Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: March 31, 2023 **CASE NO(S).:** OLT-22-003081 (Formerly LC140043)

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

Claimant:	413464 Ontario Limited
Respondent:	City of Windsor
Subject:	Land Compensation
Property Address/ Description:	1245 Provincial Road and 1065 Cabana Road East
Municipality:	City of Windsor
OLT Case No.:	OLT-22-003081
Legacy Case No.:	LC140043
OLT Lead Case No.:	OLT-22-003081
Legacy Lead Case No.:	LC140043
OLT Case Name:	413464 Ontario Limited v. Windsor (City)

Heard: November 22, 23, 24, 25, 28, 29 and 30, 2022, Final Written Argument submissions received December 12, 21, 2022 and on January 4, 2023

APPEARANCES:

Parties	**Counsel**
City of Windsor	P. Brode A. Farough
413464 Ontario Limited	M. Shulgan, K.C.

DECISION DELIVERED BY WILLIAM R. MIDDLETON ON MARCH 31, 2023

1. INTRODUCTION

[1] This proceeding involves the Claimant's claims arising from the expropriation by

the City by notice issued September 14, 2011 of a portion of the properties located at the intersection of Provincial Road and Cabana Road in the City: 1245 Provincial Road (the "Provincial Property") and 1065 Cabana Road East (the "Cabana Property") (together the "Subject Properties") in connection with the City's Provincial Road improvement project (the "Project")which was completed on May 13, 2013. The Claimant seeks compensation for the value of lands taken for the road reconstruction and injurious affection under the *Expropriation Act*, R.S.O. 1990, c. E26, ("EA") and its Claim was issued on October 14, 2014.

[2] The hearing of this matter proceeded before the Ontario Land Tribunal ("OLT" or "Tribunal") by video hearing ("VH") on November 22, 23, 24, 25, 28, 29 and 30th, 2022. All written final argument submissions were delivered to the Tribunal by January 4, 2023 and counsel for the Parties stated that oral final argument was not required. The materials before the Tribunal were:

(a) Joint Document Book, comprising 68 tabs and 825 pages and also including the various expert reports of: Mr. Les Otto, real estate appraiser, dated August 10, 2020 and August 6, 2021; Mr. Ray Bower, real estate appraiser, dated February 14, 2012, August 18, 2020, September 7, 2021 and October 12, 2022; Mr. Jim Tracey, business valuator, dated October 26, 2021; Mr. Glenn Tautrims, business valuator, dated October 13, 2022;

(b) Claimant's List of Documents, comprising 13 tabs duplicating many of the items in the Joint Document Book as noted in (a) above, but also including the Witness Statements ("WS") of Ms. Rene Mallete, Mr. Gary Barbesin and Mr. Mark Lalovich and a one-page document described as Summary of Income Loss Claims Chart dated October 26, 2020;

(c) Additional documents from the Respondent City of Windsor, including the WS of Ms. Jane He and of Mr. Tom Mosey;

(d) November 18, 2022 letter from the Claimant's counsel to the Tribunal

attaching a “Fresh as Amended Statement of Claim’ and a Statement of Law and Brief of Authorities, comprising 5 tabs and 75 pages;

(e) Statement of Agreed Facts of Glen Tautrims and Jim Tracey, comprising 2 pages;

(f) Refusals and Undertakings Chart for Jane He from November 29, 2016 Discovery, comprising 4 pages;

(g) Final written argument of the Claimant, dated December 12, 2022, comprising 21 pages;

(h) Final written argument of the City of Windsor, dated December 21, 2022, comprising 26 pages;

(i) Reply written argument of the Claimants, dated January 4, 2023, comprising 5 pages; and

(j) Various additional jurisprudence cited by counsel for both Parties.

2 Motion Rulings During the Hearing

[3] In addition to numerous evidentiary rulings, there were also two distinct matters which gave rise to motions before the Tribunal at this hearing. The first concerned the Claimant’s motion for leave to file a Fresh as Amended Statement of Claim (“SOC”). The second was a motion by the Claimant to exclude certain evidence of Mr. Bower, a real estate appraiser retained by the City to respond to and critique the opinions rendered by the Claimant’s appraisal expert, Mr. Otto.

<u>Motion for Leave to filed Fresh SOC</u>

[4] Just 4 days prior to the commencement of the VH, the counsel for the Claimant

advised counsel for the City and the OLT that he intended to seek leave to file a Fresh as Amended SOC.

[5] The City opposed this request on a number of grounds, arguing that it was too late in the proceeding and that it could unfairly impact the evidence to be tendered on behalf of the Claimant which would cause prejudice to the City. However, no clear evidence of prejudice was presented by the City's counsel.

[6] For his part, in his letter advising of the motion, the Claimant's counsel referred to the Tribunal's *Rules of Practice and Procedure* ("Rules") and submitted that the proposed Fresh as Amended SOC did not raise any new causes of action and claimed that "…*it more clearly states the relief the claimant seeks in the basis on which the claimant seeks entitlement to that relief* [sic]".

[7] In reliance on the Rules, which with respect to expropriation proceedings under Rule 26.16 permit the Tribunal in certain prescribed circumstances to also have reference to the Ontario Rules of Civil Procedure ("Ontario Rules"), the Claimant's counsel argued that under the Ontario Rules a party may amend a statement of claim at any time so long as it cannot be demonstrated that the amendment would cause prejudice that could not be compensated for by a costs order.

[8] The Tribunal notes that the proposition cited by counsel for the Claimant as described in paragraph [7] above is not an absolute rule, as pointed out by Regional Senior Justice Edwards in the recent case of *Broome v. Western Assurance Company*, 2023 ONSC 1732:

> "…When is too long for a party to amend a claim to add punitive damages after the action has been set down for trial? …This matter dates back to a motor vehicle accident which occurred on July 21, 2011, nearly 12 years ago. The plaintiff claimed accident benefits from the defendant and commenced an action in November 2013…
>
> In *Marks v. Ottawa (City)*, 2011 ONCA 248, the Court of Appeal affirms that there is no absolute right to amend pleadings…

> The law with respect to the application of Rule 26 was further reviewed by the Court of Appeal in *1588444 Ontario Ltd. v. State Farm Fire and Casualty Co.,* 2017 ONCA 42. The principles applicable are summarized by the Court of Appeal at paragraph 25 and confirm that the court must grant leave to amend unless the responding party would suffer non-compensable prejudice. The Court of Appeal in *1588444 Ontario Ltd.* further confirms that the amendment may be granted at any stage of the action and that, as it relates to prejudice, the prejudice must flow from the amendments and not from some other source. Of particular importance in the Court of Appeal decision is confirmation that at some point, the delay in seeking an amendment would be so lengthy and the justification so inadequate that prejudice to the responding party will be presumed …
>
> As it relates to the issue of delay in the pursuit of a motion to amend a pleading, the most recent decision of the Court of Appeal on this issue can be found in *Horani v. Manulife Financial Corporation*, 2023 ONCA 51 where the Court of Appeal found a presumption of prejudice where the appellants were seeking leave to amend their pleading seven and a half years after the incident in question and four years after the action had been set down for trial…"

[all above emphasis added]

[9] After hearing the arguments of counsel for the Claimant and the City's counsel, the Tribunal ruled that it would defer consideration of the Claimant's request for leave to file the Fresh as Amended SOC until after the Claimant had presented its full case at the VH. However, the Tribunal also stated that it would entertain and rule upon any objections made by the City's lawyer if he believed at any point during the Claimant's case in chief that an issue had arisen regarding inadmissibility or unfairness in relation to this proposed new pleading. Moreover, the Tribunal further pointed out that the Claimant's counsel could, at the appropriate juncture in the VH, specifically seek leave to introduce *viva voce* or other evidence based upon the Fresh as Amended SOC – subject, of course, to any valid objections raised by the City's counsel.

