Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: August 02, 2024 **CASE NO(S).:** OLT-22-002251 (Formerly LC170005)

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

Claimant:	470698 Ontario Ltd.
Respondent:	His Majesty the King in Right of Ontario as represented by the Minister of Transportation
Subject:	Land Compensation
Property Address/Description:	5800 Outer Drive
Municipality:	Town of Tecumseh
OLT Case No.:	OLT-22-002251
Legacy Case No.:	LC170005
OLT File No.:	OLT-22-002251
Legacy File No.:	LC170005
OLT Case Name:	470698 Ontario Ltd. v. HMK in Right of Ontario (Minister of Transportation)

Heard: May 15 – 19, 2023, by video hearing;
August 11, 2023, in writing;
September 13, 2023, November 11, 2023, March 1, 2024, by video hearing

APPEARANCES:

Parties	**Counsel/Representative**
470698 Ontario Limited	Dante Gatti
His Majesty the King in Right of the Province of Ontario as represented by The Minister of Transportation	Jonathan Sydor

DECISION DELIVERED BY ROBERT G. ACKERMAN AND ORDER OF THE TRIBUNAL

Link to the Order

INTRODUCTION

[1] This Claim is brought pursuant to the provisions of the *Expropriations Act*, R.S.O. 1990, c. E. 26 (the "Act"), and arises as a result of the expropriation by His Majesty the King in Right Of Ontario as represented by the Minister of Transportation ("MTO") of all of the Claimants' right, title and interest, in and to a portion of the lands and premises municipally known as 5800 Outer Drive, Tecumseh, and more particularly described as North Part of Lot 305, Concession STR, Sandwich East, designated as Parts 3 & 4 on Plan 12R-155577, Tecumseh, Essex County, PIN 70620-0001 (LT) (the "Subject Property").

[2] The Subject Property comprised 1.44 acres (62,604 square feet ("sq. ft.").) and is a corner lot located at the south-east corner of Outer Drive and Highway 3 (Talbot Road). The Subject Property is improved with a single-level light industrial building.

[3] The MTO expropriated a portion of the Subject Property designated as Part 1 on the Plan of Expropriation registered on August 19, 2010 (the "Effective Date"), as Instrument No. CE437682 ("Expropriation Plan"). The taking comprised an area of 0.05 acres (2,193 sq. ft.) (the "Expropriated Lands") and was required for the construction of the Earl Grey Parkway ("the Works").

[4] The Claimant seeks compensation for:

a. the Market Value of the Expropriated Lands;

b. Injurious affection for the costs of replacing the septic system servicing the Subject Property as a portion of the system's tile field is located within the Expropriated Lands, and for damage to the septic system's tile field caused

by MTO's contractor; and

c. Injurious affection for the loss of the use of an easement over and upon the property which adjoined the Subject Property along its southerly lot limit, which easement facilitated truck access to the loading dock area on the east side of the Subject Property.

(collectively, "Claims")

ISSUES

[5] The Issues are:

a. The Market Value of the Expropriated Lands;

b. Whether the actions of the MTO amount to a notice of abandonment of a portion of the Expropriated Lands, and whether the Claimant has made a valid election pursuant to section 41 of the Act, requiring the MTO to retain all of the Expropriated Lands and preserving the Claimant's right to full compensation therefor;

c. Whether the Claimant has suffered damages for Injurious Affection resulting from the location of a portion of the septic system within the Expropriated Lands, and if so, the quantum of any such damages;

d. Whether the Subject Property enjoyed the benefit of an easement over and upon a portion of an adjoining property which was expropriated by the MTO in its entirety ("Easement"), and if so, whether the loss of the easement has caused the Claimant to suffer damages for Injurious Affection and the quantum of any such damages.

THE HEARING

[6] The hearing proceeded by video from May 15 to May 19, 2023, and continued on September 13, 2023, November 11, 2023, and March 1, 2024.

Agreed Statement of Facts

[7] Prior to the commencement of the Hearing the Parties entered into an Agreed Statement of Facts ("ASF") which was filed and marked as Exhibit 16. The provisions of the ASF are re-produced below:

1. 470698 Ontario Ltd. (the "Claimant") is an Ontario corporation with its head office located at 5590 Outer Drive, in the City of Windsor. The Director of the Claimant is Mario Dalla Bona ("Mario").

