IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Holly C. Beard
Mr. Justice Christopher J. Mainella

B E T W E E N :

CAREN DAVIS, DAVID DAVIS and CAREN (RACHEL) DAVIS	)	***J. A. Mercury*** *and* ***D. J. Dubois*** *for the Appellants*
(Owners) Appellants	)	***T. J. Bjornson*** *and* ***D. A. Johnston***
- and -	)	*for the Respondent*
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF MANITOBA	)	*Appeal heard* ***January 9, 2019***
(Authority) Respondent	)	*Judgment delivered:* ***July 8, 2019***

BEARD JA

I. THE ISSUES

[1] This is an appeal by one of the owners, Caren Rachel Davis (the owner), under section 44(1) of *The Expropriation Act*, CCSM c E190, of the amount certified by the Land Value Appraisal Commission (the LVAC) as compensation for land owned by her (Parcel 1) and expropriated by the authority (Manitoba). The issues on appeal are as follows:

(i) Did the LVAC err by disregarding the award that it made in *Kleysen v Manitoba*, 2014 CarswellMan 239 (*Kleysen LVAC*), when valuing Parcel 1, and thereby offend the common law doctrines of

issue estoppel and abuse of process and the principles of consistency and fairness?

(ii) Is it open to the owner to raise the issue of a breach of the common law doctrines of issue estoppel and abuse of process if those issues were not raised and argued before the LVAC?

(iii) Does the principle of *stare decisis* apply to the valuation of the subject land?

(iv) What is the applicable standard of review?

II. THE FACTS

[2] In September 2008, the Government of Manitoba introduced legislation that created CentrePort as Canada's first inland port, to be located on land adjacent to the Winnipeg James Armstrong Richardson International Airport.

[3] In April 2009, the Federal Government allocated $212.4 million to construct an access road, called CentrePort Canada Way, from the Perimeter Highway on the west side of the City of Winnipeg (Winnipeg). Manitoba was required to acquire land for the implementation of this project, including the construction of the access road. The owners who had land designated for acquisition for this project included Hubert Kleysen, Genstar Titleco Limited (Genstar) and the owner.

[4] In 2010 and 2011, Manitoba proceeded with the expropriations. Mr. Kleysen's land and the owner's land were close together and, at some points, contiguous. Together, they retained a land appraiser to prepare a joint

report regarding the market value of their properties, which they both used in their negotiations with Manitoba. When they were not able to conclude an agreement for the sale of their properties to Manitoba, each proceeded separately with an application to have the amount of the compensation for the land set by the LVAC, and each filed the appraisal report, together with other evidence, in support of their compensation claims.

[5] The Kleysen claim proceeded first. Mr. Kleysen argued that the highest and best use of his land was to develop it as a rural enterprise subdivision, which he valued at $100,000 per acre. Manitoba argued that the highest and best use was to hold it as a speculative holding, which it valued at $15,000 per acre. The LVAC determined that the highest and best use of the land was as a commercial/industrial development and it set the value at $50,000 per acre. Manitoba appealed that decision to this Court (see *Kleysen v Her Majesty the Queen in Right of the Province of Manitoba*, 2015 MBCA 54 (*Kleysen CA*)), which concluded that "the award in this case was within an acceptable and reasonable range and sufficiently explained by the LVAC" (at para 33). It dismissed the appeal and upheld the award.

[6] The hearing of the owner's claim by the LVAC began in June 2016. Before it could be completed, there was a change in government and new members were appointed to the LVAC. As a result, a new hearing was conducted before a new panel. The owner made essentially the same arguments as Mr. Kleysen regarding the highest and best use. She initially took the position, through her experts, that her land should be valued at $80,000 per acre, but reduced that to $60,000 during the hearing. She also referred the LVAC to several earlier decisions in which other panels had

applied the principle of consistency when valuing properties that were taken in the same expropriation.

[7] Manitoba argued, as it had at the Kleysen hearing, that the property was not ready for development and that the highest and best use was as a speculative holding with a value of $12,000 per acre. In addition to calling its appraisal expert, it also called two experts in the area of land-use planning who had not testified at the Kleysen hearing. In response to the consistency argument, Manitoba argued that the LVAC was not bound by its earlier decisions, and that this case, which involved different evidence, should be decided on its own facts.