[10] Interestingly, no objections by the City's counsel nor any further requests by the Claimant's counsel, were made subsequent to the Tribunal's ruling described in paragraph [9] above concerning the proposed Fresh as Amended SOC. In addition, following the conclusion of the Claimant's case, counsel for the Claimant did not seek leave to file that pleading. Finally, this issue was also not raised or discussed in the final written arguments of either the City or the Claimant. In any event, it is not the role

of the Tribunal to, in the absence of such submissions, to determine the relevance of the proposed Fresh as Amended SOC to either the Claimant's case or the City's case.

[11] In light of the circumstances described in paragraph [10] above, the Tribunal assumed that the Claimant's counsel had decided that he no longer wished to pursue his initial request for leave to deliver the Fresh as Amended SOC. Thus, the Tribunal made no further ruling on this matter and leave to file the Fresh as Amended SOC is not granted.

Motion to Exclude Certain Expert Opinion Evidence

[12] During the cross-examination of the Claimant's expert appraiser Mr. Otto by the City's counsel on Day 3 of the VH, as an objection, the Claimant's counsel sought to exclude certain opinion evidence contained in one of the reports by the City's appraisal expert Mr. Bower. This occurred suddenly and unexpectedly – no prior notice had been provided to either the Tribunal or to the City, even though Mr. Bower's report had been filed months before the VH and was made part of the Joint Document Book delivered, without objection, for this hearing.

[13] At the hearing, the Tribunal delivered a summary oral version of the ruling now set out in paragraphs [14] to [30] below.

[14] The Tribunal noted that the better time to seek to strike out portions of Mr. Bower's expert report would have been to bring a formal motion under Rule 10.1 or 10.3 long before the onset of this hearing. These Rules apply to expropriation cases just as they do to all other cases before the OLT. Nonetheless, the Tribunal exercised its discretion under Rules 1.3, 1.7, 10.10 and 10.11 to entertain a motion by the Claimant's counsel to exclude certain elements of Mr. Bower's written report – in the interests of determining the issues raised "…*in a fair, just, expeditious and cost-effective manner*…".

[15] Specifically, the Claimant's motion sought to exclude pages 5-29 of the Bower report at Tab 65 of the Joint Document Book ("Impugned Portions") and also to disallow

any cross examination of Mr. Otto or other Claimant witnesses based on the Impugned Portions.

[16] In summary, the Impugned Portions set out Mr. Bower's detailed critique of Mr. Otto's reports based on his alleged failures to adhere to the Canadian Uniform Standards of Professional Appraisal Practice ("CUSPAP"). Mr. Shulgan for the Claimant argued that any cross-examination of Mr. Otto by Mr. Brode for the City based on Mr. Bower's critique related to the CUSPAP 'non-compliance' was "completely irrelevant and inadmissible" because Mr. Bower was "not entitled to opine on the reliability of Mr. Otto's reports and conclusions" and that his opinions "did not constitute evidence".

[17] Mr. Shulgan filed a Statement of Law at the VH which related to his complaints regarding Mr. Bower's report (which again begs the question of why his motion was not brought long before the hearing). His written argument on the point was as follows:

> Before an expert's opinion is admissible into evidence, the facts on which the opinion is based must be disclosed in its report. The failure of an expert to disclose the facts on which the opinion is based denies the trier of fact the opportunity to reject an expert's opinion if the trier of fact finds facts to be different from those that form the basis of the expert's opinion.
>
> Parliament, by his Litigation Guardian York et al. v. Conley et al., 2021 ONCA 261 at paragraphs [54] ("Conley")

[18] Upon closer review, the Conley decision of the Ontario Court of Appeal, in the Tribunal's view, is not directly relevant to the circumstances of this case where the Claimant's counsel seeks to exclude the Impugned Portions. In Conley, what was at issue was the failure of the trial Judge to caution the jury not to rely on one of the expert witnesses' expressed view as to the credibility of the Plaintiff's witnesses' testimony. Mr. Justice Harvison Young made this clear in his reasons for the majority where he stated in paragraphs 57 and 58 thereof:

> There are two steps that the trial judge could have taken at the time that Dr. Bruce was testifying. First, she could have … in the absence of the jury, invited submissions from the parties as to the content of a mid-trial

> instruction that the jury ignore any and all of his expressions as to the credibility or reliability of the witnesses. Second, she could have included a very clear and specific instruction in the final charge on the point. The general comment that it was entirely up to the jury to decide "[h]ow much or how little [they] believe of or rely upon an expert's opinion" was wholly inadequate given the risk that the jury would place undue weight on Dr. Bruce's opinion. Given the large number of expert and. lay witnesses who testified at trial, nothing less than a clear and specific instruction that Dr. Bruce's credibility opinions were inadmissible and should be ignored would suffice.
>
> The failure to so instruct the jury was a serious error on the part of the trial judge, despite the fact that the appellants' counsel did not ask for either a mid-trial or a closing instruction. In this case, the trial judge should have delivered a prompt and clear mid-trial instruction during Dr Bruce's testimony and reiterated this instruction in the final charge. I recognize that both steps might not be necessary in all cases, but it was necessary in this case, given the highly prejudicial nature of the impugned aspects of Dr. Bruce's evidence to the appellants' case and the fact that the jury heard a great deal of additional evidence on subjects other than the standard of care after he testified. [emphasis added]

[19] In the Tribunal's view, the circumstances in Conley are not analogous to the expression by Mr. Bower in his report of his professional opinions regarding whether Mr. Otto followed the applicable CUSPAP rules in conducting his appraisal and in expressing his appraisal findings. Mr. Bower made no statements as to the credibility of Mr. Otto as a witness or as to whether the Tribunal, from a credibility standpoint, ought to rely on Mr. Otto's written or oral evidence. He instead simply expresses his professional opinion as to whether Mr. Otto has complied with the governing CUSPAP rules.

[20] In the Tribunal's view, the decision of the Supreme Court of Canada in *R. v. Mohan* [1994] 2 S.C.R. 9, is the better starting point for consideration of any expert witnesses' opinions. In Mohan, the well-known 'four-part test' is set out:

> First, there are four threshold requirements that the proponent of the evidence must establish in order for proposed expert opinion evidence to be admissible: (1) relevance; (2) necessity in assisting the trier of fact; (3) absence of an exclusionary rule; and (4) a properly qualified expert…

[21] Mohan also underlined the important role of trial judges in assessing whether otherwise admissible expert evidence should be excluded because its probative value

was overborne by its prejudicial effect— a residual discretion to exclude evidence based on a cost-benefit analysis. This is the second component, which the subsequent jurisprudence has further emphasized.

[22] Interestingly, Mohan was cited with approval again by the Supreme Court of Canada more recently in *White Burgess Langille Inman v. Abbott and Haliburton Co*. [2015] 2 S.C.R. 182 which dealt with a civil case where opposing experts expressed opinions on whether an auditor followed generally accepted professional standards – a routine occurrence in professional negligence cases.

