Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: February 26, 2024

CASE NO(S).: OLT-23-001033
OLT-23-001183
OLT-23-001193
OLT-23-001200
OLT-23-001201

PROCEEDING COMMENCED UNDER subsection 32(1) of the *Expropriation Act*, R.S.O. 1990, c. E.26, as amended

Claimant:	Matthew Jackson and Laila Upeslacis
Respondent:	Metrolinx
Subject:	Determination of Costs Compensation
Description:	Expropriation for the construction of the Ontario Line
Property Address:	17 Lipton Avenue
Municipality:	City of Toronto
OLT Case No.:	OLT-23-001033
OLT Lead Case No.:	OLT-23-001033
OLT Case Name:	Jackson v. Metrolinx

PROCEEDING COMMENCED UNDER subsection 32(1) of the *Expropriation Act*, R.S.O. 1990, c. E.26, as amended

Claimant:	Panorea aka Linda Maroulis and Estate of Lazros aka Larry Maroulis
Respondent:	Metrolinx
Subject:	Determination of Costs Compensation
Description:	Expropriation for the construction of the Ontario Line
Property Address:	670 Danforth Avenue
Municipality:	City of Toronto
OLT Case No.:	OLT-23-001183
OLT Lead Case No.:	OLT-23-001183
OLT Case Name:	Maroulis v. Metrolinx

PROCEEDING COMMENCED UNDER subsection 32(1) of the *Expropriation Act*, R.S.O. 1990, c. E.26, as amended

Claimant:	1938386 Ontario Ltd. c.o.b. Hunter's on the Danforth
Respondent:	Metrolinx
Subject:	Determination of Costs Compensation
Description:	Expropriation for the construction of the Ontario Line
Property Address:	670-674 Danforth Avenue
Municipality:	City of Toronto
OLT Case No.:	OLT-23-001193
OLT Lead Case No.:	OLT-23-001193
OLT Case Name:	1938386 Ontario Ltd. c.o.b. Hunter's on the Danforth v. Metrolinx

PROCEEDING COMMENCED UNDER subsection 32(1) of the *Expropriation Act*, R.S.O. 1990, c. E.26, as amended

Claimant:	Panorea aka Linda Maroulis and Estate of Lazros aka Larry Maroulis
Respondent:	Metrolinx
Subject:	Referral of costs to an assessment officer of the Ontario Superior Court of Justice
Description:	Expropriation for the construction of the Ontario Line
Property Address:	670 Danforth Avenue
Municipality:	City of Toronto
OLT Case No.:	OLT-23-001200
OLT Lead Case No.:	OLT-23-001200
OLT Case Name:	Maroulis v. Metrolinx

PROCEEDING COMMENCED UNDER subsection 32(1) of the *Expropriation Act*, R.S.O. 1990, c. E.26, as amended

Claimant:	1938386 Ontario Ltd. c.o.b. Hunter's on the Danforth
Respondent:	Metrolinx
Subject:	Referral of costs to an assessment officer of the Ontario Superior Court of Justice
Description:	Expropriation for the construction of the Ontario Line
Property Address:	670-674 Danforth Avenue
Municipality:	City of Toronto
OLT Case No.:	OLT-23-001201
OLT Lead Case No.:	OLT-23-001201

OLT Case Name:	1938386 Ontario Ltd. c.o.b. Hunter's on the Danforth v. Metrolinx

PROCEEDING COMMENCED UNDER subsection 19(1) of the *Ontario Land Tribunal Act, 2021*, S.O. 2021, c. 4, Sched. 6

Request by:	Metrolinx
Request for:	Request for Dismissal

Heard:	January 8, 2024 in writing only

APPEARANCES:

Parties	**Counsel**
Metrolinx	Robert Wood Simon Fung
Matthew Jackson, Laila Upeslacis ("Claimants")	Paul Scargall Irene Wong

DECISION DELIVERED BY WILLIAM MIDDLETON AND ORDER OF THE TRIBUNAL

INTRODUCTION - PART ONE: AN UNUSUAL CHALLENGE TO THE TRIBUNAL'S JURISDICTION

[1] This Decision relates to a series of motions brought by Metrolinx challenging the jurisdiction of the Ontario Land Tribunal ("Tribunal" or "OLT") to determine costs ("Motion") pursuant to section 32 of the *Expropriations Act*, R.S.O. 1990, c. E.26 (the "Act"). The same Motion is brought in each of five separate cases, each of which involves the costs payable under the Act to the Claimants.

[2] Interestingly, Metrolinx does not dispute that it must pay costs to the Claimants and has already paid out the underlying claims for compensation to the Claimants in the amount of $100,000 ("Compensation"). However, for reasons set out in the Motions, Metrolinx objects to having the cost disputes dealt with by the Tribunal. Instead,

Metrolinx wants the cost disputes to be dealt with by an assessment officer of the Superior Court of Justice. In its Factum, counsel for Metrolinx states:

> The Tribunal has no jurisdiction to assess costs directly, but has jurisdiction to refer a claim for costs to an assessment officer of the Superior Court of Justice… The Tribunal has no jurisdiction to "assess" costs, it can only "fix" costs"…

[3] Insofar as can be determined, no Party has ever taken the identical position insisted upon by Metrolinx in these Motions. The unusual nature of these Motions, and the posture taken by Metrolinx, is amplified by the reality that the OLT and its predecessors have been ruling upon cost matters under the Act for decades.

[4] Indeed, a recent lengthy Decision of this Tribunal was issued on January 11, 2024, in a well-known, longstanding and hotly contested proceeding concerning cost entitlement being pursued by both parties – by way of motion - where several millions of dollars in costs were at issue, and the Tribunal undertook a detailed review of the parties' respective bills of costs: OLT Case No. OLT-22-002455 (1353837 Ontario Inc. v. Stratford) ("Stratford Decision"). Neither party in that case argued that the Tribunal lacked jurisdiction to determine their dispute. In this proceeding involving the Motions, the quantum of costs sought by the Claimants is quite modest by comparison.

[5] Indeed, given the relatively modest cost amounts at issue here (initially being less than the Compensation), the Tribunal was inclined to direct these Parties to meet and confer regarding the efficacy of mediation on this costs matter – or to simply direct them to mediate – pursuant to the recent new Rule 26.6 or 26.7 of the OLT *Rules of Practice and Procedure* ("Rules"). Despite the practical benefits to be gained from mediation of this dispute, this Tribunal was of the view that it ought to rule on the merits of Metrolinx's arguments on these Motions. This will not only assist these Parties but could also help similarly situated litigants in the future.