[8] The LVAC considered the arguments regarding consistency, but stated that its function was to decide this case on the evidence that was called, which differed from that at the Kleysen hearing. It found that the highest and best use was as a speculative holding and it set the value at $27,000 per acre. It is from this decision that the owner appeals the valuation. Two smaller pieces of property were owned by the owners (Parcels 2 and 3) and valued by the LVAC at $30,000 and $22,000 per acre before injurious affection. Those valuations have not been appealed.

III. ANALYSIS

(i) Issue Estoppel and Abuse of Process

(a) Does This Ground Raise New Issues?

[9] The owner is now arguing that, applying the doctrines of issue estoppel and abuse of process, the LVAC was required to adopt the finding in *Kleysen (LVAC)* that the highest and best use of the land was as a

commercial/industrial development. This is not, however, the position that she took at the hearing.

[10] In her opening statement, Manitoba's lawyer stated:

> In a nutshell, this case is about whether the land taken was ripe for development on the date of expropriation or would it continue to be farmed, with the potential to be developed at some later time. That makes a big difference in determining the compensation [the owner] is to receive.
>
> Two sub-issues in determining the fair market value of the land will be the highest and best use of the land and the best method by which to value the land. . . .
>
> Manitoba's appraiser . . . will testify that the subject should be valued for a higher use than agriculture land, but that development was not imminent; therefore, the land had a speculative value but could not be developed at the time of expropriation. . . .
>
> The owner's appraiser has a different view. He says that the land was ready to be developed; therefore, Manitoba will provide rebuttal evidence in response to that evidence.
>
> [emphasis added]

[11] In reply, the owner's lawyer stated, "No, I agree with everything my learned friend says, except that she's too cheap." There was no reference to any of the findings in *Kleysen LVAC* or that the LVAC was bound by any earlier findings. Further, the owner did not object to Manitoba calling evidence on the question of highest and best use and/or the value of the land on the basis that those issues had already been determined in *Kleysen LVAC*, or to it calling additional expert witnesses to give additional evidence about those issues.

[12] In his written submissions on closing, the owner's lawyer stated:

> 81. . . . The market value of the lands held with regard to the [owner's] neighbours' properties – namely those of Mr. Kleysen and Genstar – should inform the [LVAC] in its present determination of market value.
>
> 86. These valuations of lands neighbouring the [owner's lands], which were expropriated for the same project, must inform the [LVAC]'s decision. This principle of consistency has been asserted in many decisions of the [LVAC]. . . .
>
> 89. The [LVAC] should therefore, as impelled by its precedent, follow the valuation established in the Kleysen decision as a minimum benchmark for the valuation of the [owner's] lands. The value of the neighboring Genstar lands should also be persuasive.

[13] The owner did not argue in those submissions that any legal principles required that she should receive what was paid to either Mr. Kleysen or Genstar; rather, she argued that the results in those cases should be considered by the LVAC, which should be guided by them. Her final position was that she should receive more than was awarded to Mr. Kleysen and more than was accepted by Genstar.

[14] The owner now states, in her factum, that "Manitoba was *estopped* from advancing that new evidentiary record, and the [LVAC] erred in declining to hold otherwise." In fact, there was no objection taken to Manitoba calling new evidence and no argument advanced to the LVAC that Manitoba was estopped from doing so.

[15] It is clear that the application of the doctrines of issue estoppel and abuse of process were not raised or argued before the LVAC—they are being raised before this Court for the first time. As the LVAC had made no decision

on these issues, there is no decision to be appealed and, therefore, no standard of review to be applied.