[23] The Tribunal noted that in this proceeding – or any other OLT matter – the OLT will not adjudicate on specific issues of professional conduct or professional negligence or make specific rulings as to whether any expert has complied with any applicable rules of conduct or standards of practice. On the other hand, the OLT often receives diametrically opposed expert opinion reports and WS's as well as oral testimony based on those opinions. Often there are Reply and Surreply WS's tendered as well, in which the experts respond to the views and critiques offered by each other. This is common practice in many of the cases brought before the Tribunal in both land compensation and planning cases.

[24] A little less common, although not unusual, are situations where one aspect of the expert critiques relate to defined professional standards or rules such as the CUSPAP provisions governing real estate appraisers. This does not serve to convert an OLT proceeding into a professional discipline hearing, however. Nor is it in any way unfair to the Claimant, particularly in this case where the Bower critique was delivered well prior to this hearing and was included in the Joint Document Book prepared by consent of the Parties. Moreover, the Claimant's counsel will have plenty of opportunity to cross examine Mr. Bower on his critique of Mr. Otto and as to the reasons why he included a CUSPAP analysis, as well as the basis for his expressed opinions, or lack thereof.

[25] Counsel for the Claimant argued at one point that there may be an issue as to

the qualifications of Mr. Bower generally, and as to the opinions he offers in his report. On the other hand, he also maintained that for the purpose of his Motion to exclude the Impugned Portions and any cross examinations based on them, it “wouldn’t matter” if Mr. Bower had appropriate qualifications and credentials to offer such opinions, because in his view the Impugned Portions are still improper and inadmissible and cross examination on them should not be permitted. Thus, the Tribunal assumed that Mr. Bower’s qualifications would be dealt with when City’s counsel sought to qualify him as a witness, as in all other OLT hearings – and that Mr. Shulgan would test or challenge those qualifications at that time.

[26] The City’s counsel argued that it is illogical not to permit any portion of Mr. Bower’s report or all appropriate questions arising out of it. Challenging the expert opinions proffered here are at the heart of this case just like in every other expropriation case involving market value assessments. Mr. Brode argues that it is a fundamental tenet of such proceedings that both Parties are entitled to challenge the reliability of experts’ opinions and the standards, practices and steps that were the underlying basis of their reports. Moreover, it is fair to put to Mr. Otto directly in cross the contrary opinions and criticisms made by Bower in order to hear Mr. Otto’s response. The Tribunal completely agreed and also noted that Mr. Otto repeatedly referred to (and took umbrage with) other aspects of Mr. Bower’s analysis in both his direct and cross-examination testimony.

[27] The Claimant’s counsel’s submissions seem to assume that the Tribunal will be ‘captured’ by the opinions expressed by Mr. Bower in his critique. This is simply not the case. Like a Court, the OLT has a gate-keeper role when it comes to all expert opinion evidence and must always assess it keeping in mind the structure set out in Mohan and White Burgess. The OLT is very well aware of its obligation not to abdicate its fact-finding role and its duty to reach a decision only after carefully weighing the opinions of opposing experts, in addition to the evidence of the lay witnesses. Moreover, if any issues of actual or implicit bias arise for an expert witness, the Tribunal must also assess those and ultimately determine whether that might impact on admissibility or as

to the weight to be accorded to the expert's opinion. Obviously, all such considerations will be duly considered in this proceeding, just as in every other OLT case. There is no intention here to leave 'the ultimate issue' to be determined solely by one of the experts.

[28] The Tribunal notes that Under s. 1.1 of the Rules, and pursuant to section 12(3) of the *Ontario Land Tribunal Act*, S.O. 2021, C. 4, Schedule 6 ("OLTA"), the provisions of OLTA and the Rules prevail to the extent of any conflict with the *Statutory Powers Procedure Act* R.S.O. 1990, C. S.22. Moreover, Rules 1.3 and 1.6 provide that:

> 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."
>
> "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.

[29] The City's counsel cited the OLT Decision of VC Jacobs in LC190009, June 22, 2021, a case broadly similar to the current proceeding. VC Jacobs noted, with respect to a submission by the Claimant's solicitor in that case urging her to reject 'critique evidence' from the City's business loss expert opining on the opinion offered by the Claimant:

> [174] <u>It is common in expropriation matters for a respondent's expert witness to critique the evidence put forward by a claimant's expert</u>, given that a claimant bears the burden of proving its damages for business loss. The Tribunal finds no basis for the Claimant's submissions that Mr. Tautrims went beyond the impartial role of an expert witness to serve as the City's "advocate and 'hired gun'".
>
> [175] <u>There are critical flaws in Mr. Tracey's valuation</u>, as identified by Mr. Tautrims, that would make it difficult for the Tribunal to rely on his valuation as an accurate calculation of quantum of damages.
> [emphasis added]

[30] In the Tribunal's view, counsel for the Claimant has not raised a proper basis to exclude any portion of the Bower report. As for the continued cross-examination by Mr. Brode, he is entitled to put Mr. Bower's conclusions to Mr. Otto, obviously in a proper and appropriate manner. If there are grounds for any further objections, the Tribunal

will rule upon them if and as they arise. However, it will not be a proper objection if the sole basis for it is a question relating to the opinions and conclusions of Mr. Bower, whether or not they relate to the CUSPAP standards. It is certainly open to Mr. Otto to disagree with or otherwise respond to those opinions and conclusions. Finally, it is of course permissible for the Claimant's counsel to have wide latitude to later cross examine Mr. Bower on his opinions, conclusions and other statements made in his report or otherwise in his oral testimony, including his comments regarding the CUSPAP rules.

[31] Interestingly, after the Tribunal delivered its oral ruling as described above in paragraphs [14] to [30], the Claimant's counsel did indeed cross-examine Mr. Bower with respect to his credentials prior to his being qualified by the Tribunal. It turned out that Mr. Bower, by virtue of his considerable past experience in a senior role with the Appraisal Institute of Canada including but not limited to his expertise in serving on professional discipline hearings and in implementing the CUSPAP rules and in continuing professional education programs for the Appraisal Institute, was eminently qualified to provide the opinions expressed in his expert reports for the City – including those in the Impugned Portions. Significantly, the Claimant's counsel did not oppose his qualifications or seek to limit his opinions after finishing his questions at that juncture.

3. Onus of Proof

[32] Under the relevant provisions of the EA, compensation is determined as follows:

> **Definitions**
> **1** (1) In this Act,
>
> "injurious affection" means,
>
> (a) where a statutory authority acquires part of the land of an owner,
>
> (i) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and

(ii) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute,

COMPENSATION

13 (1) Where land is expropriated, the expropriating authority shall pay the owner such compensation as is determined in accordance with this Act. R.S.O. 1990, c. E.26, s. 13 (1).

IDEM

(2) Where the land of an owner is expropriated, the compensation payable to the owner shall be based upon,

(a) the market value of the land;

(b) the damages attributable to disturbance;

(c) damages for injurious affection; and

(d) any special difficulties in relocation,

but, where the market value is based upon a use of the land other than the existing use, no compensation shall be paid under clause (b) for damages attributable to disturbance that would have been incurred by the owner in using the land for such other use. R.S.O. 1990, c. E.26, s. 13 (2).

Market value

14 (1) The market value of land expropriated is the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer. R.S.O. 1990, c. E.26, s. 14 (1).