PART TWO: THE ONTARIO LAND TRIBUNAL CLEARLY HAS JURISDICTION TO DETERMINE COSTS UNDER *THE EXPROPRIATIONS ACT*

1. Both the Act and OLTA Invest the Tribunal with Jurisdiction

[6] The Tribunal firmly rejects the argument that it does not have fulsome jurisdiction under the Act and under the provisions of its constituent statute, the *Ontario Land Tribunal Act*, S.O. 2021, c. 4, Sched. 6 ("OLTA"), to fully determine costs in any expropriation proceeding.

[7] The relevant provisions of the Act are:

> 1 (1) In this Act,
>
> "judge", except where otherwise described, means a judge of the Superior Court of Justice;
>
> "Tribunal" means the Ontario Land Tribunal. ("Tribunal")…
>
> **Conflict**
>
> (4) Where there is conflict between a provision of this Act and a provision of any other general or special Act, the provision of this Act prevails….
>
> **Agreements**
>
> **24** A statutory authority has the authority to make and perform an agreement with an owner in respect of any claim of the owner under this Act, including any costs of the owner despite the fact that this Act requires the claim to be determined by the Tribunal….
>
> **Application, if compensation not agreed to**
>
> **26** (1) If the statutory authority and the owner do not agree on the compensation payable under this Act, the statutory authority or the owner may, subject to subsection (2), apply to the Tribunal for the determination of compensation by way of a hearing or as otherwise provided for under the *Ontario Land Tribunal Act, 2021*. 2021…
>
> **Duties of Tribunal on application**
>
> **29** The Tribunal shall determine any compensation in respect of which an application is made under section 26 and, in the absence of an agreement made under section 24, shall determine any other matter required by this or any other Act to be determined by the Tribunal. 2021

Appeals

31 (1) A decision or order of the Tribunal under this Act may be appealed to the Divisional Court within six weeks from the day the decision or order was served on the parties, on a question of law or fact or both

Extension of time for appeal

(2) A judge of the Divisional Court may extend the time for appeal for such period as the judge considers proper. 2021, c. 4, Sched. 6, s. 48 (7).
Powers of Court

(3) On an appeal under subsection (1), the Divisional Court may,

(a) refer any matter back to the Tribunal; or

(b) make any decision or order that the Tribunal has power to make

Costs

32 (1) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Tribunal and the amount awarded by the Tribunal is 85 per cent, or more, of the amount offered by the statutory authority, the Tribunal shall make an order directing the statutory authority to pay the reasonable legal, appraisal and other costs actually incurred by the owner for the purposes of determining the compensation payable, and may fix the costs in a lump sum or may order that the determination of the amount of such costs be referred to an assessment officer who shall assess and allow the costs in accordance with this subsection and the tariffs and rules prescribed under clause 44 (d). 2017, c. 23, Sched. 5, s. 35.

Same

(2) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Tribunal and the amount awarded by the Tribunal is less than 85 per cent of the amount offered by the statutory authority, the Tribunal may make such order, if any, for the payment of costs as it considers appropriate, and may fix the costs in a lump sum or may order that the determination of the amount of such costs be referred to an assessment officer who shall assess and allow the costs in accordance with the order and the tariffs and rules prescribed under clause 44 (d) in like manner to the assessment of costs awarded on a party and party basis. 2017, c. 23, Sched. 5, s. 35.

Same

(3) If no tariffs or rules are prescribed under clause 44 (d), the assessment officer shall instead have reference to the rules made by the Tribunal for the purposes of section 20 of the *Ontario Land Tribunal Act, 2021*…

Interest

33 (1) Subject to subsection 25 (4), the owner of lands expropriated 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

to which the owner is entitled, outstanding from time to time, at the rate of 6 per cent a year calculated from the date the owner ceases to reside on or make productive use of the lands. R.S.O. 1990, c. E.26, s. 33 (1). …

Variation of interest

(2) Subject to subsection (3), where the Tribunal is of the opinion that any delay in determining the compensation is attributable in whole or in part to the owner, it may refuse to allow the owner interest for the whole or any part of the time for which the owner might otherwise be entitled to interest, or may allow interest at such rate less than 6 per cent a year as appears reasonable.

Same

(3) The interest to which an owner is entitled under subsection (1) shall not be reduced for the reason only that the owner did not accept the offer made by the expropriating authority, although the compensation as finally determined is less than the offer. R.S.O. 1990, c. E.26, s. 33 (3).

Same

(4) Where the Tribunal is of the opinion that any delay in determining compensation is attributable in whole or in part to the expropriating authority, the Tribunal may order the expropriating authority to pay to the owner interest under subsection (1) at a rate exceeding 6 per cent a year but not exceeding 12 per cent a year.

Compensation paid into court

Payment into court

38 (1) In any case where the statutory authority considers it advisable, it may without an order, pay the compensation agreed upon or determined into the office of the Accountant of the Superior Court of Justice together with a sum equal to the interest thereon at the rate of 6 per cent a year for six months.

Payment out of court

(2) Upon an application for payment out of court of compensation paid into court, a judge may direct that such notice of the application be given by publication or otherwise as the judge considers proper and may direct the trial of an issue or make such order with respect to the payment out of court of compensation and as to costs as the judge considers reasonable. R.S.O. 1990, c. E.26, s. 38 (2).

Adjustment of interest

(3) Where an order is obtained under subsection (2) in less than six months after the payment of the compensation into court, the judge making the order may direct that a proportionate part of the interest be returned to the statutory authority. R.S.O. 1990, c. E.26, s. 38 (3).

Where unborn issue interested

(4) Where unborn issue or an unascertained person or class is interested in compensation paid into court, a judge may appoint such person as he or she

considers proper to represent them, and any order made under this section is binding on them….

Possession of expropriated land

39 (1) Where land that has been expropriated is vested in an expropriating authority and the expropriating authority has served the registered owner with a notice that it requires possession of the land on the date specified therein, the expropriating authority, subject to any agreement to the contrary and if no application is made under subsection (3), shall take possession of the land on the date specified in the notice. R.S.O. 1990, c. E.26, s. 39 (1).

Date for possession

(2) Subject to subsection (3), the date for possession shall be at least three months after the date of the serving of the notice of possession. R.S.O. 1990, c. E.26, s. 39 (2).

Application for adjustment of date of possession

(3) A registered owner or an expropriating authority may, upon such notice as the judge may direct, apply to a judge for an adjustment of the date for possession specified in the notice of possession, and the judge, if he or she considers that under all the circumstances the application should be granted, may order that the date for possession shall be on such earlier or later date as the judge may specify in the order

Warrant to put down resistance to entry, etc.

40 (1) Where resistance or opposition is made to the expropriating authority or any person authorized by it in entering upon, using or taking possession of land when it is entitled so to do, it may apply to a judge for a warrant directing the sheriff to put down the resistance or opposition. R.S.O. 1990, c. E.26, s. 40 (1).

