fourchalk regularly, seeking information about the progress of the Overpass Project. They were very concerned about its impact on their business, and actively considered what mitigation measures they and the City should implement to help the business operate during this time. These measures included maintaining access to the dealership and locating alternative vehicle display and parking areas. The Springman brothers did not consider Surrey's proposals viable.

[16] From August 2011 on, the Springman brothers and their staff worried about the negative impact of the Overpass Project on the business. Some employees left. Springmans purchased less inventory anticipating that parking space would be limited.

[17] In November 2011, Dan Springman first raised the prospect of business interruption funding with Mr. Fourchalk. This continued to be discussed. While the parties also discussed a possible consensual acquisition of the Property, those negotiations were not successful.

[18] In December 2011, MoT filed documents with the Land Title Office that excluded the Gazette Area from the legal description of the Property. As a result, the Property measured 5,712 m^2. The plaintiffs learned about the Gazette Area at this time. All parties accept that the Gazette Area does not form part of the Property.

[19] In late January 2012, Surrey issued three expropriation notices for the Property as follows:

a) Instrument BB2009653 for a fee simple interest of 259.7 m^2 ("Fee Simple Area"),

b) Instrument BB2009655 for a permanent right of way interest of 242.4 m^2 ("Permanent RW Area"), and

c) Instrument BB2009657 for a temporary right of way interest of 622.3 m^2 ("Temporary RW Area").

As required by the *Act*, these were served on all of the plaintiffs.

[20] In late February 2012, Surrey issued Certificates of Approval for each expropriation notice and served them on the plaintiffs.

[21] In March 2012, Surrey issued Notices of Advance Payment and made the related payments to the plaintiffs as required under s. 20 of the *Act* as compensation for the expropriation, other than for business losses. Surrey made a supplemental advance payment with interest under s. 20(12) of the *Act* in March 2021. In total, Mr. Visco and 498198 received $146,738 for the Fee Simple Area, $89,032 for the Permanent RW Area, and $33,877 for the Temporary RW Area. As lessee, Springmans received $1 for each taking (collectively, "Advance Payments").

[22] Also in March 2012, the parties met to discuss how to mitigate the adverse impact of the taking on Springmans' business through regular payments by Surrey. In July 2012, Surrey agreed in principle to make these payments; however, the terms were not settled until August 2012. The payments were called the "Float" or "Float Payments."

[23] The expropriated areas were conveyed to Surrey in late March 2012, by way of Vesting Notices served on the plaintiffs.

Construction of the Overpass Project

[24] On March 12, 2012, the project contractor requested access to part of the Property for land clearing activities. This required Springmans to temporarily remove some vehicles from the display lot and park them on Landmark Way, a back street running behind the Property. Springmans complied with this request although the expropriation had not yet occurred.

[25] On May 31, 2012, Springmans was required to move all of the vehicles from its Highway 10 frontage so that new parking could be built along the shoulder of Highway 10. This reduced the visibility of Springmans' inventory, particularly of the vehicles that were moved to Landmark Way.

[26] The Overpass Project was active from mid-July 2012 until October 31, 2013. In mid-July 2012, the contractor erected a yellow fence blocking the Temporary Right of Way Area from the rest of the Property and installed culverts along the east side of the Property. Pile driving started in mid-July and ended on November 26, 2012. Excavation, concrete-pouring and related activities started in August 2012 and ended at the end of November 2012. Girders and the overpass deck were installed subsequently.

[27] There is no question that the construction created a great deal of noise, dust and distraction. Obviously, such effects are inimical to running a successful car dealership. For example, construction vehicles made it difficult to access the Property at times. The dust made it challenging to keep the inventory and interior of

the building clean. The noise deterred some potential customers. The construction meant there was less drive-by traffic on Highway 10. The adverse effects on Springmans and its staff included diminished pay for commission employees and low morale. While some staff were assured of a minimum base pay, the general anxiety persisted.

[28] Between August 2012 and April 2013, Surrey made monthly Float Payments to Springmans totalling $762,818. The payments were made on a without prejudice basis pursuant to s. 30(2)(b) of the *Act* as an advance payment of business losses to which the plaintiffs might be entitled under ss. 34, 39 or 40 of the *Act*. The amounts were calculated by Springmans' accountants monthly and represented an approximation of the reduction in revenue that month based on a mutually agreed formula. Generally, the formula compared the revenue earned in each month with that earned in the comparable month in 2011. Surrey also compensated the plaintiffs for out-of-pocket expenses directly attributable to the expropriations. Springmans' accountants prepared and submitted the calculations and all supporting documentation. The Springman brothers found the delay between submitting their invoice and receipt of the funds from Surrey frustrating.

Sale of Springmans and the Property

[29] In April 2013, Surrey informed Springmans that the last Float Payment would apply to the month of April 2013, and no payments would be made thereafter.

[30] The Springman brothers felt devastated. They could not see how they could continue to operate with construction of the Overpass Project not anticipated to be completed until March 2014. They made efforts to persuade Surrey to resume Float Payments. They also contacted the owner of a nearby car dealership, Gary Trotman, who had previously expressed interest in buying or leasing the Property.