Idem

(2) Where the land expropriated is devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, and the owner genuinely intends to relocate in similar premises, the market value shall be deemed to be the reasonable cost of equivalent reinstatement. R.S.O. 1990, c. E.26, s. 14 (2).

Idem

(3) Where only part of the land of an owner is taken and such part is of a size, shape or nature for which there is no general demand or market, the market value and the injurious affection caused by the taking may be determined by determining the market value of the whole of the owner's land and deducting therefrom the market value of the owner's land after the taking. R.S.O. 1990, c. E.26, s. 14 (3).

Idem

(4) In determining the market value of land, no account shall be taken of,

(a) the special use to which the expropriating authority will put the land;

(b) any increase or decrease in the value of the land resulting from the development or the imminence of the development in respect of which the expropriation is made or from any expropriation or imminent prospect of expropriation; or

(c) any increase in the value of the land resulting from the land being put to a use that could be restrained by any court or is contrary to law or is detrimental to the health of the occupants of the land or to the public health. R.S.O. 1990, c. E.26, s. 14 (4).

…

> **Allowance for disturbance**
> **Owner other than tenant**
>
> **18** (1) The expropriating authority shall pay to an owner other than a tenant, in respect of disturbance, such reasonable costs as are the natural and reasonable consequences of the expropriation, including,
>
> (a) where the premises taken include the owner's residence,
> (i) an allowance to compensate for inconvenience and the cost of finding another residence of 5 per cent of the compensation payable in respect of the market value of that part of the land expropriated that is used by the owner for residential purposes, provided that such part was not being offered for sale on the date of the expropriation, and
> (ii) an allowance for improvements the value of which is not reflected in the market value of the land;
> (b) where the premises taken do not include the owner's residence, the owner's costs of finding premises to replace those expropriated, provided that the lands were not being offered for sale on the date of expropriation; and
>
> (c) relocation costs, including,
> (i) the moving costs, and
> (ii) the legal and survey costs and other non-recoverable expenditures incurred in acquiring other premises. R.S.O. 1990, c. E.26, s. 18 (1).
> …
> (all above emphasis added)

[33] There can be little question that the Claimant bears the onus to establish its business losses and disturbance damages in its claim for injurious affection, and this was not contested by the Claimant's counsel (See VC Jacobs in LC190009 for a recent example, as described in paragraph 28 above and two other cases cited by the City:

> Polidor Holdings v MTO (1985) 33 LCR 94 at 101 (Tab 7) "It is up to the claimant to convince the board by appropriate evidence as to the amount of compensation that the claimant is in fact entitled to." And in Black v Brant County (1972) 1 LCR 325, para 14 (Tab 6) that while "there is no burden of proof of market value on either party but that the burden of proof with reference to all other aspects of claims under the Act for compensation for expropriation or for damages caused by injurious affection is on the claimant.

[34] However, the Claimant's counsel made the following interesting contention in his written Reply submission:

> The claimant acknowledges that it must prove, on a balance of probabilities, that the road reconstruction project, for which its lands were taken, was a direct cause of its loss. But, the claimant is not aware of any authority that states that the expropriation of its lands must be the only cause for its rental loss as opposed to a factor that contributed to its rental losses

[35] While the precise meaning of the assertion noted above in paragraph [34] is a little unclear, if it was intended to suggest that the Tribunal certainly should ignore the contribution of other causal factors related to the Claimant's business losses, the Tribunal must disagree. In other words, under section 1(1) and section 13 of the EA, the City cannot be held responsible to compensate the Claimant for damages not caused "by" "resulting from" or "attributable to" the expropriation or losses/costs that are not "the natural and reasonable consequences of" the expropriation. In fact, taken as a whole, the Claimant's written final submissions concede as much.

4. Business Loss Claim: Rental Losses/Disturbance Damages

[36] The Claimant's claim for damages for business loss / disturbance damages relied primarily on the opinion evidence of Mr. Tracey and Mr. Otto in conjunction with the fact evidence of Ms. Malette and Mr. Gary Barbesin.

[37] The City's response to the Claimant's damages claim for injurious affection was based on the opinion evidence of Mr. Bower and Mr. Tautrims and the fact evidence of Mr. Tom Mosey who had operated a used car sales lot on the subject property prior to the expropriation.

[38] In summary, the Tribunal preferred the opinion evidence of Mr. Bower and Mr. Tautrims to the extent of all contradictions with the evidence of Mr. Otto and Mr. Tracey. Moreover, the Tribunal found the evidence of Ms. Mallette to be incomplete and inconsistent in parts and found the evidence of Mr. Barbesin, a real estate agent who acted for the Claimant in past, to be purely anecdotal and unhelpful to the Tribunal.

[39] The Tribunal found Mr. Bower's evidence to be more detailed, thorough and reliable than that of Mr. Otto. Despite his many years of practice experience, Mr. Otto was unable to satisfactorily explain many of the inconsistencies and problems in his expert reports as were exhaustively analyzed by Mr. Bower. Moreover, at many times during his oral testimony he displayed an argumentative and partisan approach, terming some of Mr. Bower's opinions as "banging his drum".

[40] The Tribunal firmly rejects the premise put forward by Claimant's counsel in his final argument that there was a mere difference of opinion between the appraisal approaches of Mr. Otto and Mr. Bower and his suggestion that the Tribunal could simply choose among these two equally legitimate opinions. In the Tribunal's view, the opinions of Mr. Bower were far more cogent, coherent and credible. Despite a lengthy cross-examination, Mr. Bower's opinions and conclusions were not successfully challenged, despite the contrary characterizations made in the final written submissions of the Claimant's counsel.

[41] Mr. Tracey, although an agreeable witness, actually did not provide an independent opinion on the Claimant's business loss and he essentially just uncritically reiterated the information he received from the Claimant. By contrast, Mr. Tautrim both in his written report and oral testimony, demonstrated a strong attention to detail and a sound analytical approach to his evaluation of the Claimant's business loss allegations and of the reliability of the information provided by the Claimant. Mr. Tautrim's conclusions were also not successfully challenged in a long cross-examination – again, despite the contrary assertions set out in the final arguments of the Claimant's counsel.

[42] Therefore, the Tribunal entirely accepts the following opinions of Mr. Bower:

(a) Mr. Otto's report dated August 6, 2021 regarding the Claimant's Rental Loss claims is flawed, and does not provide sufficient support for his conclusions;

(b) Mr. Otto in arriving at his conclusions, examined 34 comparable market rent transactions, but 15 of those were not relevant. The Subject Property is an auto-related facility. In attempting to determine applicable lease rates for an auto related facility, Mr. Otto included lease information on various industrial properties, located in industrial parks; office properties; retail plaza properties, a restaurant; a truck driving school, and other unrelated property types. The dynamics of these unrelated uses do not provide any

insight into either applicable lease rates for an auto service facility or trends in lease rates for auto-related facilities;

(c) Mr. Otto in his report also included 12 lease transactions which were actually ‘asking’ lease rates which ultimately expired. The only reasonable conclusion to be drawn from an expired listing is that the asking rate was too high;

(d) Only 7 leases used by Mr. Otto may be considered relevant but alone these 7 remaining leases do not provide sufficient information to support the conclusion reached by Mr. Otto. For example, these remaining market transactions do not include any information for the years 2009 to 2011;

(e) Mr. Otto also presented contradictory conclusions with his own information on prevailing economic conditions, in his August 2020 and August 2021 appraisal reports;

(f) Mr. Otto failed to adequately describe the physical and economic characteristics of the subject property as of September 2011;

(g) Mr. Otto failed to consider the implications of his conclusion of Highest and Best Use (as solely a redevelopment property) on the opinion and conclusions of his report on rental income losses;

(h) Mr. Otto failed to describe and analyze data relevant to his investigations and eventual expressed opinions; and

(i) The analysis in Mr. Otto’s report on the Claimant’s alleged rental losses is inadequate, inappropriate and unreasonable and as a result, his conclusions are unreliable.

