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# Expropriation Law: A Brief Overview

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## Expropriation Law: A Brief Overview <sup>1</sup>

Ontario is experiencing rapid growth and an increase in population which means that new residential housing and supporting services are required. This growth requires new major infrastructure projects to be undertaken by planning authorities at all levels of government, including local municipalities and ministries of the provincial government. These infrastructure projects require planning authorities to obtain land within established areas. If the existing landowner is not willing to sell the required land to the authority, then an expropriation may be necessary.

New roads and transit projects being constructed in Ontario, are examples of infrastructure projects that have introduced the term of expropriation into the lexicon of owners, tenants, businesses, and real estate professionals in a whole new way. Numerous expropriations have already affected property owners and businesses, and more are sure to follow.

The Ontario *Expropriations Act*<sup>2</sup> (the “Act”), governs the process of expropriation in Ontario. It applies where land is expropriated by a statutory authority, and where work by a statutory authority on adjacent land causes injurious affection (discussed below). All sections discussed in this paper refer to the *Act*, unless otherwise indicated.

The purpose of this paper is to provide a brief introduction to the Ontario expropriation process including the following:

- Key points to consider for an “Owner”, which is defined in the *Act*, includes a landowner, mortgagee, tenant or other person with an interest in the land, who may be involved in a land acquisition or expropriation process.<sup>3</sup> The term “Expropriated Party” is not used in the *Act* but it will be used in this paper in addition to the term Owner.
- A summary of the expropriation process and compensation scheme for expropriations in Ontario – what’s compensable and what’s not? When will expropriated parties receive compensation?
- Tips for Owners and businesses facing the possibility of expropriation. What costs will an Owner, including a tenant, the “Expropriated Party”, face? What can they do to make sure they’ll be able to recover incurred expenses?

### Key Points

- Ontario’s *Expropriations Act* is deceptively complicated to apply. While the *Act* itself is brief, the case law is extensive. The case law includes principles established in other Common Law

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<sup>1</sup> The authors are grateful to previous Associates and Articling Students that contributed to updating this paper.

<sup>2</sup> *Expropriations Act*, RSO 1990, c E26, as amended. All references throughout this paper are to the Ontario *Expropriations Act*.

<sup>3</sup> *Expropriations Act*, Section 1(1).

jurisdictions and incorporated into the law in Ontario. A challenge with case law is that, although caselaw provides considerable guidance, it is not necessarily precedent setting, and each expropriation situation is fact specific with many variables. While prior decisions should be considered, they may not be determinative of the outcome in a new expropriation matter.

- An Expropriating Authority is any entity empowered by statute to expropriate an interest in land. Expropriating Authorities can include municipalities, the provincial government, the Ministry of Transportation, utility companies and universities. Additionally, it is notable that federal entities may also have expropriation powers such as the National Capital Commission however this is done under the federal *Expropriation Act*.<sup>4</sup>
- Each Expropriating Authority (it could be municipality or the Minister of Transportation in addition to others) has a different way of negotiating. Some Expropriating Authorities will use their in-house property officers and/or legal counsel to negotiate purchase agreements while others will hire outside consultants, including legal counsel, to proceed with a full expropriation process.
- Managing an Expropriated Party's expectation of compensation may be challenging. Since every expropriation is different, it is difficult to predict how much compensation an Expropriated Party is entitled to, and it may take years to determine the amount of compensation. This is important to keep in mind when managing an Expropriated Party's expectations. The assessed value of a property may be valued far lower than the Expropriated Party personally feels it is worth. It can be especially hard on business owners that have spent most of their lives building the business.
- Do not under-estimate the emotional impact that an expropriation may have on an Expropriated Party. The stress associated with having to relocate and the uncertainty of how much compensation will be received, and when, can be difficult.

## Expropriation Defined

Expropriation is defined in the *Act* to include “the taking of land without consent of the owner by an Expropriating Authority in the exercise of its statutory powers.”<sup>5</sup> Expropriation is one of the most powerful exercises of a public authority's power. An expropriation may take all of a property, part of a property, or it may take only a partial interest in a property such as an easement or subterranean rights. An expropriation may be for a limited time.