(b) Raising New Issues on Appeal—the Test

[16] The test for permitting a new issue to be raised on appeal was recently explained by the Supreme Court of Canada in *Guindon v Canada*, 2015 SCC 41 at paras 21-23:

> The Court has many times affirmed that it may, in appropriate circumstances, allow parties to raise on appeal an argument, even a new constitutional argument, that was not raised, or was not properly raised in the courts below: see, e.g., *R. v. Brown*, [1993] 2 S.C.R. 918; *Corporation professionnelle des médecins du Québec v. Thibault*, [1988] 1 S.C.R. 1033; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678. The Court has even done so of its own motion, as we shall see.
>
> The test for whether new issues should be considered is a stringent one. As Binnie J. put it in Sylvan Lake, "The Court is free to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice": para. 33. While this Court can hear and decide new issues, this discretion is not exercised routinely or lightly.
>
> . . . The burden is on the appellant to persuade the Court that, in light of all of the circumstances, it should exercise its discretion to hear and decide the issue. There is no assumption of an absence of prejudice. The Court's discretion to hear and decide new issues should only be exercised exceptionally and never unless the challenger shows that doing so causes no prejudice to the parties.

(See also *The Rural Municipality of St Clements v Zucawich*, 2013 MBCA 65 at paras 92-98; *Samborski Garden Supplies Ltd v MacDonald (Rural Municipality)*, 2015 MBCA 26 at para 27; *Wolfe et al v Taylor et al*, 2017 MBCA 124 at paras 6-8; *Sawatzky v Sawatzky*, 2018 MBCA 102 at paras 23-

25; and *Dakota Ojibway Child and Family Services v KRF et al*, 2018 MBCA 104 at para 29.)

[17] In *Harder v Manitoba Public Insurance Corp et al*, 2012 MBCA 101, Chartier JA (as he then was), explained the reason for this rule (at paras 12-13):

> The basis for this general rule is simple. Appellate courts review decisions to correct error. If an issue is not raised in the first instance, it is difficult for an appellant to argue that the decision-maker committed an error on that issue.
>
> Moreover, in administrative law, applying the reasonableness standard to an issue not raised before the tribunal poses unique challenges. The standard of reasonableness basically involves asking, "After a somewhat probing examination, can the reasons given, when taken as a whole, support the decision?" (*Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 47, [2003] 1 S.C.R. 247). There has to be a "line of analysis within the … reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived" (*Ryan* at para. 55, and see *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190). As can be seen from the above, there is a direct correlation between the standard of reasonableness and the reasons given by the administrative tribunal. The inescapable reality in this case is that since the s. 6 argument was never raised before the Commission, there are no express reasons to review on that issue.

[18] In *R v Beaulieu*, 2015 MBCA 90, Steel JA, for the Court, explained and dealt with the ground that raised a new issue as follows (at paras 64, 66, 68):

> As a general rule, new issues will not be entertained on appeal. Beside the clear interest in supporting finality of litigation, raising new issues on appeal can raise concerns of prejudice to the other side caused by the lack of opportunity to respond and adduce evidence at trial; and the lack of a sufficient record upon which to

> make the findings of fact necessary to properly rule on the new issue.
>
> However, exceptions [to the general rule] should be permitted only where the interests of justice require it and the court has a sufficient evidentiary record and findings of fact to resolve the issue. . . .
>
> However, if the argument had been raised, it may be that the Crown would have been able to offer an explanation. Given that the argument was not raised substantively at the hearing, it is understandable why no explanation was given, and no evidence was led as to the reason for delay. There is no record upon which to debate the merits of this argument. No foundation was laid for this Court to assess it.

(c) Issue Estoppel

[19] In *Toronto (City) v CUPE, Local 79*, 2003 SCC 63, the Supreme Court of Canada reviewed the conditions that underlie the common law doctrines of issue estoppel and abuse of process. Arbour J, for the majority, confirmed the preconditions for issue estoppel to be as follows (at para 23):

> . . . For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies.

(See also *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at para 25; and *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at para 27.)

[20] The applicability of issue estoppel is problematic in this case, one reason being the requirement that the parties to the proceedings must be the same or their privies. It is clear that the parties in this case are not the same,

given that there was no connection or relationship between Mr. Kleysen and the owner, other than that their lands were close together. While the owner referred to the decision in *EnerNorth Industries Inc, Re,* 2009 ONCA 536, in support of its interpretation of privies, in that case, the parties under consideration who were found to be privies were a company, in one proceeding, and two of its officers, in the other.