[43] Thus, the Tribunal rejects Mr. Otto’s conclusion in his August 6, 2021 report that

the reported February 2007 lease amount of $129,600 per year (gross), was reasonable to utilize for the period of mid-2007 to mid-2013. Instead, the Tribunal accepts Mr. Bower's contrary view that market rents instead range from $39,919 to $48,232 per year and his conclusion that the Claimant's asking rent of $46,800 per year in its 2009 and 2011 listings (largely ignored by Mr. Otto) for the property support the market rental rates for that period in respect of the Claimant's property were in the range of $6.50 to $7.50 per square foot.

[44] The Tribunal also accepts the fact summary (not contradicted in testimony before the Tribunal) and expert opinions of Mr. Tautrims, as follows:

(a) from its purchase in 1997 until March 2004 the Provincial Property was leased to a company related to the Claimant for a used car business operating as Superior Auto Centre. The Claimant received rental income of $37,000 from Superior Auto Centre for the Provincial Property in the fiscal year ended March 31, 2004;

(b) Ms. Malette ran Superior Auto Centre from October 2002 until March 2004, at which time a tenant was found for the Provincial Property, and its assets were liquidated;

(c) The Claimant leased the Provincial Property to Auto Motion for the period April 1, 2004 to March 31, 2007 with rent of $90,000 in the first year, $96,000 in the second year and $102,000 in the third year. Ms. Malette indicated that the rent was based on the performance of Superior Auto Centre, and that no investigation of market rents was undertaken in arriving at the rent for the Provincial Property;

(d) Although Auto Motion paid all of its rental obligations under its lease, it ceased operations on the Provincial Property prior to the expiry of the lease on March 31, 2007, due to a lack of business/profitability;

(e) The Provincial Property remained vacant from the departure of Auto Motion until Quicky Auto Service ("Quicky") commenced renovations of the premises in May 2012 and that Quicky received a rent-free period of May to December 2012 to perform renovations, paid rent of $18,000 for the period January to December 2013, $54,000 for 2014 and $60,000 for 2015;

(f) During the period the building was vacant and Quicky was performing renovations, the Claimant received rental revenue from time to time for the rental of portions of the land on the Provincial Property for the sale of flowers etc., and by Union Gas;

(g) The Claimant purchased the Cabana Property in 1998 and leased it back to the seller who was operating a used car business from the Cabana Property. In the fiscal year ended March 31, 2004 the Claimant received $7,100 in rental income from the Cabana Property, with a mix of automotive and residential tenants. It is not clear how much rental income the Cabana Property earned in fiscal 2005. The Claimant received $15,000 from Canadian Auto Remarketing in fiscal 2006 in addition to $11,000 from Sam Auto Sales, who leased the Cabana Property commencing November 1, 2005, for a total of $26,000 in fiscal 2006

(h) The Claimant leased the Cabana Property to 1670112 Ontario Inc., operating as Sam Auto Sales, on November 1, 2005 for a one year period at rent of $2,200 per month, or $26,400 per year. On November 1, 2006 the Cabana Property was leased to a different numbered company, 13882214 Ontario Inc., also operating as Sam Auto Sales, for a one year period at rent of $2,300 per month, or $27,600 per year. 13882214 Ontario Inc. leased the Cabana Property for a one year period, at the same rent, on November 1, 2007, however, we understand that it left the Cabana

Property in April 2008 due to a slip and fall lawsuit, and it did not pay any rent for the remainder of the lease term;

(i) The Cabana Property was vacant until it was leased to Frank Nelson for the period April 1, 2009 to March 31, 2010, at a rate of $1,500 per month. Despite signing a one year lease, Ms. Malette indicated that Frank Nelson only stayed for two months. Tom Koulosoulas and Joe Cirino rented the Cabana Property from July 2011 to October 2012 for $600 per month for the scrap metal business “Scrappy Doo”;

(j) The Tracey Report estimates the Claimant’s loss of business income for the period February 3, 2007 to May 31, 2013 to be $604,303. In determining its business loss estimates, the Tracey Report relies on the Otto Rental Income Report (August 5, 2021: see Bower opinions set out above in paragraph [37]) for its estimates of vacancy rates and fair market value rent for the Subject Properties;

(k) The Otto Rental Income Report indicates that in its original report it was concluded “the removal of the existing buildings and full site re-development would be representative of the maximum productivity of the site (as at the effective date). Therefore, my conclusion of the subject’s Highest & Best Use is: Immediate re-development for commercial uses.” Accordingly, the Tracey Report’s estimation of business losses related to the loss of rental income is inconsistent, as the Claimant could not both redevelop the Subject Properties, yet also earn rental income from the existing use.

(l) Notwithstanding the question of whether business losses related to the rental of the Subject Properties is compatible with the contemplated use of the properties, the Tracey Report’s business loss estimates were reviewed;

(m) The Claim alleges that "as a direct consequence of the Respondent's announcement of its intended road reconstruction project, the commercial tenants who occupied the Provincial Road lands and the tenants who occupied the Cabana Road lands each elected not to renew their respective leases";

(n) The Tracey Report therefore makes the assumption that had the Project not occurred the Claimant "would have continued to lease the properties at the fair market value rates from the time the reconstruction of the Cabana Rd. E. and Provincial Rd. intersection was announced on February 3, 2007 to the period that reconstruction was completed on May 31, 2013." Based on this assumption, the Tracey Report calculates the Claimant's business losses for three time periods (see (o) below);

(o) Pre-Expropriation Period – Feb 3, 2007 to Sept 14, 2011 = $447,114; Expropriation to Reconstruction Period–Sept 15, 2011 to Jan 31, 2012 = $31,635; Reconstruction Period – Feb 1, 2012 to May 31, 2013 = $125,554; Total Business Losses = $604,303;

(p) A key assumption in including the Pre-Expropriation Period, from the date the City published the environmental assessment on February 3, 2007 to the date of the expropriation on September 15, 2011, in the Claimant's business losses related to the Project is that the existing tenants left the Subject Properties as a direct result of the City's announcement of the Project (<u>the Tribunal notes that this is an unsupported proposition not established by the evidence, and specifically rejects the Claimant's contention that somehow the Environmental Assessment in 2007 constituted a 'public announcement' of the road improvement project and/or impending expropriation and that Ms. He (for the City) de facto admitted this during her cross-examination</u>);

(q) The Claim alleges that the tenants of the Subject Properties did not renew their respective leases as a direct result of the announcement of the upcoming Project. It is our understanding that neither Auto Motion nor Sam Auto Sales failed to renew their leases as a result of the upcoming Project (the Tribunal agrees that this is wholly unsupported by the viva voce evidence at the VH and noted that the Claimant called no witnesses to establish that);