The Supreme Court has recently broadened what may constitute an expropriation by defining constructive expropriation. In *Annapolis Group v Halifax Regional Municipality* The Supreme Court concluded that a constructive taking occurs “where: (1) a beneficial interest — understood as an advantage — in respect of private property accrues to the state, which may arise where the use of such property is regulated in a

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<sup>4</sup> *Expropriation Act*, RSC, 1985, c E-21.

<sup>5</sup> *Expropriations Act*, Section 1(1).

manner that permits its enjoyment as a public resource; and (2) the impugned regulatory measure removes all reasonable uses of the private property at issue.”<sup>6</sup> The Supreme Court stated substance would prevail over form. A Court deciding whether a regulatory measure constitutes a constructive taking “must undertake a realistic appraisal of matters in the context of the specific case.”<sup>7</sup> The application of the constructive expropriation principle continues to evolve.

## The Process

The first time an Owner may be made aware of a possible expropriation is through the public consultation process related to the infrastructure project. There are usually public notices, newspaper notices, and public meetings for the purpose of discussing the proposed project and land requirements. A separate approval, with its own public process, may be required for the infrastructure project separate from the land taking process.

Before an expropriation can occur, the Expropriating Authority must make an application to the Approving Authority<sup>8</sup> for approval to expropriate the land. In some cases, the Expropriating Authority and the Approving Authority are the same entity - for example, the City of Ottawa is both the Expropriating Authority and Approving Authority. In other cases, the Approving Authority will be the responsible Minister; for example, provincial highway works being done by the Ministry of Transportation must seek approval from the Minister of Transportation. The Expropriating Authority and Approving Authority will vary depending on the project being undertaken.

## The Notice of Application for Approval to Expropriate

Pursuant to Section 6 of the *Act*, the Expropriating Authority must serve each of the registered Owners with a Notice of Application for Approval to Expropriate. The Notice of Application for Approval to Expropriate must also be published in a local newspaper for three consecutive weeks. Once the Owner receives a Notice of Application for Approval to Expropriate, they then have 30 days within which to exercise the option of requesting a Hearing of Necessity.

## Hearing

The *Act* used to describe a Hearing of Necessity. The term has been replaced with a Hearing. A Hearing request permits an Owner the opportunity to question both the necessity of the expropriation and the extent of the expropriation – how much land is to be taken.<sup>9</sup> There are, however, several disincentives that an Owner should consider before requesting a Hearing.

If a Hearing is requested, the Ontario Land Tribunal (“OLT” or “Tribunal”) will “inquire into whether the taking of the lands or any part of the lands... *is fair, sound and reasonably necessary in the achievement*

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<sup>6</sup> *Annapolis Group Inc v Halifax Regional Municipality*, 2022 SCC 36, at para 4.

<sup>7</sup> *Ibid* at para. 45.

<sup>8</sup> *Expropriations Act*, Sections 1(1) and 5.

<sup>9</sup> *Expropriations Act*, Section 6(2).

of the objectives of the expropriating authority.”<sup>10</sup> At the Hearing, it is not open to the Owner to challenge the Expropriating Authority’s objectives. The Hearing may result in a recommendation to increase or reduce the size of the expropriation. It could recommend a change from a fee taking to that of an easement. It is unlikely, however, that an Owner will avoid the expropriation altogether.<sup>11</sup>

Following the Hearing, the Tribunal will issue a report that will outline the Tribunal member’s “opinion on the merits of the application for approval”.<sup>12</sup> The Approval Authority must consider the report but does not need to follow it.<sup>13</sup>

An Owner should be aware of the possible cost consequences of a Hearing. Pursuant to the *Act*, an Owner that requests a Hearing is limited to recovering up to \$200.00 (two hundred dollars) in costs, at this time, or such other amount as may be prescribed.<sup>14</sup>

### Plan of Expropriation and Notices of Expropriation

If there is no request for a Hearing, or there is a Hearing and the Approval Authority has decided to proceed, the Approval Authority will proceed to issue a Certificate of Approval to the Expropriating Authority.<sup>15</sup> This Certificate allows the Expropriating Authority to proceed to expropriate.