[21] The determination of whether the owner and Mr. Kleysen were privies would, in the end, require a finding of fact. In this case, it is doubtful that the owner's argument would succeed, but it is a finding of fact that should be made by the LVAC in the first instance, after hearing evidence on that issue. It would be unfair to Manitoba to make any finding without it first having the opportunity to call evidence and otherwise address the issue.

[22] In oral argument on appeal, the lawyer for the owner acknowledged the weakness of their position on privies and agreed that they were, in essence, relying on the doctrine of abuse of process, rather than issue estoppel. Thus, I would dismiss the owner's appeal on the ground of issue estoppel on the basis that it was raised for the first time on appeal, the issues to be determined are factual in nature and have not been determined by the LVAC, and this is not one of those exceptional cases where this Court should hear and determine this new issue for the first time on appeal.

(d) Abuse of Process

[23] In *Toronto (City)*, Arbour J explained the doctrine of abuse of process as follows (at paras 35, 37, 52):

> Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was

> described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" . . . and as "oppressive treatment". . . .
>
> . . . Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.
>
> . . . There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. . . .

(See also *Figliola* at paras 31-34.)

[24] While there are similarities between the expropriations of the Kleysen property and Parcel 1, there are also differences, including differences between the characteristics of the properties. While the owner argues that these differences are minor in nature and would not affect the outcome of the analysis, Manitoba is not in agreement. Clearly, that is an issue of fact that should have been argued and determined by the LVAC.

[25] Allowing the owner to argue abuse of process at this stage is unfair to Manitoba because it had no notice that that would be her position. It was agreed that the major issues before the LVAC would be the determination of the highest and best use of the land and the imminence of the development of the land. Thus, Manitoba focussed its evidence on those issues, calling two expert witnesses who did not testify at the Kleysen hearing to address the

planning legislation and issues related to obtaining a variation or otherwise changing the permitted uses so that the property could be developed as proposed by the owner. The owner received their reports and examined them in preparation for the hearing without giving any notice to Manitoba that her position would be that it would be an abuse of process for the LVAC to make any finding that was contrary to that in *Kleysen (LVAC)*. Thus, Manitoba did not focus on or address that issue, other than to speak to the related but legally different question of consistency, which I will deal with below.

[26] The owner now takes the position that there is no substantial difference between the Kleysen property and Parcel 1. That is a question of fact that should be decided by the LVAC, not by this Court in the first instance.

[27] There are two other issues that do not support a finding of abuse of process. First, three parcels of land were expropriated from the owners, all of which were close to the Kleysen land, and the LVAC came to the same conclusion regarding the highest and best use for all three parcels. Parcel 2 was valued at $30,000 per acre, while Parcel 3 was valued at $22,000 per acre. To come to these conclusions, the LVAC was required to consider and compare the characteristics of the land, and it made its determination of the value in the same manner as it did for Parcel 1, that is, by looking at the characteristics of the land. The owner is not arguing that the findings in *Kleysen (LVAC)* should apply to Parcels 2 or 3. In the case of all three parcels, these are clearly findings of fact that were to be made by the LVAC based on the evidence that it heard and the arguments of the parties.

[28] Secondly, the owner did not take the position before the LVAC that Parcel 1 should be valued at the same amount as the Kleysen land. She argued

that Parcel 1 was sufficiently different that she should receive significantly more for it than was awarded for the Kleysen land. As was noted above, her position, throughout the proceedings and until part way through the hearing, was that Parcel 1 was worth $80,000 per acre. Thus, her position on value was not consistent with now arguing that it would be an abuse of process to fail to apply the findings in *Kleysen (LVAC)*.

[29] In my view, the questions of the application of the doctrine of abuse of process and the findings in *Kleysen (LVAC)* involve findings of fact that were not made by the LVAC because those issues were not raised. Further, it would be unfair to Manitoba to decide this appeal on this basis when it had no notice of this claim and no opportunity to call evidence and otherwise address it before the LVAC. In my view, this is not one of those exceptional cases where this Court should hear and determine this new issue for the first time on appeal.