(r) At the time the City published the environmental assessment, Sam Auto Sales was renting the Cabana Property under a one-year lease commencing November 1, 2006. It signed another lease for the period November 1, 2007 to October 31, 2008, however, Ms. Malette indicated that "He left in April 2008, because there was a slip and fall lawsuit, and he didn't have enough insurance". Further, we understand that Sam Auto Sales operated from 1275 Provincial Road, the property adjacent to the Provincial Property, since at least August 2009. Accordingly, it does not appear that Sam Auto Sales left the area due to the upcoming Project construction:

(s) It also does not appear that the Subject Properties became vacant as a direct result of the announcement of the Project, and we do not agree that any business losses suffered in the Pre-Expropriation time period should be included in the Claimant's business losses attributable to the Project. Exclusion of this time period would reduce the Tracey Report's business loss estimate by $447,114;

(t) The Tracey Report indicates that the Project construction commenced February 1, 2012 and was completed May 31, 2013, with its loss period ending at the completion of construction. It is our understanding, however, that construction commenced on April 23, 2012 and was substantially complete on November 30, 2012, with all traffic opened on both Provincial

Road and Cabana Road on December 1, 2012. Accordingly, the Tracey Report loss period, and resulting business loss estimate, is overstated by 6 months. On Appendix A, we calculated the portion of the Tracey Report's loss of rental revenue for the period December 2012 to May 2013 to be $45,892;

(u) Notwithstanding the disagreement with the inclusion of this time period in the Claimant's business losses, it is noted that the Tracey Report has understated the actual rental revenue for the Provincial Property in fiscal 2014, by $5,167, thereby further overstating its business loss estimate, as it assumes all rental revenue was earned evenly throughout the year, however, the May 2013 letter from Union Gas indicates the revenue from Union Gas related to April to June 2012;

(v) The Tracey Report fails to consider whether the Claimant realized any cost savings or incurred any additional costs associated with the reduction in its rental revenue which should be taken into account to determine the Claimant's loss of income. Accordingly, the Tracey Report has overstated the Claimant's business losses by failing to consider the net saved costs. The Tracey Report does not take the lease marketing time period noted by Mr. Otto into account in determining its losses, resulting in an overstatement of the business losses calculated;

(w) The Tracey Report utilizes the market rent conclusions from the Otto Rental Income Report to determine its projected rent revenue throughout its loss periods, both pre-expropriation and post-expropriation. Accordingly, the Tracey Report's projected rent revenue for the Subject Properties throughout its loss period is based on the leases in effect prior to the expropriation, in February 2007;

(x) Since the Claimant was compensated for the value of the land expropriated, any losses calculated based on the rental revenue prior to the expropriation should be reduced by the amount of the compensation received by the Claimant of $193,250 for the land expropriated and injurious affection to the remainder. The Tracey Report does not make an adjustment for the compensation the Claimant received from the expropriation and therefore its business loss estimate is overstated;

(y) It does not appear that the tenants of the Subject Properties left as a direct result of the announcement of the Project in February 2007. Accordingly, we do not consider it reasonable to attribute the extended vacancies experienced at the Subject Properties to the Project prior to the expropriation (The Tribunal agrees with this assumption based on all of the evidence tendered at the VH, notwithstanding the contrary submissions of the Claimant's counsel);

(z) Renting the Subject Properties may have become more difficult once the expropriation took place, and the Project construction was expected to commence in the near future. We have therefore considered the loss period that the Claimant may have experienced business losses as a result of the expropriation to be from the date of expropriation, September 14, 2011 to the substantial completion of the Project construction on November 30, 2012;

(aa) Mr. Bower's opinion indicates market rent for the Provincial Property would be in the range of $39,919 to $48,232 per year and concludes that the Claimant's asking rent of $46,800 per year in its 2009 and 2011 listings for the property support the market rental rates. The estimated expected rental revenue for the Provincial Property for the period September 14, 2011 to April 30, 2012 on Schedule 2 can be based on $46,800 per year. An estimate of the property taxes for the Provincial

Property of $19,759 per year should be added, as indicated by Mr. Bower, to determine an expected annual rent of $66,559, or $5,547 per month;

(bb) Quicky was permitted to occupy the Provincial Property rent-free for the period May to December 2012 to undertake leasehold improvements. A rent-free period for purposes of leasehold improvements can be considered to be a normal leasing practice, and therefore it is assumed that market rent during this leasehold improvement period would be $nil;

(cc) Based on Mr. Bower's opinion it is estimated that the expected rent for the Cabana Property is $600 per month. Expected annual property taxes for the Cabana Property of $3,918 should be added, to determine an expected annual rent of $11,118 per year, or $927 per month for the Cabana Property;

(dd) Actual rental income from the properties was deducted to arrive at an estimate of the lost rental revenue of $20,431 from which must be subtracted the saved property tax and repairs and maintenance costs associated with the lost rental revenue of $6,788. Total property tax savings comprised $4,018 and total repairs and maintenance savings of $2,770 were estimated; and

(ee) After deduction of the estimate of saved costs from the estimate of lost rental revenue, the net estimate of the Claimant's business losses is $13,644.

[45] After careful evaluation of the competing written and oral evidence tendered by the Parties and consideration of the final argument submissions of counsel, the Tribunal reiterates that it accepts and relies on the opinion evidence of Mr. Bower and Mr. Tautrims in strong preference to that of Mr. Otto and Mr. Tracey. Therefore, the

Tribunal agrees that the Claimant's business losses are properly estimated at $13,644.

[46] The Tribunal also agrees with the characterizations made by the City's counsel in final argument as to the fallacy of the 'pre-expropriation incident' claimed by the Claimant:

> The Claimant alleges that there was a pre-expropriation incident being a road reconstruction project announced on February 2007. It is noted in the Statement of Claim:
>
> s. 10 – The Applicant states that as a direct consequence of the Respondent's announcement of its intended road reconstruction project, the commercial tenants who occupied the Provincial Road lands and the tenants who occupied the Cabana Road lands each elected not to renew their respective leases.
>
> s. 19 – After the Respondent announced in 2007 its intention to reconfigure the Provincial/Cabana Road intersection, each of the tenants who were in occupation of the said premises vacated the said premises on the expiration of their respective leases.
>
> However, from the Claimant's own evidence, it is clear that the above did not happen. The tenant Auto Motion left the site in 2006, prior to the announcement of an environmental assessment. The Cabana Road tenant, Sam's Auto, left the property in April 2008 to avoid the consequences of a lawsuit. The Claimant has failed to prove the fundamental allegation of its claim…Neither the claimant's representative, Mrs. Malette, nor the experts called appear to have any real understanding of what happened when the City filed for an environmental assessment ["EA"] in February 2007. As provided in the *Environmental Assessment Act,* RSO 1990, c. E.19… it is a planning process that must be followed. It does not authorize any road reconstruction. Pursuant to section 5(3) an undertaking cannot proceed until it gets ministerial approval. As Jane He testified, sometimes environmental assessments are approved and then nothing happens…
>
> The claimant's appraisal expert Mr. Otto stated that he was unaware of …[the EA], and the limit of his knowledge was that a road reconstruction project was possible….[The Claimant's experts}…made no attempt to inform themselves if in fact any road reconstruction project was actually scheduled… No witnesses were brought forward by the Claimant to show that any persons were aware of the…[EA]… or to indicate how it impacted on their decisions with regard to the subject site.