Hearing

(2) The judge shall, in writing, appoint a time and place for the hearing of the application and in the appointment may direct that it shall be served upon such person as the judge may prescribe

Issue of warrant

(3) On proof of the resistance or opposition, the judge may issue a warrant. R.S.O. 1990, c. E.26, s. 40 (3).

Return

(4) The sheriff shall forthwith execute the warrant and make a return to the judge of the execution thereof…

Time for application

43 Any application to set aside or quash any proceeding or step taken under this Act shall be made within thirty days after the proceeding or step in respect of which the application is made, but this section does not apply

where the applicant was entitled to and not given notice of the proceeding or step or where the proceeding or step was a nullity.

Regulations

44 The Lieutenant Governor in Council may make regulations,

(0.a) providing for and governing circumstances in which costs shall not be recommended or ordered to be paid under subsection 7 (7);

(0.a.1) specifying a maximum costs amount for the purposes of subsection 7 (8), including providing for different maximum costs amounts in respect of different classes of hearings;

(a) prescribing rates of interest for the purposes of section 20;

(a) prescribing rates of interest for the purposes of sections 20 and 33, or methods for determining them;

(b) prescribing forms for the purposes of this Act and providing for their use;

(c) REPEALED: 2021, c. 4, Sched. 6, s. 48 (10).

(d) prescribing tariffs of costs and rules to be applied by assessment officers for the purposes of section 32."

[all of the above emphasis added]

[8] As can be seen from the excerpts set out in paragraph [7] above, the Act clearly defines those specific circumstances where the OLT cannot act and where instead a judge must rule. There are no provisions that specifically require any other quasi-judicial officer to act in place of the Tribunal. The applicable provisions of OLTA are:

JURISDICTION AND POWERS

Exclusive jurisdiction

8 (1) The Tribunal has exclusive jurisdiction in respect of all matters in which jurisdiction is conferred on it by this or any other Act.

Same

(2) The Tribunal has authority to hear and determine all questions of law and fact with respect to all matters within its jurisdiction, unless limited by this or any other Act.

Orders

9 (1) The Tribunal has authority to make orders or give directions as

may be necessary or incidental to the exercise of the powers conferred on the Tribunal under this or any other Act.

Conditions

(2) The Tribunal may include in an order conditions that it considers fair in the circumstances, including a condition that the order comes into force at a future fixed time or on the performance of terms imposed by the Tribunal.

Interim orders

(3) The Tribunal may make an interim order without notice if it is of the opinion that it is necessary to do so, but no such order shall be made for any longer time than the Tribunal may consider necessary to enable the disposition of the proceeding.

Relief

(4) Unless another Act specifies otherwise, the Tribunal may, as it considers to be appropriate,

(a) make an order granting all or part of the relief applied for; or

(b) make an order granting relief that is additional to or different from the relief applied for.

Extension of time

(5) If an order or decision of the Tribunal requires anything to be done within a specified time, the Tribunal may extend the specified time,

(a) on notice and with a hearing; or

(b) without notice or a hearing, if the Tribunal is of the opinion that it is necessary to do so.

Power to order entry, inspections

10 (1) If the Tribunal considers it necessary, the Tribunal may by order authorize a member or employee of the Tribunal to, at any reasonable time, enter and inspect any land or premises, other than a dwelling, for any purpose relevant to the subject matter of the proceeding, subject to subsection (4).

Prior notice required

(2) Before making an order under subsection (1), the Tribunal shall give notice of its intention to make the order to the owner or occupier of the land or premises, in accordance with the rules.

Submissions

(3) An owner or occupier who receives a notice under subsection (2) may make submissions to the Tribunal with respect to the proposed order, in accordance with the rules.

> **Order**
>
> (4) The Tribunal shall not make an order under subsection (1) until it has given notice under subsection (2) and considered any submissions made under subsection (3).
>
> **Exercise of powers**
>
> (5) The member or employee shall exercise their powers under an order made under subsection (1) in accordance with the directions of the Tribunal in the order, this section and the rules.
>
> **Identification**
>
> (6) The member or employee shall, on the request of an owner or occupier of the land or premises, identify themself and explain the purpose of the entry and inspection.
>
> **No use of force**
>
> (7) The member or employee shall not use force to enter and inspect land or premises under the order.
>
> **No entry without consent**
>
> (8) The member or employee shall not, despite the order, enter or inspect land or premises of an owner or occupier who is not a party to the proceeding without the owner or occupier's consent."
>
> [all of the above emphasis added]

[9] As can be seen from even a cursory review of the above-noted provisions of OLTA, the powers granted to the OLT are extensive and significant. There are again no express limitations set out in respect of its duties and mandate under the Act, beyond those matters noted in paragraph [7] above which are assigned to judges. There is abundant jurisprudence (well-referenced in the Claimants' responding Factum and Brief of Authorities) that confirms this long-recognized exclusive authority of the OLT and its predecessors to determine compensation and costs under the Act. In addition, there is a longstanding principle that the awarding of costs under section 32 of the Act is uniquely directed to ensuring a full measure of indemnity for claimants – a more unusual notion in civil court actions (the usual domain of assessment officers of the Superior Court). The best-known case is the often-cited decision of the Supreme Court of Canada in Dell Holdings Limited v. TTC [1997] 1 S.C.R. 32 where the majority noted:

> …the Expropriations Act should be read in a broad and purposive manner in order to comply with the aim of the Act to fully compensate a land owner whose property has been taken... Indeed, the overriding objective of the entire Act is to provide fair and proper indemnity for the owner of the expropriated land… Thus it is clear that the Act should be interpreted in a broad, liberal and flexible manner in considering the damages flowing from expropriations…
>
> [above emphasis added]

[10] In its later decision in Smith v Alliance Pipeline Ltd, [2011] 1 SCR 160, the Supreme Court went on to confirm that there is to be comprehensive indemnification for the legal costs of a claimant under expropriation legislation analogous to the Act:

> Today, the principle of full indemnification appears explicitly in s. 75 of the NEBA, which provides, as I noted earlier, that a company "shall make full compensation . . . for all damage sustained" by the expropriated owner. Parliament adopted this more comprehensive approach to indemnification by broadening the language of s. 99(1) from "costs of the arbitration" to "all legal, appraisal and other costs determined by the Committee to have been reasonably incurred by that person in asserting that person's claim for compensation…
>
> Like various provincial expropriation statutes, the *NEBA* is remedial and warrants an equally broad and liberal interpretation. To interpret it narrowly, as the respondent in this case suggests, would in practice transform its purpose of full compensation into an unkept legislative promise…
>
> [above emphasis added]

2. The Broad Jurisdiction of the OLT Is Not Limited by Any Distinction between the Concepts of 'Fixing' or 'Assessing Costs'

[11] The Tribunal found the arguments made by Metrolinx attempting to circumscribe the OLT's jurisdiction on the basis of the terms "fixing" and "assessment" of costs to be unnecessarily tortured, formalistic and entirely unpersuasive. The case cited for this proposition, Hession v. Black Construction Services Inc. (2015) 25 ONSC 7047 ("Hession"), an endorsement by a case management master in entirely different proceedings, is neither binding on the OLT nor relevant.