[31] On May 31, 2013, the Springman brothers met with Surrey to seek reinstatement of the Float or some other financial assistance. Surrey refused to provide any further financial assistance.

[32] The Springman brothers negotiated sale of the Property to Mr. Trotman. In the end, Mr. Visco and 498198 sold the lands for $6,025,000. Springmans sold its assets for $550,000 plus the value of parts and inventory. Both Springman brothers signed non-compete agreements with Mr. Trotman, and he hired Reuben Springman as manager of the body shop. A condition of the sale was that construction of the Project had to be finished by October 31, 2013, rather than March 2014. The City agreed to that condition and the sale completed.

ENTITLEMENT TO COMPENSATION FOR EXPROPRIATION

The Statute

[33] The *Act* is a remedial law that should be interpreted liberally in favour of the entities from whom land is expropriated: *Toronto Area Transit Authority v. Dell Holdings Ltd.*, [1997] 1. S.C.R. 32. It contains a complete compensation scheme for those holding interests in land that is expropriated.

[34] In this case, Mr. Visco and 498198 are owners under the *Act* because they hold title to the Property and Springmans is an owner because it is a lessee of the Property.

[35] Section 31(1) sets out the basic formula for compensating owners:

> 31 (1) The court must award as compensation to an owner the market value of the owner's estate or interest in the expropriated land plus reasonable damages for disturbance …
>
> …
>
> (3) If there is more than one separate interest in the land expropriated, the value of each interest must, if practical, be established separately.

[36] Section 34(1) explains “damages for disturbance” as follows:

> 34 (1) An owner whose land is expropriated is entitled to disturbance damages consisting of the following:
>
> > (a) reasonable costs, expenses and financial losses that are directly attributable to the disturbance caused to the owner by the expropriation;
> >
> > (b) reasonable costs of relocating on other land, including reasonable moving, legal and survey costs that are necessarily incurred in acquiring a similar interest or estate in the other land.

[37] The reasonableness of damages is to be assessed from an objective economic perspective. Disturbance damages may arise before the expropriation date but their reasonableness will be assessed in light of the certainty of the prospect of expropriation: *Associated Building Credits Ltd. v. British Columbia (Minister of Transportation and Highways)*, 2007 BCCA 546 at para. 42.

[38] Section 39 expressly addresses disturbance damages for lessees:

> 39 If land that is subject to a lease having a term greater than one year is expropriated, the lessee, whether or not he or she is an occupant of the land, is entitled to reasonable disturbance damages in an amount to be determined by the court by having regard to
>
> (a) the length of the term of the lease,
>
> (b) the length of the unexpired term of the lease,
>
> (c) any rights to renew or the reasonable prospect of renewal,
>
> (d) the nature of the business, if any, carried out on the land under the lease, and
>
> (e) the extent of the lessee's investment in the land that the lessee cannot reasonably recover.

[39] As Surrey did not expropriate the whole Property, s. 40 applies:

> 40 (1) Subject to section 44, if part of the land of an owner is expropriated, he or she is entitled to compensation for
>
> > (a) the market value of the owner's estate or interest in the expropriated land, and
> >
> > (b) the following if and to the extent they are directly attributable to the taking or result from the construction or use of the works for which the land is acquired:
> >
> > > (i) the reduction in the market value of the remaining land;
> > >
> > > (ii) reasonable personal and business losses.
>
> (2) If a person claims business losses under subsection (1), the losses must not, unless the person and the expropriating authority otherwise agree, be determined until at least 6 months after the loss was sustained.
>
> (3) If part of the land is expropriated, the amount of compensation payable in respect of the matters referred to in subsection (1) (a) and (b) (i) may be established by determining the market value of the area of all of the land before the date of expropriation and subtracting from it the market value of the land remaining after the expropriation occurs, but in no case, subject to section 44, must compensation be less than the amount determined by multiplying the ratio of the area of the land taken to the area of all of the land before it was taken, times the value of the land before it was taken with the

> appropriate reduction if the interest expropriated is an easement, right of way or similar interest less than the fee simple interest.
>
> (4) For the purposes of the second calculation referred to in subsection (3), the value of the land before it was taken is the value of the land only, having no regard to improvements on the land.
>
> (5) If, in the case of a partial taking, the character and use, or potential use, of the land before it was taken varies such that the land that was taken was, before the taking, more valuable or less valuable than the average value of the land that was not taken, the court may, after making a determination under subsection (3), make an adjustment to reflect that value accordingly.
>
> (6) For the purposes of this section, expropriation of part of the land of an owner occurs only if
>
> > (a) he or she retains land contiguous to the expropriated land, or
> >
> > (b) he or she owns land close to the land that was expropriated, the value of which was enhanced by unified ownership with the land expropriated.

[40] The *Act* does not expressly address disturbance damages payable to lessees after a partial expropriation, but there is no dispute that ss. 39 and 40 apply.