After obtaining the Certificate of Approval, the Expropriating Authority must proceed to register a Plan of Expropriation within three months of the granting of the approval.<sup>16</sup> Once the Plan is registered, title to the expropriated land vests in the Expropriating Authority. The Expropriating Authority must serve the registered Owner with a Notice of Expropriation within 30 days of registration of the expropriation plan.<sup>17</sup> An offer of compensation must be provided within three months after the registration.<sup>18</sup>

### Notices of Election and Possession

The Expropriating Authority will usually serve a Notice of Election and a Notice of Possession along with the Notice of Expropriation.

The Notice of Election allows the expropriated landowner to choose the valuation date for the expropriated property. The value of the expropriated property will be determined as of the valuation date. As outlined in the *Act*, the landowner may choose from three different valuation dates as follows:

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<sup>10</sup> *Expropriations Act*, Section 7(5).

<sup>11</sup> In *Ontario (Ministry of Transportation) v Marwick* (1998), 67 LCR 154 (Ont Bd of Inquiry), the proposed expropriation would have left the owner’s remaining property landlocked hence the Inquiry Officer found that the area of the expropriation should be increased, and the entire property should be taken.

<sup>12</sup> *Expropriations Act*, Section 7(6).

<sup>13</sup> *Expropriations Act*, Section 8(2).

<sup>14</sup> *Expropriations Act*, Section 7(8).

<sup>15</sup> *Expropriations Act*, Section 4.

<sup>16</sup> *Expropriations Act*, Section 9(1).

<sup>17</sup> *Expropriations Act*, Section 10(1).

<sup>18</sup> *Expropriations Act*, Section 25(1).

- Where there has been a Hearing of Necessity inquiry, as of the date the Notice of Hearing was served;
- As of the date of the registration of the expropriation plan; or
- As of the date on which the Owner was served with the Notice of Expropriation.<sup>19</sup>

There are many different reasons that will influence what date should be selected – including the impact that changing real estate markets will have on the value of land (values may go up or down). Where an Owner fails to make an election with respect to the different valuation dates, the valuation date will be deemed to be the date of the registration of the plan.

The Notice of Possession specifies the date on which the Expropriating Authority will take possession.<sup>20</sup> This date must be at least 3 months after the notice is served. It is also possible for the Expropriating Authority to obtain possession earlier, or for the Owner to delay providing vacant possession if there are significant and justified reasons for doing so. The vacant possession date is typically established through discussions but, if necessary, it may be established through an application to the Superior Court of Justice.

## Compensation

Pursuant to the Act an Owner may be entitled to compensation under four general heads:

- 1) The market value of the land;
- 2) The damages attributable to disturbance (only for a partial taking of land);
- 3) Damages for Injurious Affection; and
- 4) Any special difficulties in relocation.<sup>21</sup>

An Owner may receive compensation at different times, but expropriating authorities generally prefer to wait until all matters associated with the expropriation, compensation and costs, have been agreed upon. Note that any claim will require documentation and likely considerable consultation with professionals such as lawyers, appraisers, and possibly land use planners, engineers and architects, to quantify and justify any claim.

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<sup>19</sup> *Expropriations Act*, Section 10(2).

<sup>20</sup> *Expropriations Act*, Section 39.

<sup>21</sup> *Expropriations Act*, Section 13(2).

## Section 25 Offer

In order to obtain actual possession of the land, the Expropriating Authority is required to serve an Offer of Compensation on the Owner within three months of filing the Plan of Expropriation pursuant to Section 25 of the *Act*. A Section 25(1)(a) offer will be for a full and final amount of compensation which thereby terminates an Owner's right to seek further compensation. Alternatively, the Owner can accept the Section 25(1)(b) offer which grants the owner a partial payment, being the estimated amount of compensation as calculated by the Expropriating Authority, without prejudice to the Owner's rights to continue to pursue additional compensation under the *Act*. An Expropriating Authority cannot withdraw and substitute a respective Section 25 offer.<sup>22</sup>