[47] The City's counsel notes that counsel for the Claimant argued in final submissions that: "…Nevertheless, Jane He, the City's representative, acknowledged that it would flow from common sense that prospective tenants would be deterred from renting the site by the intended

road reconstruction project…". Like the City's counsel, the Tribunal has no record of Ms. He making such an explicit 'admission' – moreover, even if she did make a similar statement in cross-examination, that would not rise to the level of a relevant 'admission' nor would it constitute an effective or reliable way for the Claimant to prove the elements of this alleged "pre-expropriation event". Moreover, in the Tribunal's view, it would not be cogent evidence as to the impact on the tenant market since Ms. He neither professed nor possessed any expert opinion expertise in that subject matter and had not been qualified in that regard.

[48] The Tribunal must observe that when counsel for opposing parties make final submissions contradicting each other's recollections of the oral evidence, this puts the Tribunal - which must rely on its own notes - in a difficult position. This is puzzling given that this hearing was recorded and that either or both parties could have ordered transcripts of one or all of the witnesses – however, in answer to the Tribunal's question well prior to the end of the hearing, both counsel indicated that they did not intend to order any transcripts. While the Tribunal can appreciate that the costs of transcripts are not insignificant, it still seems unsatisfactory in these circumstances. If either party chose to appeal an OLT Decision it could order the hearing transcripts in furtherance of that purpose. This would then lead to the strange – and perhaps unfair - circumstance that the Divisional Court and/or the Court of Appeal would then be provided with a more complete record than was available to the OLT. At any rate, this is not a matter for determination by this Tribunal.

[49] Simply put, the Claimant has not made out a factual case that the 2007 environmental assessment constituted an announcement of the impending Project that anyone understood or was aware of. The Claimant's counsel called no cogent evidence on this and indeed, Ms. He testified to the opposite effect. In any event, as already noted, any statement she could make about what a prospective tenant might think would be speculative and quite irrelevant: the Claimant needs to instead demonstrate that proposition through its own evidence and clearly did not, and apparently could not, do so.

[50] The Tribunal further adopts and agrees with the statement of law made by the counsel for the City as follows:

> It is essential when a claim is being made for damages predating an expropriation that there must be evidence that any damages are the natural and reasonable consequence of the project. Merely stating there was an incident may have occurred is not sufficient to advance a claim; the connection of the incident to losses must be shown. (Dell Holdings Ltd., v Toronto Area Transit (1997) 60 LCR 81 at paragraph 28 (Tab 4) where the claimant showed that the municipality withheld zoning approvals and impeded development while the project was pending. No such actions are shown here.

[51] Another point raised by the City's counsel pertains to the new position – and *de facto* concession – put forward in final argument by the Claimant's counsel suggesting that the Tribunal ought to in essence 'estimate' a possible business loss claim in the circumstances of this case:

> The claimant recognizes that there were other influences that existed, in addition to the City's intended road reconfiguration project, that impaired the claimant's ability to find replacement tenants. The claimant acknowledges that those additional contingencies must be addressed in quantifying the extent of its rental loss. The claimant contends that, having regard to those additional contingencies, it would be fair and reasonable to award it rental losses of an amount equal to two years rent calculated at the rate of $129,600.00 per year as compensation for the income it lost over the four-year period, after the City's announced project, during which the lands remained vacant.

[52] The Tribunal instead agrees with the counter-argument made by counsel for the City as follows:

> In the Claimant's argument…[it is proposed]…that an (unspecified) two years be selected to allow rental losses at $129,600 per year….[However]…a business loss claim has to be proven by reliable financial evidence of loss over a specified period. This latest position [of the Claimant] concedes that there is no quantifiable claim that can be measured. The two-year period suggested has no origins in any evidence but is simple conjecture. There is no provable business loss claim being advanced as a natural and reasonable outcome of a taking.

[53] In conclusion then, in reliance on the opinion evidence of Mr. Bower and Mr. Tautrims over that of Mr. Otto and Mr. Tracey, the Tribunal therefore agrees that the Claimant's business losses are properly estimated at $13,644. There is no

demonstrated basis upon which the Tribunal can arbitrarily make a much higher award to the Claimant.

5. Determination of Compensation for Impact of Expropriation on Market Value

[54] The Tribunal agrees with counsel for the City that the Claimant's appraiser Mr. Otto erred in his report by ignoring the long history of how the Claimant's property had been used for used auto sales and service (prior to his own appraisal) and instead determined that the highest and best use of the property as of September 14, 2011 was for "…the removal of existing buildings and full site re-development…". Beyond his own insistence, Mr. Otto really was unable in his testimony to explain to the satisfaction of the Tribunal any sound basis for reaching that conclusion as to highest and best use. The suggestion by the Claimant's counsel in final argument that this conclusion was justified solely because the subject property had been vacant for a period of time is untenable in the Tribunal's view.

[55] In any event, in terms of the other substantive elements of Mr. Otto's appraisals of the subject property the Tribunal once again preferred the detailed, contrary opinion evidence of Mr. Bower. Mr. Otto concluded that it was his opinion that: "…the adjusted range most reflective of the subject's underlying land value was between $18.00 and $19.00 per sf. When this adjusted range is applied to the subject site area (before) of 56.498 sf, the following retrospective market value was estimated at…$1,050,000." Mr. Bower instead concluded that the market value of the Subject Property prior to the expropriation was $701,500, and the Tribunal accepts that opinion.

[56] The Tribunal also concurs with Mr. Bower's summary conclusions concerning Mr. Otto's appraisals:

> After a thorough review of the Otto Appraisal, it is my opinion that the major issue appears to be Mr. Otto's selection and analysis of comparable market data. He has failed to select, adequately research and describe appropriate comparable market data. Further he has omitted or overlooked certain relevant market data. He has errored in

> certain elements in his description of the prevailing economic conditions; the description of subject property; and facts regarding the market data he selected and analyzed. As well, he has made certain statements and adjustments without reference to specific market information for support. Finally, he has failed to analyze certain market information that has a direct influence of the value of both the subject property and the market sales examined.
>
> …[Mr. Otto]… has significantly over-stated the value of the subject property lands immediately prior (before) to the expropriation, which also leads to an over-stated estimate of compensation attributable to Injurious Affection. In my opinion, his selection and analysis of data is not reflective of the actual market and market conditions as of September 2011 and therefore his conclusion is not reliable.

[57] Mr. Bower also stated:

> When considering the value of the subject property prior to or 'before' the expropriation, the Appraiser has compared the subject property location to other commercial retail locations that are significantly superior in terms of exposure, trading area, and commercial mix.
>
> The Appraiser's comparable sales used to establish the value of the subject lands prior to the expropriation are all located in areas with a significant commercial/retail mix of properties, all with 4 lanes of traffic and all on major arterial roads. He has failed to consider three (3) vacant land sales located on Provincial Road that transacted at unit prices significantly lower than his conclusion
>
> Of the Appraiser's comparable sales used to establish the value of the subject lands 'after' the expropriation, he has incorrectly described one sale regarding the size and physical characteristic; concludes that two sales on Provincial Road are in an inferior location; and incorrectly identified two sales as being similar in terms of access.
>
> In summary, it is my opinion that Mr. Otto has failed to consider relevant market information and failed to understand the basis on which the prices of commercial/retail properties are established.