2. By Transfer/Deed registered as instrument number 1105170, on October 13th, 1989 **(TAB 1)** the Claimant acquired a parcel of land known legally as Part of the North West quarter of Lot 305, South Talbot Road, designated as Part One (1) on a Reference Plan deposited in the Registry Office for the Registry Division of Essex No. (12) as 12R-4084, in the Township of Sandwich South, in the County of Essex and province of Ontario being formerly Part 1 on 12R-3924 (the "Claimants Lands").

3. The Claimant subdivided the Claimants Lands into three separate adjoining lots (the "Three Lots") by obtaining a Consent (the "Severance") from the Committee of Adjustments on May 27th, 1997 to sever an interior part of the Claimants Lands. By Transfer/Deed registered on August 1st, 1997 as instrument number 1394636 the Claimant conveyed the middle lot of the Three Lots to Mario Dalla Bona in Trust **(TAB 4)**.They conveyance of the middle lot to Mario Dalla Bona personally, was directed by the counsel for the Claimant and Mario Dalla Bona, specifically, solicitor Richard Wolf, who at that time, made it a practice to "checker board", any lands conveyed

following a severance due to the existence of the *Planning Act*. The transfer to Mario Dalla Bona was made to him as a Trustee as stated in the Transfer/Deed and corroborated by the Land Transfer Tax Affidavit.

4. The Three Lots were located in a row, each fronting on Outer Drive. Each lot had its own separate PIN number and municipal addresses:

Address	Owner	PIN	
5800 Outer Drive	Claimant	70620-0001	**(TABS 26)**
5820 Outer Drive	Mario in Trust	70620-0002	**(TABS 27)**
5840 Outer Drive	Claimant	70620-0003	**(TABS 28)**

5. At all material times, up to and including the present date, the sole shareholder of the Claimant is and was Mario Dalla Bona. The same is reflected from the pages of the corporate Minute Book of the Claimant.

6. The Claimant and/or Mario in Trust improved each of the Three Lots with the construction of a building on each lot. The overhead photographs located at **TAB 8 pg 116 of 318, TAB 20 pg 36 of 282, TAB 8 pg 110 of 318, Tab 20 pg 17 of 282,** shows the Three Lots with the buildings which existed on the effective date of the Expropriation.

7. Each of the three parcels became tenanted by the following tenants:

5800 Outer Drive Weston Bakeries Limited (the “Weston Property”)

5820 Outer Drive Phillips Tool & Mold (Windsor) Ltd. (the “Phillips Property”)

5840 Outer Drive Tyler Hard Chrome Inc. (the “Tyler Property”)

8. Given the sizes of each of the Three Lots, the tenants of each of the Three Lots were permitted to, and did, drive upon the lands that abutted the Lot that the Tenant had possession of for the purpose of ingress and egress to and from each of the Tenant's respective lots

9. Formal easements were not registered on any of the Three Lots at the Land Registry Office

10. By the registration of a Plan of Expropriation as instrument number CE437682 **(TAB 32**) on August 19th, 2010 (the "Effective Date") the Respondent by expropriation acquired the entirety of the Phillips Property, the entirety of the Tyler Hard Chrome Property, and a triangular shaped portion (the "Triangle") of the Weston Property located in the north east corner of the Weston Property.

11. Agreements were reached for compensation arising from the expropriation of the Phillips Property and the Tyler Property.

12. With respect to the subject lands, the Claimant received a payment of $6,000 pursuant to section 25 of the Expropriations Act, without prejudice to bring this arbitration

13. As of the Effective Date the Weston Property which is the subject property in this matter was tenanted by Weston Bakeries Limited ("Weston") which used the Weston Property as a depot for the storage and redistribution of bread. The building on the Weston Property was constructed with a raised floor and multiple loading docks which permitted tractor trailers ("Weston's Transport Trucks") to unload skids of bread which bread was then re loaded back on to delivery trucks and delivered to various locations in the surrounding area. The building constructed upon the subject lands is known as a cross dock facility. At his examination for discovery, Franz Dalla Bona stated that the building was designed and built for use by Weston.

14. As of the Effective Date, given the size of the Weston Property, the location of the building, the location of the loading docks, and the turning radiuses that were required by Weston's Transport Trucks, it was necessary for Weston's Transport Trucks to use a portion of the Phillips Property to access the docks at the rear of the Weston Property. Basically, Weston's Transport Trucks could drive between the two buildings to access the easterly side of the Weston Property.