The offer must be for 100% of the appraised value of the land as estimated by the Expropriating Authority and based upon an appraisal report. Of note, litigation privilege does not cover all documents relating to a Section 25 offer if the appraiser's dominant purpose and work was not carried out in contemplation of litigation. If an appraisal report is created for the purpose of meeting the statutory obligations under Section 25, these will likely not be protected by litigation privilege.<sup>23</sup>

## Market Value

The market value approach is intended to reflect what the expropriated land would be worth if it were sold on the valuation date, assuming a willing seller and a willing buyer.<sup>24</sup>

Market value must be based on the lands "highest and best use," which means the highest economic use. If the land would need to be rezoned to realize its highest and best use, then the hypothetical rezoning must be reasonably probable based on planning evidence.<sup>25</sup> Note, however, that there must be certainty that the highest and best use will proceed in order for it to be relied upon. In *1085372 Ontario Limited v City of Toronto*, the parties contested the land valuation pursuant to Section 14(4)(b). The dispute turned on how the Tribunal considered the proposed development plan as of the expropriation date. The claimant in this case wanted to rely on a higher valuation meaning the Tribunal would view the development plan as approved for construction and the respective project could commence immediately.<sup>26</sup> However, the Tribunal ultimately found the proposed development plan was not approved for construction, meaning the claimant could not rely on the higher valuation.<sup>27</sup>

A certified appraiser will likely be required to prepare an appraisal for the purpose of determining the market value of the land taken. There are different methods that an appraiser can utilize to determine the value.<sup>28</sup> Which method should be used will depend on the existing use of the property and other site-

<sup>22</sup> *CHO v Ontario (Transportation)*, (2022), 21 LCR (2d)211 (OLT) at para 37.

<sup>23</sup> *Metrolinx v 1450638 Ontario Inc*, 2021 ONSC 804 at para 8.

<sup>24</sup> *Expropriations Act*, Section 14(1).

<sup>25</sup> *Mouawad v Leamington (Town)* (2005), 86 LCR 131 (OMB) at para 8.

<sup>26</sup> *1085372 Ontario Limited v City of Toronto*, 2020 ONSC 1136 at paras 34-35.

<sup>27</sup> *Ibid* at para 44.

<sup>28</sup> A description of the various valuation methodologies is beyond the scope of this paper.

specific factors. The value of any component of a property is measured by how much it adds to the market value “by reason of its presence or detracts from market value by its absence.”<sup>29</sup> In more complex appraisals, the importance of cultivating a knowledgeable team of experts cannot be overstated.

### Disregarding the Development or Scheme

Pursuant to Section 14(4)(b) of the *Act*, when valuing the land, any increase or decrease caused by the development, or scheme, which gave rise to the expropriation must be disregarded.<sup>30</sup> In other words, if land is being taken for a highway then reference cannot be made to the proposed highway to either increase or decrease the value of the land taken.<sup>31</sup> Note that this principle is not easy to apply, it is frequently disputed, and is often the subject of litigation.

### Disturbance Damages

Disturbance damages encompass a broad range of expenses that an Expropriated Party may receive compensation for, provided they are not too remote.<sup>32</sup> Disturbance damages for a business, owner or tenant may include business replacement costs, relocation costs (moving and advertising), and business losses.<sup>33</sup> These are out of pocket expenses incurred, caused by the expropriation, that should be reimbursed in order to make the Expropriated Party whole.

In a leading expropriation case, *Toronto Area Transit Authority v Dell Holdings Ltd*<sup>34</sup>, the Supreme Court held that disturbance damages should not be limited to losses related to the expropriated land. Instead, the Court held that if it is a “natural and reasonable consequence of the expropriation” then it might come within the definition of disturbance damages. The test for disturbance damages is:

1. Whether there is a causal connection between the expropriation and the loss in question;
2. Whether the adverse consequences of the expropriation are foreseeable and not unlikely; and
3. Whether the claimant has behaved reasonably, mitigating losses where possible?<sup>35</sup>

What may be compensable as disturbance damages is a very broad category. It remains a fact specific consideration of the expropriation and the site as to whether disturbance damages are appropriate.

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<sup>29</sup> *1125814 Ontario Limited v Hamilton (City)*, 2019 Carswell 3616 2019 at para 36.