(ii) *Consistency*

(a) *The Issue and the Standard of Review*

[30] This issue raises the question of whether the LVAC erred in its interpretation and application of the factor of consistency as between the valuations of separate properties that are expropriated for the same purpose.

[31] The owner argues that the applicable standard of review is correctness because the LVAC's decision involves a balancing of the rights of the general public with the rights of multiple property owners. Manitoba argues that the standard of review is that of reasonableness.

[32] In *Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47, Karakatsanis J, for the majority, stated (at para 22):

> . . . The reviewing court should begin by considering whether the issue involves the interpretation by an administrative body of its own statute or statutes closely connected to its function. If so, the standard of review is presumed to be reasonableness. . . .

(See also *Loewen v Manitoba Teachers' Society*, 2015 MBCA 13 at paras 47-50; and *Kleysen (CA)* at para 8.)

[33] In this case, the substantive issue is whether the LVAC erred in its application of the principle of consistency and in the determination of the value of the property. This turns on the interpretation and application of the LVAC's home statute and its own jurisprudence. In my view, the standard of review is that of reasonableness.

(b) The Proceedings at the LVAC

[34] It is clear that, in this case, the owner did raise this as an issue to be considered by the LVAC, arguing before the LVAC:

> These valuations of lands neighbouring the [owner's land] . . . must inform the [LVAC]'s decision. This principle of consistency has been asserted in many decisions of the [LVAC]. . . .
>
> The [LVAC] should therefore, as impelled by its precedent, follow the valuation established in the Kleysen decision as a minimum benchmark for the valuation of the [owner's] lands. The value of the neighboring Genstar lands should also be persuasive.

[35] Manitoba replied before the LVAC that, while it was good practice for tribunals to be consistent in certain circumstances, where there was

additional evidence to rebut much of the owner's evidence, the LVAC was entitled to perform an analysis and find its own value.

[36] The LVAC addressed this issue in its reasons, stating:

> . . . While the Commission acknowledges the principle of consistency, it is of the view that the application of this principle is not absolute. If this Commission were to strictly apply the valuation in Kleysen, where that decision is based on a different evidentiary record and analysis than the case now before it, such an approach would undermine the decision-making autonomy and duty of this Commission to apply their expertise and analysis in reaching their own independent conclusions.

(c) The Parties' Positions

[37] The owner's position in this Court is that the LVAC's decision "represents a marked departure from its long-standing and repeated commitment to making consistent rulings when multiple properties are expropriated for the same purpose."

[38] The jurisprudence that the owner referred to both at the hearing and in this Court consisted of several decisions of the LVAC that addressed consistency.

[39] In reply before this Court, Manitoba states as follows:

> The [LVAC] stated that it was mindful of the guiding principles of fairness and of consistency and understood that *The Expropriation Act* is to be read in a broad and purposive manner. The [LVAC] acknowledged that to strictly apply the valuation of Kleysen, which was different land based on different evidence, would undermine its duty.

(d) Analysis

Nature of the LVAC's Decision

[40] The owner explained the nature of the issue to be resolved by the LVAC in her factum as follows:

> The central question before both the [LVAC] was the "highest and best use" and, ultimately, the fair market value of the subject lands. [The LVAC] recognized that "the concept of highest and best use is the *cornerstone supporting whatever compensation might be awarded*".
>
> The question of the "highest and best use" of an expropriated property is a question [of] *fact*, not law.
>
> The determination of "fair market value" is also a question [of] *fact*.

[41] While these comments were made by the owner in the context of her arguments on *stare decisis*, they apply equally here.

LVAC Jurisprudence

[42] The owner has referred to several cases in support of her argument regarding the application of consistency.

[43] The owner argues that, in *Dorge v Winnipeg (City)*, 1999 CarswellMan 416, the LVAC determined that the compensation awarded to others was the starting point for setting compensation for other owners. In her written brief, she argued that the compensation paid to Mr. Kleysen was a minimum benchmark.