15. As of the Effective Date, a formal lease **(TAB 2, TAB 16)** existed between the Claimant and Weston (the "Weston Lease"). The Weston Lease identified the easement that permitted Weston's Transport Trucks to utilize the Required to Turn Path. The lease states:

> *"2.1 Demise*
>
> *WITNESSETH that in consideration of the rents, covenants and agreements hereinafter reserved and contained on the part of the said Lessee, to be paid, observed and performed, the said Lessor has demised and leased and by these presents doth demise and lease unto the said Lessee the premises, together with an easement over the lands sketched in Schedule AA attached hereto for the purpose of maneuvering the Lessee's trucks into the loading bays of the Premises.*
>
> [underlined emphasis added]
>
> **(TAB 2 pg 13 of 318)**

16. The Weston Lease was signed by Mario Dalla Bona on behalf of the Claimant. No easement was ever registered on title to the Phillips Property.

17. Mario Dalla Bona at all material times owned and controlled all three properties. Weston had a leasehold interest in land, and Weston physically utilized a portion of the Phillips Property on a daily basis, which the owner and tenants of the Phillips Property always permitted.

18. At any given time, it was within Mario Dalla Bona's sole and exclusive right, power, and authority, to formally register an easement from himself to the

Claimant and if necessary, vice versa. In the event that the Weston Property or the Phillips Property was to be sold, Mario Dalla Bona's lawyer could have memorialized the easement by registering an instrument at that time. As of the Effective Date no easement had been registered on the title to the Phillips Property, or the Weston Property.

19. As a result of the Expropriation, Weston's Transport Trucks could not, without driving over and on to the lands now owned by the MTO, properly access the rear of the Weston Property.

20. Weston, by letters dated February 1st, 2010 (TAB 7) and October 12th, 2010 (TAB 13) identified the concern that it then had to the MTO. Weston clearly stated its view that its use of a portion of the Phillips Property was integral to its continuation as a tenant on the Weston Property.

21. As a result, the MTO entered into an agreement with Weston which permits Weston's Transport Trucks to drive on and over lands owned by the MTO and identified in the Encroachment Permit/Letter of Acknowledgement/Easement given by the MTO and signed by Weston (TAB 25, TAB 17). The agreement is an Encroachment Agreement and has been renewed for as long as Weston has remained a tenant of the Weston Property.

22. MTO has erected a chain link fence near the south west corner of the Weston Property that delineates the area designated as Controlled Access Highway of the newly constructed highway.

23. Presumably, the Encroachment Agreement has been adequate to satisfy the access needs of the current tenant of the Weston Property as Weston continues to use the property and has paid its rent.

24. MTO has offered to convey the Encroachment Agreement land, a strip of

land that borders the southern portion of the Weston Property that is approximately 10.4 metres wide, from the street to the limits of the designated Controlled Access Highway, to the Claimant for no additional cost to the Claimant. The Claimant has not accepted this offer.

25. The Claimant has asked that the MTO convey a larger portion of the lands that it currently owns to the South, of similar length but approximately 24.4 metres wide. The MTO has not agreed to do that.

26. Also as of the Effective Date, the building on the Weston Property was serviced by an underground septic system which straddled into the Triangle. Following the Effective Date, the underground septic system was located in part beneath lands still owned by the claimant, and in part beneath the Triangle which became owned by the MTO.

27. Following the Effective Date and while the MTO was constructing the Rt. Hon. Herb Gray Parkway, the MTO and/or its agents, drove one or more posts into the ground which punctured and damaged the underground septic system. The MTO was formally advised of the damage by the Claimant's then counsel, who forwarded an email dated June 4th, 2012, to Mark Conley of the MTO **(TAB 18)**.

28. With the consent and agreement of the Claimant, MTO hired 1797465 Ontario Limited (O/A Glen Knight Septic Tank Service) to repair the septic system. MTO also agreed to convey the majority of the Triangle back to the Claimant at no cost to the Claimant such that the septic system is wholly located on lands owned by the Claimant. The repair of the system was completed in December of 2021 and the fences were moved. By email dated December 15th, 2021, Leeann Levac of the Town of Tecumseh advised that the repair was inspected by the Town of Tecumseh and passed the inspection **(TAB 39 pgs 68-70 of 134)**.