<sup>30</sup> This is a codification of the common law decision of the British Privy Council in *Pointe Gourde Quarrying & Transport Co v Sub-Intendant of Crown Lands* [1947] AC 565 (PC). See also: *Windsor (City) v Paciorka Leaseholds Ltd*, 2012 ONCA 431 [*Paciorka*]. A discussion of the application of this principle is beyond the scope of this paper.

<sup>31</sup> *D’Amore v Ontario (Minister of Transportation & Communications)* (1985), 32 LCR 307 (OMB).

<sup>32</sup> *Black v Brandt (County)* (1972), 1 LCR 325 (Ont LCB).

<sup>33</sup> *Expropriations Act*, Sections 18 and 19.

<sup>34</sup> *Toronto Area Transit Authority v Dell Holdings Ltd*, [1997] 1 SCR 32 (SCC) [*Dell*].

<sup>35</sup> *Dell; Tanchuk v Ontario (Transportation)*, 2019 CarswellOnt 14879 (LPAT); *Pitblado v Oakville (Town)*, 2005 CarswellOnt 6382 (OMB).

## Damages for Injurious Affection & When No Land Taken

An injurious affection claim does not exist when a full taking occurs.

When a partial taking of land occurs, compensation for injurious affection may be given to reflect the reduced market value of the lands retained by the Owner or to cover personal or business damages.<sup>36</sup> Other possible injurious affection claims are very broad but may include things such as a loss of trees and landscaping or loss of access. There must be a causal link between the damages and the expropriation. Injurious affection claims require a consideration of whether the damage is caused by the works or use of the works as opposed to the construction of the works.<sup>37</sup> This is a very site-specific and fact specific analysis.

If no lands are taken, there is a more restricted remedy which is limited to losses arising out of the construction, but not the use of the works, on the lands expropriated. In the Supreme Court of Canada decision of *Antrim Truck Centre Ltd v Ontario (Transportation)* (“*Antrim*”), the Court held that to recover damages for injurious affection where no land is taken, the claimant must meet three requirements:

1. The damage must result from action taken under statutory authority;
2. The action would have given rise to liability but for the statutory authority; and
3. The damage must result from the construction and not the use of the works.<sup>38</sup>

The *Antrim* decision also addressed the issue of public purpose versus private impact:

How should [the Court] decide whether an interference with the private use and enjoyment of land is unreasonable when it results from construction which serves an important public purpose? The answer, as I see it, is that the reasonableness of the interference must be determined by balancing the competing interests, as it is in all other cases of private nuisance. The balance is appropriately struck by answering the question whether, in all of the circumstances, the individual claimant has shouldered a greater share of the burden of construction than it would be reasonable to expect individuals to bear without compensation.<sup>39</sup>

A critical element of an injurious affection claim is that an Owner must notify the Expropriating Authority of the damages or loss within one year of the damages being sustained otherwise the claim is statutorily barred.<sup>40</sup>

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<sup>36</sup> *Expropriations Act*, Sections 1(1) and 21.

<sup>37</sup> *Expropriations Act*, Sections 1(1) and 21.

<sup>38</sup> *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, [2013] SCJ No 13 (SCC) [*Antrim*].

<sup>39</sup> *Ibid*, para 2.

<sup>40</sup> *Expropriations Act*, Section 22(1).

## Special Difficulties in Relocation

A special difficulty in relocation claim allows an Owner who experiences manifest difficulty in relocating their business or home due to the property's special attributes, or specific challenging market conditions, to be compensated for the costs incurred to relocate to a similar property.<sup>41</sup> Note that this type of award is not frequently given.

An example of special difficulties for a business occurred in *Gray Coach Lines Ltd v Hamilton (City)* where the coach line was required to relocate its bus garage due to the expropriation.<sup>42</sup> The needs of the business and the nature of the equipment used by the claimant restricted the potential replacement sites to a small geographic area. Further, the urban renewal that necessitated the expropriation resulted in zoning regulations that made it impossible to locate a bus garage in the surrounding area. The claimant found a suitable site that was larger and was awarded compensation for the difference between the market value of the land at the old site and the amount the claimant needed to spend for the larger site which was the only parcel of land available to duplicate the old site.