[58] In his final argument the Claimant's counsel engaged in a lengthy attempt to challenge and refute Mr. Bower's thorough critique of Mr. Otto's appraisals. Yet, in the Tribunal's view, he was unable to successfully challenge Mr. Bower's detailed evidence during his cross-examination by putting to Mr. Bower the points he expressed in final written submissions. The Tribunal accepts the conclusions and value estimates reached by Mr. Bower to the extent of all contradictions with the evidence of Mr. Otto. It is both impractical and unnecessary for the Tribunal to reiterate in this Decision a detailed comparison of each and every element in the respective reports of both Mr.

Otto and Mr. Bower and each component of their oral evidence. As set out above in this **Part 5**, the Tribunal accepts Mr. Bower's summary explanations.

[59] The City's counsel got to the crux of the matter in his written argument and the Tribunal concurs with his positions as stated below:

> In the Claimant's Argument the following points are stated:
>
> a) In paragraph 6 that Bower did not identify sites he referenced. This is incorrect and sites are identified and described. It is stated that Bower failed to appreciate that the excess lands were of value; in fact he attributed a value to them.
>
> b) Paragraphs 20-22 there is a chart of five Bower comparables and an observation that "those prices were closely similar to the values adopted by the claimant's appraiser" which misses the point: in the Bower appraisal those sales give a building value, not a square footage. They do not relate in any way to the Claimant's values.
>
> c) In paragraph 30 that there were no particulars of the Bower comparables on injurious affection. This ignores the thrust of the Bower analysis on this issue that there was a relationship between commercial traffic and property values and that a quantifiable percentage of loss could be applied.

[60] In the end, in his February 14, 2012 appraisal report prepared to estimate the fair compensation payable to the Claimant for the lands required by the City of Windsor for the purpose of road improvements, Mr. Bower reached the following conclusions which are accepted by the Tribunal:

a) For the project, the City required from Parcel (a) (being Conc. 5, Pt Lot 15; COM SW Corner Parcel) 4,834.07 sq.ft. (450 m²) and from Parcel (b) (being Concession 5, Part Lot 15) 1,150.66 sq.ft. (106.9 m²);

b) A further portion for the purposes of an underground easement in favour of Union Gas was required from Parcel (a) of 653.37 sq.ft. (60.7 m²);

c) Parcel (a) of the subject property is improved with a one floor commercial structure previously used as an automobile repair facility with an attached office area. According to the Municipal Property Assessment Corporation

(MPAC) the building contains 2,724 sq.ft. and was built in 1993. Parcel (b) is improved with an older detached 1½ storey residentially designed dwelling and detached garage. According to the Municipal Property Assessment Corporation (MPAC) the residential building contains 1,310 sq.ft. and was built in 1925

d) The subject property is zoned CD4.1 Commercial according to bylaw #8600 of the City of Windsor which permits a wide variety of commercial uses such as certain specific retail store uses, automobile sales lot, automobile repair garage, car washes, offices, warehouses, hotels, etc. The structure on Parcel (a) is commercial in nature and has been used as an automobile service and repair shop. The structures on Parcel (b) are comprised of a residentially designed building and detached garage with a small office area. These uses are deemed to be legal and assumed to be conforming. All structures appear to have sufficient remaining economic life to provide utility into the near future;

e) The Highest and Best Use of the subject property is deemed to be for commercial uses as permitted under the current zoning regulations with the existing improvements used for legally permitted uses as may be adaptable to the structure;

f) The land required constitutes approximately 10.6%of the total site area. The easement constitutes an area of just over 1% of the total site area;

g) The value of the subject site “after” the property requirement is deducted from the value of the subject site “before” the property requirement, with the difference being the compensation. Should a property requirement affect parking requirements or setback requirements; a “before” and “after” method would be necessary to establish any additional compensation payable under the concept of Injurious Affection;

h) Damage by Injurious Affection, sometimes referred to as “consequential

damage", may arise when the piece or pieces of the owner's land remaining may be rendered less valuable as a result of their severance from the required portion;

i) In the case of the subject property, the construction of medians along both Cabana Road East and Provincial Road will restrict access to the subject site from vehicles traveling north on Provincial Road;

j) The Before Value estimate for the Claimant's property is $701,500, being the midpoint between $660,750 at the lower end and $742,238 at the high end;

k) The After Value estimate for the Claimant's property is $638,600 being the midpoint between $600,870 and $676,370;

l) Therefore, the Fee Simple Taking Value (being the difference between the After Value and the Before Value) is $62,900;

m) The value of the "easement" is usually something less than the unit value of the fee simple land itself, in that the owner experiences some loss in value due to the loss in use of the lands because of the restrictions to the property. However, the owner has retained the right of access over the "easement";

n) The Easement Value is $3,400, being the midpoint between $3,275 and $3,602;

o) Injurious Affection recognizes that the taking of part of an owner's land could result in 'injury' to the owner's remaining land. A median strip is proposed on both Cabana Road and Provincial Road directly in front of the subject property. As a result, direct access from northbound traffic on Provincial Road will not be possible to the subject site. Being a commercial property, it is reasonable to assume that Injurious Affection will be created as a result of this median strip;

p) In the case of the subject property median construction, it is anticipated that, at most, 25% of the traffic would be affected by reduced accessibility. Therefore, the loss in value to the property would be significantly less than 25% and a 20% loss in value attributable to Injurious Affection is deemed to be reasonable;

q) This brings the After Value Estimate down to $507,480 (being $638,600 minus the Easement Value of $3,400 minus the Injurious Affection 20% factor of $127,720);

r) The net sum of $194,000 results from subtracting the After Value Estimate of $507,480 from the Before Value Estimate of $701,500, and comprises the Total Compensation owing to the Claimant arising from the takings

[61] Based on its assessment of the totality of the written and oral opinion and fact evidence, and its preference for the evidence of Mr. Bower over the evidence provided by Mr. Otto, the Tribunal agrees and adopts the conclusions of Mr. Bower as described in paragraph above.

6. Conclusions

[62] Based on the findings and analysis set out in **Parts 3 to 5** above, the Tribunal concludes that the Claimant is entitled to the following compensation: $194,000 plus $13,644 for business losses, for a total of $207,644 ("Total Compensation"). The amount of any offer pursuant to section 25 of the Expropriations Act, R.S.O. 1990, c. E-26 paid out to the Claimant by the City must be taken into account, but the Tribunal notes that the pleadings make no reference to this nor was there any mention of it in the final written submissions of the Parties.

[63] In the event that the Parties are unable to reach an agreement, the Tribunal will permit the Parties to make written argument on the net amount payable to the Claimant and on any interest payable and on costs. The timing of the exchange of such

submissions shall be by agreement of the Parties, however the Claimant shall be permitted at least five (5) clear days from receipt of the City's submissions to deliver any Reply submissions

ORDER

[64] The Tribunal Orders that the award of compensation to the Claimant shall be $207,644 ("Total Compensation"), subject to the provisions of paragraph [65] below.

[65] The Tribunal Orders that the Parties shall deliver to the Tribunal by no later than **Friday, June 30, 2023**, written submissions on the compensation payable to the Claimant, taking into account the Total Compensation; any amounts paid to the Claimant pursuant to section 25 of the *Expropriations Act*, R.S.O. 1990, c. E-26 ("Act"); and any amounts owing for interest and costs under the Act.

[66] The Vice-Chair shall remain available to assist with any matters relating to the above Orders. Upon receipt of the written submissions delivered in accordance with paragraph [65] above, the Tribunal may, at its discretion, schedule a further hearing event to determine any unresolved matters requiring further adjudication.

"William R. Middleton"

WILLIAM R. MIDDLETON
VICE-CHAIR