[8] The Claimant pleads that the Subject Property enjoyed the benefit of an unregistered easement over and upon the adjoining Phillips Property, which is described in paragraphs 7, 8, 9, 15, 16, 17 and 18 of the ASF (the “Easement”). As set out in paragraph 10 of the ASF, the Expropriation Plan resulted in the expropriation of the entire fee simple interest in both the Phillips Property and the Tyler Property. The former lot limit between the Subject Property and the Phillips Property has since been fenced and the former Phillips Property designated as comprising a portion of the Provincial highway known as the Earl Grey Parkway.

[9] Prior to the commencement of the hearing, the Claimant accepted an undertaking from the Respondent to convey the fee simple interest in the portion of the former Phillips Property which is the subject of an encroachment agreement in favour of the Claimant’s tenant at the Subject Property, which is described in paragraph 21 of the ASF (“Encroachment Agreement”). The offer by MTO is referred to in paragraph 24 of the ASF. The parcel subject to the Encroachment Agreement which has been undertaken to be transferred to the Claimant, is described as Part 1 on Plan 12R-29091, Town of Tecumseh (the “Part 1 Lands”).

[10] When the initial evidentiary portion of the hearing was concluded on May 19, 2023, the hearing was adjourned to continue September 13, 2023, for oral argument by counsel, subject to the completion of the conveyance of the Part 1 Lands. Counsel were also directed to file Written Submissions by August 11, 2023, which were received by the Tribunal as directed.

[11] When the hearing re-convened on September 13, 2023, Counsel for the MTO advised the Tribunal that, as the Part 1 Lands had been designated part of a Provincial highway, an Order-in-Council is required authorizing the transfer to the Claimant, which was not yet available. On consent, the hearing was adjourned to continue on November 11, 2023.

[12] When the hearing re-convened on November 11, 2023, counsel for the MTO advised that the required Order-in-Council was yet to be issued and it was expected to

be received during January or February 2024. On consent the hearing was adjourned once more to continue on March 1, 2024.

[13] Upon re-convening on March 1, 2024, counsel for the MTO advised the Tribunal that the Order-in-Council had been received in January, and that on January 24, 2024, the Transfer of the Part 1 Lands to the Claimant was completed by the registration of Instrument No. CE1167883 in the Land Registry Office for the Land Titles Division for the County of Essex at Windsor (No. 12). The Tribunal inquired whether the transfer impacted any of the Claims and counsel for the Claimants submitted that it did not. Counsel for the Respondent disagreed and referred to two (2) AutoTurn computer simulations of truck turning movements on the Subject Property which had been marked as Exhibits 20 and 21. The AutoTurn simulations appeared to clearly show that, with the addition of the Part 1 Lands, a WB-19 tractor-trailer was able to enter and exit the east side of the Subject Property and reverse up to a loading dock area without hindrance. The Tribunal directed both Counsel to file Supplementary Written Submissions by March 15, 2024, addressing any issues arising out of the transfer of the Part 1 Lands, including the issues of ingress to, and egress from, the Subject Property, and respecting the Claims for Market Value and Injurious Affection. The Supplementary Submissions were filed as directed.

[14] During the evidentiary portion of the hearing, the Tribunal heard from the following witnesses:

For the Claimant

- Franz Dalla Bona – Officer of the Claimant, Dalla Bona Construction and Dalla Bona Estates;

- Dennis Pupulin – P.Eng., who testified as an Expert Witness;

- David Medved - Principal of Bear Construction;

- Ray Bower – Real Estate Appraiser, who testified as an Expert Witness;
- Mario Dalla Bona – Principal of the Claimant;
- Jeff Shipley – Principal of Shep's Excavating;

For the Respondent:

- Jamshid Zohrehheydariha, P.Eng., who testified as an Expert Witness;
- Dan Van Houtte, Real Estate Appraiser, who testified as an Expert Witness;
- Ross Moore, Director of Distribution, Wonder Brands, who testified under Subpoena;
- Gary Knight, Employee of Glenn Knight Septic Tank Services, who testified under Subpoena;

[15] The Parties filed the following documents which were marked as Exhibits:

- Exhibit 1 – Claimant's Production Brief Part 1;
- Exhibit 2 – Claimant's Production Brief Part 2;
- Exhibit 3 – Claimant's Production Brief Part 3;
- Exhibit 4 – Respondent's Supplemental Document Brief;
- Exhibit 5 – Acknowledgement of Expert's Duty – Dennis Pupulin;
- Exhibit 6 – Email exchange between Counsel confirming Respondent's undertaking to convey Part 1 on Plan 12R-29091;