In a residential situation, section 18(1)(a) and (c) sets out some factors that will be considered in order to grant compensation due to the relocation. An additional amount of compensation may be granted to an Owner if it is necessary "to enable the owner to relocate his or her residence in accommodation that is at least equivalent to the accommodation expropriated."<sup>43</sup>

## Tenant Compensation

Pursuant to Section 1(1) of the *Act* "Owner" is defined as including a tenant. A "tenant" is defined in the *Act* to include a lessee or occupant under any tenancy whether written, oral or implied. Tenants have some rights to compensation, but any compensation will be evaluated according to the terms of the lease.<sup>44</sup> There is very little certainty as to what compensation a tenant will receive or when they will receive it.

If a tenant is in a lease that has been frustrated by an expropriation, then the tenant should be entitled to moving and relocation expenses as well as reasonable tenant fit-up costs at the new location. However, there is no legislative statement as to when a tenant is to be paid, and therefore compensation may not occur until after the tenant has relocated into a replacement property. This means that the tenant will likely have to pay the relocation costs upfront and then seek reimbursement later. A tenant may also be able to pursue a claim arising from the expropriation under other heads of damages.

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<sup>41</sup> *Expropriations Act*, Section 13(2)(d).

<sup>42</sup> *Gray Coach Lines Ltd. v. Hamilton (City)*, (1971), 1 L.C.R. 181, [1971] 2 O.R. 689 (C.A.), affirmed (1972), 3 L.C.R. 1, [1973] (S.C.C.).

<sup>43</sup> *Expropriations Act*, Section 15.

<sup>44</sup> *Expropriations Act*, Section 18(2).

## Abandonment of Expropriated Land

Pursuant to Section 41(1) of the *Act*, if an Expropriating Authority deems the expropriated land or any part thereof unnecessary at any time before the compensation for the expropriation is paid in full, then the Expropriating Authority shall notify each Owner who was served with the Notice of Expropriation that the land is no longer required.

The Owner then has a choice as to whether he or she wants to take the land back or require the Expropriating Authority to retain the land and the Owner can then proceed to seek full compensation. If the Owner takes the land back, he or she has a right to compensation for “consequential damages.” Although consequential damage is not defined in the *Act* it has been held to mean “all damages sustained and all costs incurred by [the owner] in consequence of the expropriation and abandonment.”<sup>45</sup> This could include legal fees and disbursements, lost rents, appraisal fees and any decrease in market value.

## Section 30 Agreement

Section 30 of the *Act* provides a mechanism through which an Expropriating Authority can avoid the formal expropriation process (the Application for Approval to Expropriate and Notice of Expropriation) if an Owner agrees to transfer the required property to the Expropriating Authority for compensation. The Owner can agree to the transfer, receive the compensation offered by the Expropriating Authority in the Section 30 Agreement and the Owner may still retain the right to continue to pursue a claim for compensation as if the land had actually been formally expropriated. This is a more efficient process that is usually beneficial to the Owner and the Expropriating Authority. The Section 30 process will not work if there are several interests involved and one interest will not consent which would thereby necessitate the full expropriation process.

## Determining Compensation & The Ontario Land Tribunal (“OLT”)

Compensation for most expropriation matters is determined by way of negotiation. Typically, professional reports such as property appraisals (an expert’s opinion as to the value of land), will be exchanged to inform settlement discussions. Settlement discussions may proceed for an extended period of time (months or even years) if it appears that a settlement may be reached.

If compensation cannot be settled, either the Owner or the Expropriating Authority may file an application for binding arbitration before the Ontario Land Tribunal (“OLT” – formerly the Ontario Municipal Board and Local Planning Appeal Tribunal) by issuing a Notice of Arbitration and Statement of Claim simultaneously in one document.<sup>46</sup> The claim should detail what compensation is being sought and briefly summarize what facts are being relied upon in support of the claim. Within 20 days of being served with the claim, a Reply Statement must be filed by the other party.