[44] In my view, neither of these propositions is correct. In *Dorge*, the LVAC stated (at para 20): "[s]econd, in a multi-property expropriation

project consistency is a very relevant factor." In that case, Winnipeg had expropriated land from several owners along Pembina Highway to widen it by adding a median and two lanes. The contentious issue was determining an appropriate award for injurious affection, being the effect of the expropriation on the unexpropriated portion of the property. The LVAC acknowledged the amount that was awarded to another property owner, but then went on to compare the characteristics of the two properties and concluded that the Dorges were entitled to a much lower amount due to the lesser effect of the project on their remaining property compared to the effects on the neighbour's property.

[45] Thus, while the amount paid to the other owner was relevant, it was neither binding nor a minimum benchmark. In the end, the LVAC based its decision on the evidence that it heard about the subject property.

[46] The owner also referenced the LVAC's decision in *Joli Enterprises Ltd v Manitoba*, 2001 CarswellMan 681. In that decision, the LVAC expressed the view that (at para 14):

> . . . It seems to the Commission that, along with comparable sales, in a multi-property expropriation project, its decisions are an equally relevant, if not more pertinent, indicator of market value in a subsequent case before the Commission. Surely, appraisers must expect the Commission to take into account its own comparable decisions.

[47] While considering the compensation awarded for comparable acquisitions, the LVAC looked at the characteristics of the various properties as compared to the subject property to determine the value of the subject property. Thus, while the values of the other properties were relevant, they were not determinative.

[48] Finally, the owner refers to *Quiring v Manitoba (Department of Highways)*, 1991 CarswellMan 448. In that case, several pieces of property were expropriated along P.T.H. No. 1, two belonging to Mr. Quiring and his company. When determining the value of the expropriated properties, the LVAC took into account the amount paid for other properties, but looked at the characteristics of each property to determine the appropriate value for the subject property.

[49] In that case, Manitoba had settled a number of claims with other property owners and, as part of those settlements, had agreed to pay an amount for injurious affection. Manitoba argued that no injurious affection should be paid to Quiring because the owner had put forth no evidence to support the claim. The LVAC did not agree, stating (at para 16):

> The [LVAC] can see no difference between the situation of the subject parent parcels and those other parcels in the expropriation project whose owners through settlement received injurious affection compensation. Even if the respondent wrongly agreed to pay injurious affection compensation to other owners in the expropriation project, surely for the sake of fairness in terms of consistency such compensation must be certified in this case on the same basis. . . .

[50] That decision is distinguishable from the present case in that compensation for injurious affection had been offered by Manitoba to other owners, and the LVAC was of the view that fairness and consistency required that the same offer should be extended to Quiring—that is, that Manitoba should treat all owners the same. In the present case, the owner is not relying on any offers of compensation by Manitoba to Mr. Kleysen. Further, Manitoba takes the same position regarding highest and best use and value in this case as it took in *Kleysen LVAC*, so it cannot be said that Manitoba was

not treating the owner fairly or consistently. Manitoba did settle with Genstar, but that settlement is far below the amount sought by the owner for Parcel 1. (See also *Narfason v Manitoba (Department of Highways & Transportation)*, 1993 CarswellMan 545 (LVAC).)

[51] The owner also relies on the finding of Hewak CJQB in *Bjarnarson et al v Government of Manitoba* (1987), 38 DLR (4th) 32 (Man QB), aff'd 45 DLR (4th) 766 (Man CA). Hewak CJQB, on a motion to strike portions of Manitoba's statement of defence, found that Manitoba could not re-litigate the question of its liability in negligence for causing flooding to several farms. This was upheld by this Court, Monnin CJM finding that it would have been an abuse of process to permit the claim to proceed. I have already explained why the doctrine of abuse of process is not available to assist the owner in this case.

[52] *Herda v Manitoba (Department of Highways)*, 1988 CarswellMan 263, is a decision of the LVAC to which the owner did not refer, but it deals with compensation for other properties expropriated for the same purpose—in that case, a highway. Herda argued that the market value for her property should be based on the $2,500 per acre that the LVAC had certified for other properties, noting that her property was being used in the same manner as the others. The LVAC compared the properties and concluded that there were differences between the properties and "[t]his fact makes irrelevant the market values of the strips of land expropriated in the [other] cases" (at para 10).