[12] The Hession case had nothing to do with an expropriation proceeding nor did it involve the OLT. It was a decision on a motion for costs brought pursuant to Rule 23.05 of the *Rules of Civil Procedure* requesting an order for costs of a discontinued court proceeding (a provision which has no relevance or application to OLT proceedings). The presiding master (who was a case management master) made certain observations expressing his views about the difference between fixing and assessing costs in that context. Notably, in his ruling, he also stated:

> …A case management master has all of the jurisdiction of a judge to hear most motions including motions under Rule 23. A case management master may also be designated as a referee by order of a judge pursuant to Rule 54. Of course, a case management master may award and fix costs in the exercise of his or her jurisdiction, but a case management master is not an assessment officer under … Rule 58…
>
> [above emphasis added]

[13] Clearly, the concern of the case management master in Hession was that he did not have the power to assess costs under Rule 58 because he was not an assessment officer. In the Tribunal's opinion, this cannot be extrapolated to any principle that could impact the jurisdiction of the OLT under either OLTA or the Act.

[14] In this Tribunal's view, it is notable that Metrolinx failed to raise a single decision of the OLT or its predecessors; of the Ontario Superior Court; or of the Divisional Court or the Court of Appeal to rely upon for its novel objection to the Tribunal's jurisdiction under the Act. It is equally notable that Metrolinx also ignored in its initial submissions several past Tribunal decisions that have rejected similar arguments to those made by Metrolinx on this Motion.

[15] The reliance by Metrolinx on Rule 58 of the *Rules of Civil Procedure* is also not well-founded, in this Tribunal's opinion. Indeed, the actual text of this rule, even if applicable, demonstrates that it would not be relevant in the circumstances of this case:

> **58.01** Where a rule or order provides that a party is entitled to the costs of all or part of a proceeding and the costs have not been fixed by the court, they shall be assessed in accordance with rules 58.02 to 58.12
>
> [above emphasis added]

[16] The triggering event contemplated by Rule 58.01 is not present here in the Tribunal's view: the costs entitlement of the Claimants does not stem from "…a rule or order…". Instead, the Claimant's right to costs is explicitly set out in section 32 of the Act and does not depend on any Rule of Civil Procedure – it is a substantive entitlement under the Act. Moreover, this is not a situation where the Tribunal has declined to fix an amount for the costs pursued by the Claimants – neither is it one where the Claimants are asking the OLT to perform an "assessment" of costs. The Claimants are justifiably simply trying to compel Metrolinx to pay the costs it freely admits that it is compelled to pay but for reasons only it can fully explain has not done so.

[17] In any event, the Rules of Civil Procedure are not paramount in expropriation cases - or in any other OLT proceeding for that matter. Pursuant to OLTA, the recently-revised Rule 26 of the OLT Rules applies to proceedings under the Act. Under OLTA and the OLT Rules, the Tribunal is not bound to apply or even consider the Rules of Civil Procedure except in very narrowly defined circumstances (such as for example, with respect to examinations for discovery). Moreover, the important language of the following OLT Rules must be kept in mind, since they emphasize the broad powers and public interest mandate of the Tribunal and the discretion afforded to it:

> **1.3 Interpretation of the Rules** These Rules shall be liberally interpreted to offer the best opportunity for a fair, just, expeditious and cost-effective resolution of the merits of the proceedings.
>
> **1.4 Matters Not Dealt With in the Rules** The Tribunal may at any time in a proceeding before it make orders and direct practices and procedures that offer the best opportunity for a fair, just, expeditious and cost-effective resolution of the merits of the proceeding and may exercise any of its powers under the OLT Act, the SPPA, or other applicable legislation. If these Rules do not provide for a matter of procedure, the Tribunal may adopt or follow the procedures set out in the *Rules of Civil Procedure* where appropriate and do whatever is necessary to adjudicate effectively and completely to resolve the merits of any dispute on any matter. If the Tribunal does not provide for a particular form, then the Tribunal may adopt, or modify the applicable form in the *Rules of Civil Procedure* to apply to any proceeding before the Tribunal.

> **1.5 Technical Objections** Substantial compliance with the requirements of these Rules is sufficient and technical non-compliance shall be deemed to be an irregularity and does not render a proceeding or a step, decision or order in that proceeding a nullity.
>
> **1.6 Tribunal May Exempt From Rules** The Tribunal may grant all necessary exceptions from these Rules or from any procedural order, or grant other relief as it considers necessary and appropriate, to ensure that the real questions in issue are determined in a fair, just, expeditious and cost-effective manner. …
>
> **26.3 The *Rules of Civil Procedure*** Subject to the Tribunal's discretion under Rules 1.4 and 1.6, the *Rules of Civil Procedure* apply to Tribunal proceedings under the *Expropriations Act* where these Rules do not provide for a matter of procedure.
>
> [all of the above emphasis added]

3. The Circumstances of this Case Justify the Tribunal's Decision to Adjudicate Costs

[18] In this Tribunal's view, the position taken here by Metrolinx highlights exactly the type of scenario that should invoke the Tribunal's broad mandate: claimants under the Act ought not to be forced by the insistence of an expropriating authority that they embark on another route to achieve the determination of their costs entitlement when it is clear that the OLT possesses clearly defined and expansive authority under the Act to deal with expropriation disputes. The position of Metrolinx that this situation demands that a costs assessment be conducted by an assessment officer of the Superior Court is unconvincing. Given that the basis for its position is so unpersuasive, the Tribunal can only assume that Metrolinx may have other ulterior motives.

[19] The Tribunal finds that it would be fair, just, expeditious and cost-effective for the Tribunal to adjudicate this matter given that the Claimants have commenced a proceeding before the OLT to seek that very remedy. Indeed, given that the Tribunal regularly adjudicates claims for compensation under the Act sometimes involving tens of millions of dollars, in addition to very large costs entitlements which can also comprise 6-figure or even 7-figure awards, it is counter-intuitive for the Tribunal to refuse to deal with the relatively modest costs dispute here. In the Tribunal's opinion, it

would be unfair, unjust and certainly not cost-effective to deny the Claimants this recourse and to force them to instead initiate an unnecessary costs assessment proceeding in a separate forum. The Tribunal can certainly expeditiously perform its role under section 32 of the Act. Although there is no direct evidence before the Tribunal as to how many further months of delay would be involved if this matter proceeded through the assessment process of the Superior Court, clearly the OLT's adjudication will be much faster (it can be presumed that the Claimants share that view since they have instead commenced the underlying proceeding before the OLT).