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<sup>45</sup> *Buckhorn Lodge Ltd v Minister of Transportation and Communications* (1972), 3 LCR 105 (Ont LCB).

<sup>46</sup> *Expropriations Act*, Section 26 ; Ontario Land Tribunal, *Rules of Practice and Procedure*.

The OLT provides mediation services to attempt to settle the expropriation claims, however this process is not mandatory. The OLT mediation process replaces what used to be referred to as the Board of Negotiation.

### OLT Hearing

The OLT has the jurisdiction to determine all compensation claims.<sup>47</sup> An OLT hearing to determine compensation for an expropriation matter is an interesting hybrid of OLT and Superior Court rules and proceedings. In expropriation matters, there are rights and obligations associated with full production, admissions and discovery, and the establishment of a Procedural Order which sets key dates for documents to be exchanged and expert meetings to occur. Note that the OLT Rules of Practice and Procedure require expropriation hearings to be recorded by a court reporter.<sup>48</sup>

An OLT hearing requires the attendance of professional witnesses, including an appraiser and likely a land use planner, to justify the amount of compensation sought by the Owner or offered by the Expropriating Authority. A written decision is issued by the OLT. An OLT decision may be appealed to the Divisional Court on a question of law or fact or both, within a short period of time after the decision is issued.<sup>49</sup>

### Costs

Pursuant to Section 32(1) of the *Act*, if the Tribunal awards an amount in excess of 85% of the Expropriation Authority's offer then the Owner is entitled to recover their "reasonable" legal, appraisal and other expenses incurred as part of the process in order to determine compensation payable.<sup>50</sup> Costs may be disallowed if they are not deemed to be for the purposes of determining compensation payable, or if they are not reasonable. The *Act* does not provide a definition or formula to calculate what is reasonable. This may require further negotiations with the Expropriating Authority or submitted to the OLT for adjudication or a Court appointed assessment officer. Generally, costs of the Expropriated Party are covered by the Expropriation Authority, but it is not necessary for the Expropriation Authority to do so. Costs not covered by the Expropriation Authority will be the responsibility of the Expropriated Party.

Owners (claimants) should be aware that costs may indeed be awarded against them if the expropriated party is found to have pursued an unnecessary proceeding or has acted unreasonably. In *Shergar Development Inc v Windsor (City)*, the Ontario Court of Appeal held that the Tribunal is "free to use a costs award to sanction inappropriate and wasteful conduct by a claimant during an expropriation proceeding."<sup>51</sup> The Court in *Shergar* went on to state that the purpose of the cost discretion in Section 32

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<sup>47</sup> *Expropriations Act*, Section 29.

<sup>48</sup> *OLT Rules*, Rule 26.27.

<sup>49</sup> *Expropriations Act*, Section 31.

<sup>50</sup> *Expropriations Act*, Section s 32(1) says the Tribunal "shall" make an order for costs. Section 32(2) states that costs may be granted if the amount awarded by the Tribunal is less than 85% of the Expropriating Authority's offer.

<sup>51</sup> *Shergar Development Inc v Windsor (City)*, 2020 ONCA 490, para 4.

was “to encourage an expeditious settlement of claims on an equitable basis.”<sup>52</sup> Therefore, the Court held that the Tribunal could address an inappropriate delay or other actions in the context of cost awards.

## Interest

An expropriated Owner is entitled to be paid interest on the portion of the market value of the Owner’s interest in the land and on the portion of any allowance for injurious affection. Interest is not applied to a disturbance damage award. Interest is at the statutory rate of 6% a year calculated from the date the Owner ceases to reside on or make productive use of the lands.<sup>53</sup> When the Owner ceases to make productive use of the land is frequently a subject of discussion and litigation. The interest rate may be reduced below the statutory amount if the conduct of the Owner resulted in a delay in determining the amount of compensation payable.<sup>54</sup> Conversely, the interest rate may be increased if the delay in determining compensation is attributable to the Expropriating Authority.<sup>55</sup>