[53] In summary, the LVAC jurisprudence demonstrates that it has developed a practice of considering fairness and consistency when adjudicating claims related to neighbouring lands expropriated for the same project. It is applied as an evidentiary factor, to be weighed along with the

other evidence. Even where the consistency factor is applied, there are more cases where it is followed in a qualified fashion than where it is followed absolutely, and most of those are factually distinguishable from the present matter. One reason for this is that landowners, like the owner in this case, often argue that their land or the injurious affection should be assessed at a higher value than the other properties that were expropriated.

(e) Conclusion

[54] In my view, the primary role of the LVAC is to value expropriated land based on evidence that is relevant to that land. The principle of consistency that has been applied by the LVAC includes, as a relevant consideration, the factual issue of whether the authority, here Manitoba, is being fair and consistent in its dealings with owners of neighbouring lands that are expropriated for the same project. This is not a binding requirement that is determinative of the outcome, but only one factor among many. While the LVAC can give weight to this factor, it is not required to do so. In other words, the principle is relevant but not determinative, and may, in the end, have no application if the LVAC decides that that is so in light of all of the evidence in a given case.

[55] In the present case, Manitoba was consistent in the position that it put forward regarding the Kleysen property and Parcel 1—it simply presented more evidence on those issues in this case than it did in *Kleysen LVAC*. The LVAC had to decide the claim based on the evidence before it. Manitoba treated both landowners the same, in that it litigated both claims on the same basis and suggested similarly low values for both properties. Even if part of the LVAC's role is to ensure that Manitoba acts fairly, as is suggested, that does not and cannot force the LVAC to adhere slavishly to its own prior

rulings when deciding a case related to different properties and on different evidence.

[56] In my view, the LVAC did not depart from its long-standing commitment to make consistent rulings when multiple properties are expropriated for the same purpose. It clearly considered its decision in *Kleysen LVAC* and it acted reasonably when it decided the value on the basis of evidence that was called. The LVAC is best placed to weigh evidence, even when weighing evidence means weighing its own prior decision against the evidence presented to it at the present hearing.

[57] Thus, the LVAC did not err by failing to apply the factor or principle of consistency when determining the value of the subject property, and its award is not unreasonable. I would, therefore, dismiss this ground of appeal.

(iii) Does the Principle of Stare Decisis Apply to the Valuation of the Subject Land?

[58] Before the LVAC, Manitoba argued that the LVAC was not bound by the findings in the *Kleysen (LVAC)* decision because the LVAC was not bound by the doctrine of *stare decisis*. It based its argument on jurisprudence related to the differences between the manner in which decisions are rendered by the courts and by administrative tribunals, as explained by Iacobucci J, in dissent, in *Weber v Ontario Hydro*, [1995] 2 SCR 929 at para 14. The LVAC accepted this argument.

[59] The owner now argues that the doctrine of *stare decisis* does not apply in this case because that doctrine pertains only to questions of law, while the questions in this case of the highest and best use of the owner's land and

the compensation to be paid are questions of fact. Thus, the owner argues that the LVAC erred in its finding.

[60] If the LVAC misapplied the doctrine of *stare decisis* as argued by the owner, that would be an error of law. That said, any error must be material to the decision before an appellate court can take steps to correct it.

[61] Even if the LVAC erred in its reason for refusing to apply *stare decisis*, it came to the same conclusion that is now being proposed by the owner—that is, that the doctrine of *stare decisis* did not apply in this case. Thus, this error did not result in a different outcome than was being put forth by the owner—that the doctrine of *stare decisis* did not apply. I would, therefore, dismiss this ground of appeal on the basis that appellate intervention is not justified because the error did not have a material effect on the outcome. (See, for example, Donald JM Brown with the assistance of David Fairlie, *Civil Appeals* (Toronto: Thomson Reuters, 2017) vol 2 (loose-leaf updated March 2019), at paras 6:1112, 6:1210.

[62] Given this conclusion, the standard of review is not engaged.

IV. DECISION

[63] For these reasons, I would dismiss the appeal.

Beard JA

I agree: Monnin JA

I agree: Mainella JA