[20] Whatever distinction could be imagined with respect to the words "fix" and "assess", it cannot serve to remove the Tribunal's clear and fulsome jurisdiction concerning costs matters in an expropriation proceeding. From a common-sense perspective, one might interpret these two terms as simply synonymous. In any event, the Tribunal is of the view that an OLT adjudication that "fixing" costs properly payable under section 32 of the Act will stem from a careful review and evaluation of the bills of costs of the lawyers involved and their arguments/invoices relating thereto. Moreover, any practical assessment of payable costs might well lead to an outcome which simply fixes a single sum to be a party's entitlement: for an example, see the Stratford Decision, but there are many other such cases in the Tribunal's historical jurisprudence.

[21] In this Tribunal's view, the Ontario Legislature would have used very deliberate and precise language in the Act had it intended to limit or narrow the costs jurisdiction of the OLT. Instead, the above-noted provisions of the Act set out in above and in OLTA properly lead to the opposite conclusion: the Legislature intended to provide broad authority to the OLTA to deal with any and all matters arising under the Act – except those matters clearly assigned to be dealt with by a judge of the Superior Court (or on appeal to the Divisional Court). It is illogical and unreasonable to contend that the vague language in section 32 identifying assessment officers is equivalent to the specific statutory provisions <u>that require</u> a judge's involvement. Similarly, the regulation promulgated under the Act which provides for the tariffs to be utilized by assessment officers - after the Tribunal refers a cost matter to them – cannot properly be interpreted

to eliminate or limit the OLT's jurisdiction.

[22] The provisions relied upon by Metrolinx actually instead reinforce the points made above in this Part 2 concerning the powers of the Tribunal under section 32 of the Act, OLTA and the OLT Rules. In the Tribunal's opinion, the words "…or may order that the determination of the amount of such costs be referred to an assessment officer who shall assess and allow the costs in accordance with this subsection…" simply mean that the OLT has the discretion to order that an assessment be carried out by an assessment officer in the event that the Tribunal decides not to determine costs.

[23] In the Tribunal's view, the words "or may order" are clearly permissive and describe the Tribunal's discretionary power. There could be many reasons why the OLT might, in its discretion, decide that it will not carry out a costs determination under the Act such as, for example only, (a) where the Tribunal's caseload is very high at a certain juncture; (b) the Chair determines that those Members who have experience in costs matters are otherwise occupied with other significant hearings; and/or (c) it would be faster and more cost-effective to instead order an assessment by an assessment officer. The Legislature saw fit to invest the Tribunal with this overall discretion – however, this cannot be equated to a mandatory directive which prevents the Tribunal from deciding to adjudicate any particular costs dispute under the Act.

[24] Metrolinx also could not cite any authority for the notion that the OLT's power and discretion to fix costs in an expropriation proceeding is fettered in any distinct way. Once again, it is absurd to suggest that the Tribunal could not choose to base its costs ruling upon a careful, detailed evaluation of all relevant written and oral evidence and submissions – i.e. in practical effect, an 'assessment'.

[25] The Decision of the Ontario Municipal Board ("OMB") in Morasiewicz v. Niagara (Regional Municipality), 2014 CarswellOnt 1305 (OMB) ("Morasiewicz") does not assist Metrolinx. Firstly, Morasiewicz is actually an example of an explicit exercise of discretion on the part of the OMB to refer a costs assessment matter to an assessment officer – exactly the point made above in this Part 2. Secondly, although the presiding OMB

Vice-Chair in Morasiewicz referred to a contractual agreement between the parties which seemed to require the costs to be dealt by an assessment officer, this Decision does not stand for the proposition that he was bound to do so. Rather, he simply decided, at his discretion, that this was an appropriate course of action. No question of jurisdiction was before the OMB in Morasiewicz.

[26] With respect, the apparent comments made by the assessment officer presiding in Murray Bauman Investments Ltd. v. Ministry of Transportation in Superior Court file no. CV-00000254-000, as contained in a transcript filed by counsel for Metrolinx at Tab 3 of its Brief of Authorities, are also irrelevant to the arguments made on these Motions. The assessment officer in that matter was certainly not adjudicating the issue of the OLT's jurisdiction. Moreover, his comments about his own assessment process, while interesting, simply have no bearing upon the relief sought in these Motions. This Tribunal might follow similar practices as an assessment officer in exercising its powers under the Act or it might reasonably consider other factors as well. Once again, comments made, or decisions reached by an assessment officer in a wholly unrelated proceeding do not, and could not, bind the OLT.

[27] The background of this proceeding, as described in the following paragraphs of the Claimants' Factum, is also noteworthy:

> 5. Metrolinx failed to provide a substantive response with respect to the Bill of Costs. No explanation or rationale has been provided by Metrolinx for this delay and lack of courtesy to expropriated parties. The Claimants filed materials with the Tribunal for the determination of compensation on October 18, 2023, including submission of a Supplementary Bill of Costs to capture the costs incurred by the Claimants to garner any response from Metrolinx. Metrolinx responded approximately a month after the filing on November 22, 2023.
>
> 6. The filing of materials in October… [by the Claimants seeking costs] …was preceded by three (3) months of communications from counsel for the Claimants to Metrolinx in an effort to obtain a substantive response. On September 1, 2023, counsel for the Claimants urged Metrolinx to address repayment of the Claimants' outstanding costs, citing the fundamental restorative principle of the Expropriations Act, and inviting Metrolinx to provide a substantive response.
>
> 7. By Metrolinx's own admission, it made no efforts to contact the Claimants further until the Notice of Arbitration and Statement of Claim and motion

> materials were filed. Metrolinx chose to ignore and withhold reimbursement of the Claimants' costs, which were incurred due to Metrolinx's property requirement for the construction of the Ontario Line, as well as being elongated by Metrolinx's internal inefficiencies throughout the negotiation process. By way of this motion, Metrolinx continues to attempt to skirt its obligations under the Expropriations Act and further delay the final determination of compensation…
>
> [all of the above emphasis added]

[28] In this Tribunal's view, circumstances such as those described in paragraph [27] above (and not substantively challenged by Metrolinx) require the Tribunal to act in the public interest to assist the Parties by providing a fair, just, expeditious and cost-effective resolution on the merits. The Claimants properly instituted its proceedings in order to obtain the prescribed relief due under section 32 of the Act. The Tribunal is, therefore, duty bound to fulfill its mandate to adjudicate that issue, particularly where no other issues remain in dispute.