[41] Although not referred to as such in s. 40(1)(b)(i), the phrase “reduction in the market value in the remaining land” is often referred to in the cases as “injurious affection.”

The Plaintiffs’ Claims

[42] In their closing submissions, the plaintiffs present a summary of their claims. It is difficult to follow. First, their submission does not distinguish between the claims of Mr. Visco and 498198, who hold a fee simple interest in the Property and those of Springmans, which holds a leasehold interest. The amounts claimed do not clearly relate to the body of the submission because the description of each claim is cryptic and does not correspond to any identified part of the submission. It is more convenient to use Surrey’s description of the claims.

[43] Mr. Visco and 498198 claim compensation for the partial expropriation of their fee simple interests. They say that they are entitled to more than the amount of the Advance Payments, and that they are entitled to compensation for injurious affection of the remaining land (“Land Claim”).

[44] Mr. Visco and 498198 also claim for losses from November 2013 to July 2019 related to the value of the land, such as loss of the opportunity to continue to hold it and/or sell it at a higher price ("Ongoing Land Claim").

[45] Springmans claims business losses running from July 2011 to October 2013, due to the Overpass Project. As Springmans is a lessee, these are compensable as disturbance damages under s. 39 of the *Act* ("Business Loss Claim").

[46] Springmans claims business losses from November 2013 to July 2019, after the business was sold ("Ongoing Business Loss Claim").

[47] Each plaintiff also claims legal and interest costs under ss. 45 and 46 of the *Act*. I agree with Surrey that the evidence supporting these claims is not well laid out and they are not addressed in the plaintiff's submissions. I adjourn determination of these issues until after delivery of these Reasons for Judgment.

ASSESSMENT OF THE PLAINTIFFS' CLAIMS

Land Claim

[48] Mr. Visco and 498198 are entitled to compensation for Surrey's partial expropriation of the Property, which consisted of three takings: the Fee Simple Area, the Permanent RW Area, and the Temporary RW Area. Calculation of the compensation amount first requires an assessment of the market value of the Property, which then permits derivation of the values of each of the taken areas. If these values exceed the amount of the Advance Payments, Surrey must pay the difference. If they are less, Surrey is entitled to be reimbursed.

[49] In addition, if the expropriation has reduced the value of the remaining property (that is, it has caused injurious affection), Mr. Visco and 498198 are entitled to be compensated for that reduction in value.

[50] The parties tendered expert appraisal evidence of the value of the lands at the time of the takings to support their positions on calculation of the Land Claim. Surprisingly, Surrey's expert, Larry Dybvig derived a slightly higher square foot value

($52.50 per ft^2) than did the plaintiff's expert, David Kirk ($49.50 per ft^2). In its submissions, Surrey states that it relies on Mr. Dybvig's report. However, with respect to the value of the lands taken permanently, it says I should use Mr. Kirk's calculation of value per ft^2. It does not explain why. The consequence of using Mr. Kirk's figures is that the plaintiffs will have to reimburse Surrey for part of the Advance Payments, which were based on Mr. Dybvig's calculations. The plaintiffs appear to rely on Mr. Dybvig's value per ft^2 but disagree with other aspects of his methodology.

[51] Having read both reports in light of the evidence, I find that Mr. Dyvbig's calculations of the market values of the Fee Simple Area and the Permanent Right of Way more accurately represent the value of the land than Mr. Kirk's calculations. The fact that Surrey was content to rely on Mr. Dybvig's figures until it received Mr. Kirk's report and provided no explanation why it now prefers Mr. Kirk's lower numbers leads me to infer that is the only reason for its changed position.

[52] Using Mr. Dyvbig's numbers, the value of the Fee Simple Area is $146,738 and the value of the Permanent RW Area is $89,032. As Surrey has already paid these amounts to the plaintiffs, no further award is necessary.

[53] With respect to compensation for the value of lands taken temporarily, Surrey instructed Mr. Dybvig to use a shorter taking period than the plaintiffs instructed Mr. Kirk to use. At trial, Surrey conceded that the correct period was the one Mr. Kirk was instructed to use, and it paid the plaintiffs the difference between the Advance Payment and Mr. Kirk's figure plus interest. The value of the Temporary RW Area based on Mr. Kirk's calculations is $59,909, which Surrey has already paid.

[54] The remaining Land Claim issue is injurious affection.

[55] Mr. Visco and 498198 claim $290,614 for injurious affection based on Mr. Kirk's opinion that the expropriations resulted in a 10% loss in value to the remaining lands. Surrey's position, based on Mr. Dybvig's opinion, is that there was

no adverse impact on the Property post-expropriation and therefore no injurious affection.

[56] Mr. Kirk's conclusion on injurious affection arises from his determinations that (1) there was a change in the highest and best use of the Property after the expropriation and (2) the loss in value of the remaining lands was 10%. In my view, the evidence supports neither proposition.

[57] Mr. Kirk opined that the highest and best use of the Property before the expropriations was as a full service "branded" new car dealership, whereas afterwards it was reduced to a "secondary automobile sales and service facility or alternatively a satellite service and repair facility to a neighbouring "branded" new car dealership. He also refers to the expropriation as having changed the Property from an "A grade to a B grade auto dealer use."