In *Hume v Ontario (Transportation)*, the authority conceded that interest would be payable on costs. The parties disagreed as to whether the interest commenced on the settlement date or the cost award date.<sup>56</sup> Ultimately, the LPAT decided the interest should run from the settlement date.<sup>57</sup> Specifically, the LPAT stated “the Claimants have been deprived of access to compensation for these costs through no fault of their own. I therefore find that denying interest on this compensation—even during a period when it was in dispute—would be manifestly unfair and contrary to the overriding principle that the Claimants be made economically whole.”<sup>58</sup>

## Tips for Expropriated Parties – Including Businesses

It is advisable to seek legal advice as soon as an Owner becomes aware of a possible expropriation proceeding but assistance should definitely be sought after an Owner receives a Notice of Application for Approval to Expropriate. The Notice essentially triggers the *Act* and hence the entitlement to be reimbursed for reasonable legal and appraisal costs. If an Owner retains a lawyer or an appraiser too soon, and the expropriation never occurs, then the Owner may be liable for the costs without reimbursement from the Expropriation Authority.

Expropriated businesses will likely have to pay costs such as renovations or tenant fit-ups, moving and advertising up front while pursuing their claim. Depending on the business’ financial situation, it may be advisable to attempt to negotiate a fair Section 30 agreement early in the process to have some capital to relocate and continue business as usual.

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<sup>52</sup> *Ibid* at para 19.

<sup>53</sup> *Expropriations Act*, Section 33(1).

<sup>54</sup> *Expropriations Act*, Section 33(2).

<sup>55</sup> *Expropriations Act*, Section 33(4).

<sup>56</sup> *Hume v Ontario (Transportation)*, 2019 CanLII 117324 (ON LPAT) at para 26.

<sup>57</sup> *Ibid* at para 27.

<sup>58</sup> *Ibid* at para 27.

Expropriated Parties must keep very meticulous records of expenses incurred with regards to all aspects of the relocation. If this is not done properly the ability to seek full compensation for all expenses will be compromised.

A business might receive some compensation for executive time – this is time an employee must spend dealing with the expropriation and hence is time not being spent for the business work and is a loss to the business. A business may claim compensation for business losses experienced due to the requirement to relocate.<sup>59</sup> Note that this claim requires documentation that demonstrates the reduction directly attributable to the requirement to relocate because of the expropriation. There is no compensation paid for the time a homeowner, or non-businessperson, spends to deal with an expropriation.

If businesses are planning on relocating it is important for them to keep in mind that any compensation received by an Owner of an expropriated property might trigger a capital gain payment unless a replacement property is purchased within a reasonable period of time. Also note that it may be possible to receive a Land Transfer Tax reimbursement for the value paid to purchase the replacement property. These details must be discussed with appropriate professionals such as a lawyer and accountant.

Expropriated Parties should mentally prepare themselves for the process of expropriation. Although the object of the *Act* is to make the Expropriated Parties whole, the process in many cases will be drawn out and mentally exhausting leaving many Expropriated Parties feeling like they lost out at the end of the day.

Expropriated Owners should advise their insurance company immediately after the Plan of Expropriation is registered because the Expropriating Authority will then own the land. The Expropriating Authority will have insurance for the expropriated land but it remains the Expropriated Owner's responsibility to maintain tenant/content insurance.

### Security or Mortgage Holder

Another party that has rights under the *Act*, but not discussed in this paper, is a security holder or mortgage holder.<sup>60</sup> Generally, a mortgage holder or security holder is entitled to be paid for its interest directly from the Expropriating Authority from the initial market value determination. In other words, not all of the assessed market value will be given to the Owner. The mortgage holder is typically paid first and the balance of the funds are provided to the Owner.

There are other interests that might also be entitled to compensation in an expropriation matter but a full analysis of all interests is beyond the scope of this overview.

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<sup>59</sup> *Expropriations Act*, Section 19(1).

<sup>60</sup> Refer to *Expropriations Act*, Sections 16, 17 and 20.

## Conclusion

This paper is merely an overview of the general expropriation process in Ontario and a few details to consider have been identified.

Expropriation proceedings are complicated. It is therefore essential to ensure that an Expropriated Owner is properly represented early in the expropriation process. Experienced experts will then be able to inform and assist an Owner to ensure fair compensation is obtained.

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