[29] While in its discretion the Tribunal could choose to refer the costs matter to an assessment officer, it certainly is not required to do so, as is made clear above in this Part 2. This Tribunal has the resources to adjudicate these disputes and/or to offer facilitated mediation to assist the Parties to achieve a resolution. Based on the affidavits filed, it appears to the Tribunal that Metrolinx has made little or no effort since May 26, 2023, to deal with the merits of the Claimants' rather uncomplicated costs entitlement claims and has instead refused to respond and then when it finally did so its counsel focused solely on process issues – and this Motion – instead of simply making reasonable efforts to reach an early resolution of this very simple matter. No doubt the Claimants' counsel instituted its proceedings before the OLT because of the unreasonable months of delay demonstrated by Metrolinx and/or its counsel. Interestingly, the course of action pursued by Metrolinx has also now served to increase its own costs as well as the costs incurred by the Claimants.

[30] The jurisprudence cited by the Claimants' counsel is, unlike that put forward by counsel for Metrolinx, relevant, specific and highly germane. Indeed, the Tribunal was particularly surprised that Metrolinx counsel in its initial submissions ignored one recent

OMB decision of the late, highly-respected Vice Chair Makuch in *Hume v. Ontario (Transportation),* 2017 CanLII 5203 (ON LPAT) ("Hume"). In his distinguished plus 12-year career at the OMB, Local Planning Appeal Tribunal ("LPAT") and OLT, Vice Chair Makuch presided over many dozens of expropriation cases.

[31] Obviously, when Parties to an OLT proceeding are represented by experienced, skilled counsel – as is the situation here – then the adversary system works well to ensure that both sides of a dispute are well-presented. However, notwithstanding this, the Tribunal does expect counsel for the Parties to fairly reference and address all relevant jurisprudence. Thus, with respect to this Motion, the Tribunal would have anticipated that counsel for Metrolinx would not disregard the OLT's own key caselaw in their initial factum and brief of authorities – and do so only in a reply factum.

[32] In Hume, Vice Chair Makuch directly addressed – and rejected – many of the same contentions made on this Motion – in a scenario where the Claimants sought to have the OMB adjudicate their costs entitlement after all other claims had been settled by the Ministry of Transportation ("MTO"). The MTO opposed that request and insisted that costs had to be dealt with by an assessment officer of the Superior Court. Vice Chair Makuch characterized the MTO's objections (which were very similar to the arguments made on this Motion by Metrolinx) as follows:

> [The MTO argues that] …the Board should refer the issue of costs to an Assessment Officer of the Superior Court of Justice as that assessment process is more suited to effect procedural and substantive justice in the particular circumstances of this case… Counsel for the Respondent argues that it is entitled to a review of the costs claim to ensure that only costs which are found to be both "reasonable" and "actually incurred for the purposes of determining compensation" will involve a review of the legal dockets of two law firms, as well as the review of the invoices from the Claimants' 13 experts and agents… Furthermore, it is argued that the main action was settled prior to the commencement of the hearing of this matter and that this is not a case where a Member of the Board has the advantage of having an understanding of the background of this matter…
>
> … It is indisputable that the "Ontario Municipal Board has expertise in the interpretation of the *Expropriations Act* and legal questions closely related to it" (such as planning and appraisal evidence). However, the determination of costs claims does not fall within an area of the Board's expertise. Rather the

> determination of such claims falls within the core expertise of Assessment Officers.
>
> [all of the above emphasis added]

[33] Vice-Chair Makuch in Hume then went on to categorically reject the arguments made by the MTO in that case (which have largely been repeated by Metrolinx on this Motion). In a lengthy passage, Vice Chair Makuch pointed out:

> Pursuant to s. 32 of the Act, the Board has the discretion to either fix the Claimants' costs or to refer these for assessment and therefore, the only issue on this motion is whether the Board should fix the costs of this proceeding or refer these for assessment… The assessment of the reasonableness of the related costs in this matter requires the specific knowledge of the Board based on its experience with the Act and hearings thereunder, and its expertise in the issues [raised in the Claimant's action]… There are no exceptional circumstances in this case that would justify referring costs to an Assessment Officer of the Superior Court of Justice and such referral would not be a simple, effective or expeditious manner of resolving this issue…
>
> The Board agrees with counsel for the Claimants' submission that issues arising from the determination of reasonable costs in this matter are not ones that routinely arise in the determination of costs in traditional civil litigation and which require the experience and expertise of the Board, which include:
>
> a. The scope of reasonable costs incurred by the owner as a result of planning and design issues flowing from the works planned and carried out by the Respondent, and their impact on the subject property;
>
> b. The reasonableness of expert and legal costs incurred in order to mitigate the impact of the works on the Hume Property and the Claimants' business;
>
> c. The reasonableness of expert costs incurred for the determination and quantification of injurious affection through the cost-to-cure analysis;
>
> d. The reasonableness of business loss and appraisal experts whose function was specific to assessing the impact of the Respondent's works on the subject property; and
>
> e. Legal costs arising from negotiations and dealings with public authorities in the context of an expropriation, which were intended to resolve this matter without a full hearing before the Board.
>
> Such issues are outside the general expertise or knowledge of an Assessment Officer of the Superior Court of Justice. They invoke the specific expertise of the Board, which has broad jurisdiction and experience in relation to planning and expropriation issues. This expertise is required to understand fully the planning and mitigation efforts undertaken by the Claimants, and the reasonableness of the experts whose costs are now claimed for recovery.

> The Board has the expertise, the experience, and the jurisdiction to dispose of this matter quickly, fairly and cost-effectively while an Assessment Officer does not. Fixing costs would resolve this matter in a way that is most consistent with the Rules of Practice and Procedure and the Rules of Civil Procedure. It is the preferred option in this case and the Board should exercise its discretion to fix the costs in this case.
>
> There is no requirement in the Act that the Board's authority to fix costs is only engaged after a full hearing of a matter and may be done irrespective of the manner in which the matter is resolved. The Board has regularly fixed costs in accordance with settlements that ended or avoided a full hearing. The Board should do so in these circumstances as it has the expertise and experience to adjudicate and resolve the issues quickly and efficiently…"
>
> [all of the above emphasis added]

[34] After making the findings described above in paragraph [33], the OMB in Hume went on to Order that a hearing be held to determine the "reasonable costs payable to the Claimants by the Respondents".

[35] This Tribunal agrees with and adopts the detailed reasoning of the OMB in Hume on the jurisdiction issue.

[36] The approach in Hume has been specifically adopted in other OLT jurisprudence, including in the Decision of Member Beccarea in *The Estate of Manuel Haralambus v Halton (Region*), 2021 CanLII 51747 (ON LT) ("Haralambus"). In Haralambus – a less than 3-year-old Decision of this Tribunal again apparently ignored by Metrolinx on this Motion despite it being represented by the same law firm which acted for the Respondent in Haralambus – Member Beccarea stated:

> …The Tribunal chooses to adopt and follow the reasoning …in the decision and order in Case no. LC140040, William R. Hume et al and the Ministry of Transportation. In that case …[Vice Chair]… Makuch dealt with a situation similar to the one before this Tribunal where an order was made pursuant to section 32 (1) of the Expropriations Act, where no determination of the … claim for compensation was made by a Tribunal, as a result of a settlement reached and where the request was made by the Claimant on motion to fix its costs.