[58] Mr. Kirk does not provide any evidence of a classification system for auto dealerships or the criteria on which it is based. In his rebuttal report, Mr. Dybvig states that he is unaware of any such classification system. Without evidence of an accepted classification system for auto dealerships, there is no basis to conclude that there was a change in highest and best use: both before and after expropriation, the highest and best use of the Property was as a full service auto dealership. The evidence that new car dealerships are typically full service facilities, with parts and service departments, body and paint shops, whereas used car dealerships tend not to have these services, supports treating Springmans as a full service auto dealership both before and after the expropriation.

[59] Of course, injurious affection can occur without a change in highest and best use. Mr. Kirk identifies two factors that adversely affected the value of the Property after expropriation: a reduction in the parking/vehicle display area and reduced visibility to westbound traffic on Highway 10. The evidence demonstrates that both of these impacts occurred. However, I do not accept Mr. Kirk's evidence on the magnitude of these impacts.

[60] With respect to vehicle display and parking, Mr. Kirk characterizes the functionality of the site as "dramatically impaired" post-expropriation by the loss of parking stalls on the eastern part of the site. While he states that the number of stalls in this area declined from 52 to 10 during construction, he does not address how many remained after construction and return of the Temporary RW Area.

[61] In his report, John Voss, the defendant's expert in transportation engineering, opined that the expropriation caused a loss of seven parking spots on the Property net of the Gazette Area, declining from 80 to 73. In cross-examination, he agreed that the taking of the Fee Simple Area reduced the number of stalls available for display purposes from 44 to 37.

[62] The size of the vehicle display area is obviously important to a car dealership. Dan Springman testified that this area was located on the eastern part of the Property. From my review of Mr. Voss's parking layouts for the eastern parking area (excluding any stalls on Landmark Way, which is at the rear of the Property), the effect of the expropriation is to reduce the eastern display area by seven stalls, from 40 stalls to 33.[1]

[63] As the photographs in Mr. Voss's report show, the overpass partially obstructs the view of the Property to westbound drivers. While the primary dealership sign is visible under the overpass, it is not as noticeable as it would have been before the overpass was constructed. I accept Mr. Voss's evidence that there is no change in visibility of the Property for eastbound drivers, and that actual access to the Property has not been impeded. There is no evidence about whether the Property is visible to drivers on the overpass. I note that Mr. Dyvbig was instructed to assume that it was.

[64] In summary, the lasting impact of the takings was a slight reduction in visibility and the loss of approximately seven out of 40 parking/display stalls in the eastern

[1] Whether or not Mr. Voss's drawings show a realistic layout for vehicle display, they are a useful indicator of the impact of the takings on this aspect of the plaintiffs' business.

part of the Property. How is this expressed as a percentage reduction in market value of the remaining lands?

[65] Mr. Kirk's report states that he does not have market evidence to quantify the injurious affection to the Property. He states that his opinion that there was a 10% reduction in market value is based on his judgment, "taking all matters into account." Mr. Kirk references *Rockcliffe Estates Ltd. v. Langley (City)*, 2014 BCSC 77 as supporting his conclusion. That case also concerned an expropriation of commercial property to construct another overpass over the Langley Bypass. There, the court quantified the injurious affection as a 25% loss in value to the remaining lands based on two appraisal reports. In his report, Mr. Kirk considers that the impact of the takings was greater in that case and settles on 10% as an appropriate reduced value in this case.

[66] Mr. Kirk's expertise lies in forming opinions on loss of value based on market evidence, not in deriving loss of value from case law. I have read *Rockcliffe Estates*. I agree with Mr. Dybvig that the primary cause of the loss in value there was reduced access to the remaining lands: *Rockcliffe Estates* at paras. 48-52. The evidence does not establish any permanent loss of access here. As Mr. Kirk's opinion that there was a 10% loss in value was partly based on his finding that there was a change in highest and best use and that *Rockcliffe Estates* was a useful comparator, I do not accept it.

[67] Surrey submits that the quantification of a loss in value must be based on market evidence, and cannot be assumed: *Nguyen v. British Columbia (Transportation and Infrastructure)*, 2018 BCSC 192 at para. 148. I agree. However, I consider the evidence before me sufficient to demonstrate a reduction in market value of the remaining lands at 5%. Applying a 5% reduction to Mr. Dybvig's price per ft^2 of $52.50 to the remaining areas of 58,710 ft^2, yields a loss in market value of $154,114.

[68] I award Mr. Visco and 498198 $154,114 for injurious affection to the remaining lands. I find Surrey has already fully compensated Mr. Visco and 498198 for the value of the expropriated lands.

Ongoing Land Claim

[69] Mr. Visco and 498198 say that they are entitled to be compensated for the Property's increased market value as of July 1, 2019 because the expropriation forced them to sell the Property in October 2013. They say they lost the opportunity to retain the Property and sell it for greater profit. They characterize this loss as recoverable under the *Act* as a type of disturbance damages.