> …There is in the Tribunal's view an obligation to provide an efficient adjudication of this matter and to resolve the outstanding issue of costs as quickly and efficiently as possible…There is no justification in these circumstances of referring the matter to an assessment officer and accordingly the Tribunal will order that for purposes of determining the costs payable, that they be fixed by the Tribunal in accordance with section 32(1) of the Expropriations Act.
>
> [above emphasis added]

[37] The Tribunal in Haralambus – as did the OMB in Hume – ordered an oral hearing to determine the costs payable to the Claimants in that proceeding. This Tribunal found the arguments made only in the Reply Factum by Metrolinx's counsel attempting to distinguish Hume and Haralaumbus to be unpersuasive. Much of that Reply Factum focuses on the 'contractual interpretation' urged upon this Tribunal by Metrolinx, which is dealt with below in Section 4.

4. The Settlement Agreement Cannot and Does Not Impact the OLT's Jurisdiction

[38] As an initial matter, the Tribunal rejects the contention that the private contract of settlement ("Relocation Agreement" or "Settlement Agreement") entered into by the Parties could somehow serve to subvert the jurisdiction of the OLT, for several reasons:

(a) The Tribunal is not a court of competent jurisdiction in Ontario and therefore it does not adjudicate any aspects of a contractual dispute between parties to an OLT proceeding;

(b) No provision in either the Act or OLTA – or in any jurisprudence cited to this Tribunal - supports the argument that a contract between Parties can oust the Tribunal's jurisdiction otherwise properly invoked;

(c) Even if a settlement contract could govern how remaining disputes under the Act must be adjudicated by the OLT – which is not accepted by this Tribunal - the language utilized in these Parties' settlement agreement does not reasonably lead to the conclusion that the Tribunal has no jurisdiction

under the Act to determine the costs entitlements of the Claimants.

[39] The obvious dispute between the Parties concerning their private settlement agreement is made clear by their submissions on this Motion. Metrolinx claims that there was a binding agreement that compelled the Claimants to proceed to an assessment before an assessment officer of the Superior Court. In its initial written submissions on this Motion, its counsel asserts:

> …Metrolinx bargained for and paid consideration for Paragraph 7 of the … [Settlement] …Agreement, in which the parties agreed that the Claimants' costs would be assessed in the event of dispute…Metrolinx submits that the Tribunal should give effect to the Agreement between the parties by referring this matter to an assessment officer of the Superior Court of Justice
>
> [above emphasis added]

[40] On the other hand, the Claimant's counsel in their responding Factum argue to the contrary:

> …[in their Settlement Agreement]… the Claimants and Metrolinx provided for the reimbursement of costs in accordance with Section 32 the *Expropriations Act*:
>
> > Metrolinx shall pay the Tenant's reasonable legal fees and disbursements (including applicable taxes) ***in accordance with Section 32 of the Act incurred by the Tenant in connection with the negotiation, settlement, and completion of this Agreement***, provided that the Tenant submits an itemized invoice/account to Metrolinx within sixty (60) days upon mutual execution of this agreement for Metrolinx's review and approval, acting reasonably… Metrolinx, upon receiving, reviewing, and approving such invoices/accounts, shall pay such reasonable costs within sixty (60) days. ***In the event of any dispute as to the reasonableness of any of the above-noted costs, the costs shall be determined in accordance with Section 32 of the Act*** and the Tenant agrees to execute a consent or other document as required for the Ontario Land Tribunal to order an assessment of the costs, immediately upon request by Metrolinx [***emphasis added by Claimants' counsel***]
>
> The intent of the parties was to attorn the determination of costs to the Tribunal pursuant to its exclusive jurisdiction of expropriation-related matters…The Claimants submit that the parties agreed that the Claimants' costs would be determined in accordance with Section 32 of the *Expropriations Act*. The Claimants are entitled to the determination of compensation by the Tribunal… Notwithstanding Metrolinx's assertions, there is no evidence that Metrolinx paid any additional compensation for the inclusion of this provision to reflect the statutory costs repayment obligations

> placed upon every expropriating authority
>
> [above emphasis added]

[41] Therefore, this is not a situation where the Parties have unequivocally agreed on precisely how an outstanding costs claim would be adjudicated. In fact, as noted in paragraphs [39] and [40] above, the Parties completely disagree on that point. It seems to this Tribunal that any argument of Metrolinx that the Claimants have contravened the settlement agreement (or vice-versa) gives rise solely to a breach of contract action in an Ontario court of competent jurisdiction. It is not within the purview of the OLT to adjudicate contractual disputes, and this Tribunal declines to do so in this proceeding. Therefore, in this Tribunal's view, the additional caselaw presented in Metrolinx's Reply Factum is neither relevant nor applicable here.

[42] In any event, even if the Parties were *ad idem* about the meaning of the relevant clauses in their Settlement Agreement, no authority was cited for the proposition that the Tribunal is bound by their agreement. Neither Party presented any jurisprudence to demonstrate that the jurisdiction, powers and obligations of the OLT under the Act, OLTA and the OLT Rules can be 'contracted out of' by parties in the event of an OLT proceeding brought pursuant to section 32 of the Act. On the other hand, it appears that there have been past cases where Tribunal Members have exercised their discretion to consider the private agreements reached by parties. However, those decisions are neither binding nor do they fetter the discretion that could be exercised by the OLT in subsequent proceedings. Of course, the Tribunal accepts that at any time parties may decide to mediate their disputes under the Act, utilizing either the OLT Mediation group or another mediation service. This is also not as case where the quantum of costs entitlement has been agreed to and one party is attempting to resile from that agreement. This Tribunal's ruling is not to be construed as one dealing with either of these two scenarios.

[43] The OLT is not an enforcer of private contracts. In its Reply Factum, counsel for Metrolinx seemed to urge this on the Tribunal:

> Metrolinx merely asks the Claimants to perform their obligations under paragraph 7 of the Agreement, which requires consent to the Tribunal's order for an assessment, and seeks the Tribunal's assistance with such an order as contemplated in the Agreement.
>
> …Metrolinx has attorned to the Tribunal's jurisdiction for the limited purpose of enforcing the Claimants' covenant in paragraph 7 of the Agreement, which is to consent to an order referring their cost claims to be assessed by an assessment officer as contemplated in Section 32 of the Act
>
> …The only reasonable interpretation of paragraph 7 of the Agreement is that the parties agreed that Metrolinx would apply to the Tribunal for an order referring the Claimants' costs claims to an assessment officer of the Superior Court of Justice...
>
> [all of above emphasis added]

[44] This Tribunal rejects the above contention and refuses to interpret and/or grant a remedy based upon an adjudication of the Parties' evident dispute concerning their settlement contract, nor will it bind its own discretion under section 32 of the Act to deal with the costs dispute between the Parties only as insisted upon by Metrolinx.

5. The OLT Has Broad Authority to Determine and Control Procedural Matters

[45] As noted, subsequent to Hume, this Tribunal is unaware of any proceeding prior to this Motion where its jurisdiction under section 32 of the Act to determine costs dispute was successfully challenged. Nor could counsel for Metrolinx cite a single relevant case to support that proposition.

[46] In any event, it is clear that under OLTA the OLT has the power to control its own process and procedures. This was recently pointed out by the Divisional Court in North Elgin Centre Inc. v. City of Richmond Hill, 2023 ONSC 1123 (Div. Ct.) where that Court stated:

> [13] In addition, NEC has not demonstrated good reason to doubt the correctness of the Tribunal's decisions with respect to the questions of law raised. Many of the procedural fairness issues raised by NEC fall squarely within the Tribunal's authority and discretion on procedural matters. Subsection 12(2) of the OLT Act states that the "Tribunal shall, in respect of any proceeding, adopt any practices and procedures provided for in the rules or that are otherwise available to the Tribunal that, in its opinion, offer the best opportunity for a fair, just and expeditious resolution of the merits of the proceedings." Similarly, Rule 22.3 of the Ontario Land Tribunal Rules of Procedure provides that "the Tribunal may, by order, establish and direct the procedure at a hearing event… to ensure the issues in dispute are disposed of in the most just, cost effective and efficient manner.
>
> [14] The issues raised by NEC, such as curtailing lengthy cross-examination, are the type of procedural matters over which the Tribunal has considerable discretion. Moreover, s. 18(3) of the OLT Act specifically provides that the Tribunal may limit cross-examination of a witness including "in any other circumstances the Tribunal considers fair and appropriate." Similarly, while NEC raises the Tribunal's refusal to allow a court reporter transcribe a portion of the hearing at NEC's request, this is contemplated under Rule 22.8. That rule states that any party may arrange for the attendance of a qualified verbatim reporter for the entire hearing, however, the consent of the Tribunal is required before a qualified verbatim reporter is permitted to record only part of the proceeding.
>
> [15] Many of the issues raised by NEC, such as the quashing of summons by the Tribunal, among other things, would be subject to the privative clause contained in the OLT Act. Subsection 13(4) of the Act states that "[u]nless the Tribunal's failure to comply with the rules, or its exercise of discretion under the rules in a particular manner, causes a substantial wrong that affects the final disposition of a proceeding, neither the failure nor the exercise of discretion is a ground for setting aside a decision of the Tribunal on an application for judicial review or an appeal." NEC is not able to demonstrate that a substantial wrong affected the Phase 2 disposition, as required under s. 13(4).

[47] In another recent Divisional Court decision, North Elgin was cited for the same principles - see: South Junction Triangle Grows Neighbourhood Association v. 1423 Bloor Street West Inc. et al., 2023 ONSC 7052 (Div. Ct.).

[48] Counsel for Metrolinx also complains in its factums that the Tribunal ought not to exercise its discretion to determine the Claimants' cost entitlement by ruling upon the Claimants' motions for costs because to do so would apparently not be as 'reasonable' as proceeding by way of an assessment before an assessment officer. This Tribunal is unconvinced by these bare allegations and rejects the suggestion that it is somehow unable to reasonably adjudicate the straightforward costs dispute here. As noted above in Part One, the Stratford Decision is an excellent recent example of the OLT

determining costs in a far more complex and contentious matter, by way of a motion ruling.

[49] Finally, the Tribunal also strongly disagrees with the argument that a costs dispute under the Act is not properly dealt with by way of a written motion under the OLT Rules. Clearly, those Rules provide for that mechanism and the OLT unquestionably has the power to direct and control its own procedures in the interests of arriving at a fair, cost-effective and expeditious determination – as made clear in the judicial decisions described in paragraphs [46] and [47] above. In this Tribunal's view, Metrolinx has not made a convincing argument that it alone suffers any prejudice where the Claimants have chosen to bring a written motion to seek the Tribunal's costs adjudication. Obviously, the Claimants do not feel prejudiced at all and it is difficult to understand how Metrolinx can allege unfairness when both Parties will be subject to the same requirements.

[50] While it is true that the parties in the Stratford Decision made oral submissions, all of their materials were delivered in writing only, including all supporting dockets and invoices. Moreover, the parties also filed extensive written factums and briefs of authorities – and the number of hearing days allotted was later reduced because the Tribunal determined that they were simply not required (and no resultant objections were raised by counsel to the parties).

[51] In the costs motions filed by the Claimants, the Tribunal is confident that the Parties will be equally well-served by the filing of written materials and arguments. There is no need for the Tribunal to hear oral evidence from the lawyers or any other service providers who may have performed relevant work for the Claimants. The Tribunal is also untroubled by the likelihood that one or both Parties might wish to file brief affidavits from experienced expropriation practitioners attesting to the reasonableness of the cost claims (or lack thereof). As it turns out, this Tribunal Vice Chair has considerable past experience in reviewing and considering the accounts of law firms. Nonetheless, when Metrolinx deliver its responding materials in these

motions it is still free to raise for the consideration of the Tribunal any specific grounds upon which it feels an oral hearing is also required.

ORDER

[52] THE TRIBUNAL ORDERS THAT:

(a) The motion by Metrolinx to dismiss the proceedings commenced by the Claimants to have the Tribunal determine their costs entitlement under section 32 of the *Expropriations Act* is dismissed; and

(b) The Tribunal shall determine the costs payable to the Claimants on this motion when it adjudicates the Claimants' motions on the cost payable by Metrolinx under the governing settlement agreements;

(c) This Decision shall govern each of the five proceedings described in the Title of Proceedings ("Five Proceedings") and, for clarity, the Tribunal will not entertain further motions by Metrolinx in any of the Five Proceedings contesting the jurisdiction of the OLT to determine costs under section 32 of the *Expropriation Act*, R.S.O. 1990, c. E.26, as amended;

(d) The Tribunal will provide administrative directions to the Parties to complete as soon as possible, in accordance with the timelines prescribed under the OLT Rules of Practice and Procedure, their filing of all responding materials pertaining to the motions for costs brought by the claimants in each of the Five Proceedings; and

(e) If the Parties require any further assistance with respect to the above Orders, they may file written requests with the Tribunal which will be considered by this Vice-Chair who shall remain seized of all matters pertaining to the Five Proceedings.

"William Middleton"

WILLIAM MIDDLETON
VICE-CHAIR