[70] The premise of this claim is that the sale was "forced." In my view, the evidence does not support that finding. Throughout their closing submissions, the plaintiffs describe their sale of the Property to Mr. Trotman in October 2013 as forced. However, the sale was not forced in the sense of being truly involuntary, as when a person's land is expropriated or when a property is sold in foreclosure (see E.C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed. (Toronto: Carswell,1992) at 274-275).

[71] The plaintiffs say that the sale was forced in a more colloquial sense. They claim that Surrey's abrupt decision to terminate the Float at the end of April 2013 left them in dire financial straits and they had no option other than to sell. They rely on *Rainbow Country Estates Ltd. v. Whistler (Resort Municipality of)*, 2010 BCSC 300. That case was concerned the use of comparable sales of other properties to value land subject to expropriation. The court held that forced or non-market sales are not appropriate comparables. That case is not helpful here. The sale was not made to Surrey, it was made to another auto dealer in an arm's length transaction.

[72] Moreover, the evidence of the circumstances of the sale does not demonstrate that the plaintiffs had no option other than to sell the Property in October 2013.

[73] There was a shortage of auto dealership land on the Langley Bypass, as evidenced by the various offers to buy the Property made to the plaintiffs before and during construction. While the Springman brothers turned down some of these offers, the evidence shows that they were aware of the Property's marketability and were interested in selling at the right price.

[74] In May-June 2011, Karl Jonker, another local auto dealer, expressed interest in the Property. The Springman brothers advised him that they would want more than $8,000,000. Mr. Jonker had the Property appraised but did not proceed further because his Acura brand did not approve the acquisition.

[75] In the spring of 2012, after the expropriation, the plaintiffs considered selling the Property to the Dilawri group. A draft contract of purchase and sale dated May 21, 2012 set the purchase price for the land at $6,323,000. The Springman brothers rejected it because they considered it too low and the proposed deal did not include purchase of the business. Negotiations continued into July 2012, with Dilawri offering to purchase the assets and goodwill of the business as well. The brothers were ready to proceed, but Dilawri backed out. Dan Springman testified about the reason Dilawri's agent gave him during a telephone call. However, that evidence is inadmissible hearsay. Without evidence linking the failure of this deal to the expropriation, there is no basis for finding that the expropriation impaired the plaintiffs' ability to sell the Property.

[76] In October 2012, Dan Springman received a call from an agent looking to purchase the Property on behalf of a client. Dan Springman testified that he did not follow up.

[77] In the fall of 2012, Mr. Trotman expressed interest in leasing the Property with an option to purchase. There was some informal discussion, but no progress. Discussions resumed in the spring of 2013, when construction of the Overpass Project was well underway. Negotiations proceeded, with Mr. Trotman making an offer in an email dated May 30, 2013 to purchase the land and building at $5,850,000, goodwill at $150,000, assets at the lower of book cost or market value.

Springmans responded on June 6, 2013, proposing that an appraiser retained by both parties determine the price of the land and building.

[78] Garnett Wilson's appraisal report, dated June 28, 2013 ("Wilson Appraisal"), valued the land and improvements (excluding the paint booth) at $6,025,000. In addition, the parties agreed that the purchase price for the business would consist of $200,000 for goodwill, $300,000 for assets, $50,000 for leasehold improvements, with an additional payment for tires, accessories and used car inventories outstanding at the time of sale.

[79] This evidence dovetails with Dan Springman's evidence that he was not interested in selling until Surrey stopped the Float Payments in the spring of 2013. Both of the Springman brothers testified that they were exhausted and discouraged by that point, and they subjectively felt that they had no option other than to sell to Mr. Trotman. I have no doubt that the Springman brothers were very upset about the termination of the Float and fed up with the construction. However, that in itself is not enough to establish that the sale was not for fair market value.

[80] Mr. Visco testified that he did not need to sell the Property and that he had mortgage room of $250,000. Although Dan Springman did not want to approach Mr. Visco for more money, he could have done so. Alternatively, he could have approached a financial institution. He said he did not do so. There is no evidence that the plaintiffs considered the option of leasing the business, rather than selling it. Importantly, the Property purchase price was based on a joint appraisal.

[81] The plaintiffs argue that the Dilawri offer, made post-expropriation in May 2012, represents the fair market value of the Property. Based on it, they say that the value of the land was $6,320,000, the value of the goodwill was $300,000 and the value of the assets was "over $650,000." The Wilson Appraisal, which valued the Property at $6,025,000 excluding the paint booth, was conducted 11 months later in June 2013. The contract of purchase and sale used this figure as the purchase price for the Property. Purchase of the business attributed $200,000 to goodwill, $300,000

to equipment and personal property, and $50,000 to leasehold improvements. There was also a payment for unsold inventory.

[82] The plaintiffs have not established that the Dilawri offer, rather than the Wilson Appraisal, represents the fair market value of the Property at the time of sale. The Dilawri offer was made 11 months earlier. The plaintiffs did not take me to evidence about what, if any, market changes occurred during that period. They did not show that the assets valued by Dilawri were the same as the assets valued by Mr. Wilson. There was no independent appraisal of goodwill. The evidence does not demonstrate that the Wilson Appraisal represents anything other than the fair market value of the Property at the time of sale. The fact that Mr. Trotman paid $200,000 for goodwill, $50,000 more than initial his offer, indicates that Springmans negotiated the terms of the sale.

[83] The plaintiffs have not persuaded me that the sale to Mr. Trotman was effectively involuntary. Specifically, their evidence does not show that they lacked access to financial resources that would have enabled them to continue to operate, or that they had no viable option to lease, or that they could not have negotiated a better bargain, at the time they finalized the sale to Mr. Trotman.

[84] I sympathize with the anxiety, uncertainty and disruption the Springman brothers had to endure over the course of the Overpass Project. I accept that they were frustrated and exhausted. However, that does not make the sale a forced sale. Even if I were to find that the plaintiffs sold the Property at less than fair market value (which I do not), it was because they did not have the appetite or energy to maximize their economic interests, not because of the expropriation. As there is no evidence of what else was going on in their lives over that period, a causal connection is speculative.

[85] In light of my conclusion that the sale was not forced, it is not necessary for me to address Surrey's submission that there is no legal basis for the Ongoing Land Claim. However, in light of the submissions on this point, I will say that the plaintiffs' claim is dubious. First, s. 31 of the *Act* clearly fixes the date of expropriation as the

date to determine market value, and that such compensation includes the future potential of the land: *747926 Ontario Ltd. v. Upper Grand School District Board*, 2001 CanLII 24126 at paras. 20-25 (Ont. C.A.); *Rebel Holdings Ltd. v. Division Scolaire Franco-Manitobaine*, 2008 MBCA 65 at para. 201.

[86] Further, I doubt that a loss of opportunity to retain the remaining lands after a partial expropriation falls within the meaning of "disturbance damages" in the *Act*. Such damages relate to the impact of the expropriation on the business and must be reasonable and not remote. Loss of potential future market value does not fall within this description.

[87] Finally, the authorities on which Mr. Visco and 498198 rely do not support their position. In *Associated Building Credits Ltd.*, the claim was for lost opportunities during the pre-expropriation period. There is no discussion of compensation for losses post-expropriation. In *Creative Stretch Fabrics Ltd. v. District of Pitt Meadows* (1994), 54 L.C.R. 128 (B.C.E.C.B.) the respondent district failed to register statutory rights of way when it expropriated the lands, which meant the plaintiff had no physical access to the lands for over three years. The Board awarded compensation for the reduced value of the land during the period. That case is not helpful here. The other cases cited by the plaintiffs are claims in tort, contract and other areas of law, and do not apply here.

[88] I dismiss the plaintiffs' Ongoing Land Claim.

Business Loss Claim

[89] Surrey has already paid the plaintiffs $762,818 through the Float to offset their business losses until the sale on October 31, 2013. This amount must be deducted from any compensation awarded under this heading.

[90] Section 40 of the *Act* entitles owners to "reasonable business losses" … "if and to the extent they are directly attributable to the taking or result from the construction or use of the works for which the land is acquired". In *M.C.A. Land Development Corp. v. British Columbia (Transportation and Infrastructure),* 2014

BCCA 435, the Court of Appeal explained that there must be a causal connection between the expropriation and the loss that is not remote, and the conduct of the claimant must be objectively reasonable in an economic sense (at paras. 31, 39).

[91] Surrey's position that all business losses must be directly attributable to the taking is too limited. Compensable losses also include those resulting from the construction, as long as the causal connection is not remote: *Sequoia Springs West Development Corp. v. British Columbia (Minister of Transportation and Highways)*, 69 L.C.R. 1 at para. 100 (B.C.E.C.B.), aff'd 2003 BCCA 8. With this in mind, I turn to the evidence.

[92] Springmans relies on the expert report of Donald Spence, dated January 8, 2020 ("Spence Report") and Mr. Spence's reply report, dated December 15, 2020 ("Spence Reply") to calculate the business losses suffered by Springmans due to the expropriation. The Spence Report quantifies that loss as $1,162,000.

[93] Springmans also retained Doug Bastin, formerly of Grant Thornton, to opine on the business growth opportunities for Springmans before the expropriation. Mr. Bastin is not an auto industry expert and I did not qualify him in that area. He gathered some publicly available data on new car sales, to which the Spence Reply refers. I do not rely on Mr. Bastin's opinions.

[94] Surrey relies on the expert report of Richard Crosson, dated February 21, 2020 ("Crosson Report"). Surrey provided Mr. Crosson with different assumptions than those the plaintiffs provided to Mr. Spence. Mr. Crosson criticized the Spence Report based on the assumptions he was given, concluding that the Spence Report does not reliably measure Springmans' business losses arising from the expropriation. Mr. Crosson further concludes that he cannot provide a reliable business loss estimate using his methodology. The Spence Reply critiques Mr. Crosson's report, at least in part based on the assumptions in the Spence Report, not the assumptions used by Mr. Crosson.

[95] The parties have prepared their expert evidence in a way that requires me to choose one or the other based on whose assumptions I prefer. It is very difficult to compare the analyses themselves. This is not a criticism of the experts. The parties ought to have instructed both experts to respond to the other in a way assists the court to understand and compare each analysis.

[96] The plaintiffs' submissions on this issue are unhelpful. The plaintiffs attack Mr. Crosson as biased and his opinion as inadmissible; however, they criticize their own expert for undervaluing their losses. Surrey's submission on business loss appears to be premised on the assumption that if the plaintiffs cannot prove their damages on a balance of probabilities, they are not entitled to them. That is not the law. While a plaintiff must prove the existence of a loss on a balance of probabilities, once they have done so, the court must do its best to quantify damages based on the evidence before it: see, for example, *Acumen Law Corp v. Ojanen*, 2021 BCCA 189 at paras. 62-69.

[97] Surrey concedes that Springmans experienced some business losses due to the Overpass Project. In my view there is ample evidence to support that conclusion. I must therefore do my best to quantify the loss based on the evidence before me.

[98] I start with the methodology used by the experts. They agree that a margin variance analysis is an appropriate way of calculating business losses. Briefly, "margin" is the excess of sales revenue over costs. Projected sales revenue over the loss period is calculated by applying a market adjustment factor to the sales in an earlier period, called the "base period." Costs for the projected margin calculation are based on historical levels of costs. The margin variance is then calculated by comparing the projected margin for the loss period with Springmans' actual margin in the loss period.

[99] Mr. Spence and Mr. Crosson disagree about the following:

- definition of the loss period,
- definition of the base period,

- whether the margin variation analysis should be conducted for the business as a whole or separately for each department (new car sales, used car sales, service, parts, and body shop),
- what market adjustment factor to apply to calculate projected sales revenue,
- whether a composite of new and used car sales data or only used car data should be used for projected sales, and
- what parts of the business losses are reasonably attributable to the Overpass Project.

[100] With respect to defining the loss period, the case law establishes that owners may claim pre-expropriation damages where an anticipated taking causes loss: see *Associated Building Credits Ltd.* at para 42. In the summer of 2011, Surrey told the Springman brothers that the expropriation would occur in early 2012, and expropriation notices were served in late January. The Springman brothers' evidence was that they started to make business decisions based on the anticipated expropriations in the fall of 2011, including reducing inventory and meeting with staff. Dan Springman, in particular, devoted a considerable percentage of his time from January 2012 on to preparing for and meeting with Surrey's representatives to discuss the consequences of the expropriation, including mitigation measures. The expropriations actually occurred in March 2012. I find that the loss period commenced on January 1, 2012 and ended on October 31, 2103 ("Loss Period").

[101] The plaintiffs claim for losses incurred in 2011 in addition to their claim for the Loss Period. They describe these losses as "obvious but largely unquantified" and claim $35,189 in lost internal sales based on their comparison of their internal sales in the first and second halves of 2011. The plaintiffs provide no explanation for why they asked Mr. Spence to use a Loss Period starting on January 1, 2012 and not earlier. The evidence does not satisfy me that the claimed amount is attributable to the expropriation rather than other factors. I dismiss it as speculative.

[102] Mr. Spence uses 2011 as the base period. Mr. Crosson uses the 24 months from May 2010 to June 2012, based on his instruction that the Loss Period commenced in June 2012. I agree with Mr. Spence that a base period that overlaps

with the Loss Period is not appropriate, and I therefore use Mr. Spence's base period.

[103] Both experts had reasonable explanations for their choice of whether to conduct the analysis for the business as a whole or for its separate departments. Springmans' practice of running each department as a separate business for internal accounting purposes supports Mr. Crosson's approach. However, as he points out, this meant he had to rely on Springmans' internal financial statements, which contained errors and inaccuracies. Mr. Crosson did his best to make "adjustments" to address but was not provided with all source documents or an opportunity to discuss these matters with Dan Springman or Springmans' accounting staff because they refused to speak with him. Mr. Crosson acknowledges that this prevented him from being able to provide a reliable estimate of Springmans' business losses.

[104] By contrast, Mr. Spence relied on year-end external financial statements and analysed margin variance for the business as a whole. While this may be less reliable than an analysis for each business unit, the quality of the evidence makes it necessary here.

[105] Mr. Spence used a market adjustment factor of 6% to estimate the projected increase in sales over the Loss Period, based on its history of increasing sales margins of 4.3% in 2009, 4.7% in 2010, and 5.5% in 2011, and assuming the trend would continue. Mr. Crosson disagreed. He noted that sales margins differed significantly between different departments. According to him, in 2011, there was a loss of 17.8% in new car sales, an increase of 0.1% in used car sales, 22.7% in body shop sales. For the reasons outlined above, it is not possible to analyse each department separately. I find the evidence supports Mr. Spence's use of 6%.

[106] Mr. Spence used a composite of new and used car sales data, whereas Mr. Crosson excluded new car sales data. The difference is important because new car sales were increasing and used car sales were declining in British Columbia during the Loss Period. Throughout the Loss Period, Springmans did not have a new car "brand." It had some new Saab inventory that it had to dispose of, and its used car

inventory contained a mix of one to five year-old cars (generally sold by new car dealers) and older vehicles. Springmans was built and structured as a full service dealership. That is typical of new car dealers and atypical of used car dealers. In my view, the evidence supports Mr. Spence's use of a composite of new and used car sales data.

[107] The question of what business losses are attributable to the Overpass Project is challenging. Mr. Spence was instructed to assume that it had a significantly adverse impact on the business leading to a forced sale. In the end, Mr. Spence assumes that 100% of the business loss was attributable to the Overpass Project. The Crosson report repeatedly questions the basis for this assumption, but does not attempt to quantify what percentage of Springmans' business loss is not attributable to the construction.

[108] Mr. Crosson does identify and quantify certain items, which he describes as "unusual", as not attributable to the Overpass Project. I will address each.

[109] Mr. Crosson notes a year-end adjusting journal entry of $78,000 "reserves" of 2012 income that appears to relate to the prior year. Neither the Spence Reply nor the plaintiffs address this issue. I accept Mr. Crosson's opinion that this should be excluded from the quantification of business loss.

[110] Mr. Crosson points to $42,000 in shareholder loan interest of $42,000 that was expensed by Springmans in 2013 that is not attributable to the Overpass Project. In his reply, Mr. Spence agrees this ought to be deducted from calculation of business losses. I will deduct this amount.

[111] Mr. Crosson comments that interest and personnel costs were unusually high in October 2013. Elsewhere in his report, he describes in detail his concerns with the $291,000 in personnel costs attributed by Mr. Spence to the expropriation over the Loss Period. However, Mr. Crosson does not quantify what amounts should be deducted from the claim (which would be difficult since the loss period he uses is shorter than the Loss Period). Nor does he suggest that these amounts were not

actually paid. The evidence satisfies me that the plaintiffs had to pay their staff more in order to keep the business going until the October sale. I accept Mr. Spence's calculation of higher personnel costs component of the business loss.

[112] I agree with Mr. Crosson that the $131,000 loss on Saab sales is not attributable to the Overpass Project. Mr. Spence conceded this in cross-examination. Dan Springman testified at length about the virtual impossibility of getting rid of the "poisoned" Saturn inventory when GM discontinued that brand in 2009. This amount must be deducted from the claimed loss.

[113] As well, I agree with Mr. Crosson that the recording of $83,000 in October 2013 on the sale of Springmans parts and vehicle inventories relates to winding up the company's financial affairs, and is not a compensable business loss.

[114] Deducting these amounts from the estimate of $1,162,000 in the Spence Report produces a total of $828,000.

[115] In its closing submissions, Surrey submits that the Spence Report fails to attribute any business losses to the taking of the Gazette Area. It is true that the loss of the Gazette Area was not due to the expropriation, but to the Province's exercise of its rights to that land. It is theoretically possible that some portion of the business losses experienced by Springmans could have flowed from the loss of the Gazette Area. For example, if the loss of some parking stalls was due to the loss of the Gazette Area rather than to the expropriation, and there was evidence that the loss of those stalls lowered sales revenue, one could quantify a business loss attributable to loss of the Gazette Area.

[116] I infer from the plaintiffs' failure to put this to Mr. Spence that they take the position that no business loss is attributable to the loss of the Gazette Area. While Surrey raises this possibility, they did not put it to Mr. Crosson or lead other evidence supporting their position. It remains no more than an unquantified possibility. As such, I decline to deduct any portion of the Business Loss Claim on this basis.

[117] The plaintiffs' closing submission proposes an alternative basis for calculating business losses based on what Surrey would have paid them had the Float continued to the end of October 2013. Calculating business losses on this basis flies in the face of the express terms of the agreement establishing the Float: these were without prejudice payments and were not to be relied upon by anyone for calculating business losses.

[118] Since Surrey has already paid Springmans $762,818 through the Float to offset its business losses, I award Springmans $65,182 plus interest in respect of its Business Loss Claim.

Ongoing Business Loss Claim

[119] For the reasons I have set out under the heading "Ongoing Land Claim," the plaintiffs' claim for business losses after sale of the business to Mr. Trotman cannot succeed. Having found that the Springman brothers chose to sell the business and did so in an arm's length transaction, it follows that they were fully compensated for it as of the date of sale. This claim is dismissed.

CONCLUSION

[120] In conclusion, I award Mr. Visco and 498198 $154,114 plus interest in respect of the Land Claim, specifically for injurious affection. I award Springmans $65,182 plus interest in respect of the Business Loss Claim. The Ongoing Land Claim and the Ongoing Business Loss Claim are dismissed.

[121] With respect to the claims under ss. 45 and 46 of the *Act*, if the parties are unable to settle these matters, they may apply to me to determine them based on the evidence in the record.

"Iyer J."