- Exhibit 7 – Site Plan of Subject Property with AutoTurn overlay showing truck turning movements;

- Exhibit 8 – Form 5 - Certificate of Approval and Plan of Expropriation registered as Instrument No. CE4374127;

- Exhibit 9 – Section 11 of Town of Tecumseh Zoning By-law;

- Exhibit 10 – Map plotting locations of Mr. Bower's vacant land comparable sales;

- Exhibit 11 – Google map showing Subject Property and surrounding properties;

- Exhibit 12 – Map plotting vacant land sales for industrial land;

- Exhibit 13 – Sandwich south Official plan, June 2014 Consolidation;

- Exhibit 14 – Aggregate Buy and Supply Summary;

- Exhibit 15 – Walker Aggregates price list;

- Exhibit 16 – Agreed Statement of Facts;

- Exhibit 17 – Eight exterior photos of the Phillips building;

- Exhibit 18 – Photo showing relationship of Phillips building to improvements on Subject Property taken in 2010;

- Exhibit 19 – Aerial photo of Subject Property after demolition of Phillips building;

- Exhibit 20 – AutoTurn animation showing WB-19 truck entering and exiting Subject Property when no other vehicles parked;

- Exhibit 21 – AutoTurn animation video showing WB-19 truck titled In-Last;

- Exhibit 22 – MP4 video taken by Jamshid Zohrehheydariha on December 1, 2022;

- Exhibit 23 -- Acknowledgement of Expert's Duty – Jamshid Zohrehheydariha;

- Exhibit 24 -- Acknowledgement of Expert's Duty – Dan Van Houte.

FINDINGS

[16] As set out below, The Tribunal makes the following findings and determinations:

a. The Tribunal finds that the Subject Property did not enjoy the benefit of an Easement over and upon the Phillips Property.

b. The Tribunal finds that, with the conveyance of the fee simple interest in the Part 1 Lands, there has been no loss of access to the rear loading dock area of the Subject Property and that the Claimant has not suffered damages for Injurious Affection as a result of the alleged loss of access.

c. The Tribunal finds that the Market Value of the Expropriated Lands as at the Effective Date was $16,500.

d. The Tribunal determines that section 41 of the Act has not been engaged as the Respondent did not serve a Notice of Abandonment as required by Section 41(1) of the Act. The Tribunal also finds that the Respondent's offer to convey a portion of the Expropriated Lands back to the Claimant was a

partial Offer to Settle, and that as such was made without prejudice and cannot constitute a step tantamount to the giving of a notice of abandonment. The Tribunal finds that the application of section 41 is limited to the market value of lands expropriated and that the section has no application to other categories of damages under the Act, such as damages for Injurious Affection.

e. The Tribunal finds that the Claimant has not suffered damages for Injurious Affection arising from the location of a part of its septic system within the area of the Expropriated Lands, or as a result of any damage which may have been caused by the Respondent's contractor, as any such damages have been fully cured and mitigated as a result of; 1) the Respondent's repairs to the septic system at its cost prior to the commencement of the Hearing, and; 2) by the Respondent's undertaking to reconvey the portion of the Expropriated Lands within which the Claimant's tile field is located to the Claimant at no cost and without deduction from the Claimant's claim for payment of the Market Value of the Expropriated lands.

BACKGROUND

[17] The Expropriation was a fee simple taking of a triangular portion of the Subject Property located at its northeast corner, comprising an area of 0.05 acres (2,193 sq. ft.).

[18] The Effective Date for the purposes of determining compensation is August 19, 2010, which is the date upon which the Expropriation Plan was registered. The Statement of Claim was filed on March 8, 2017, more than seven years after the taking, and the Reply was filed on May 24, 2017. The Hearing on the Merits commenced on May 15, 2023, more than 13 years after the taking, and was completed on March 1, 2024, more than 14 years after the taking.

[19] As described in paragraphs 2, 3, 4, 5, 7 and 8 of the ASF, the Subject Property was one of three adjoining parcels of land beneficially owned by the principal of the

Claimant, Mario Dalla Bona ("Mario"). All three properties were tenanted by industrial tenants. Two of the three properties (the "Phillips Property" and the "Tyler Property") were expropriated by the Respondent in their entirety for the construction of the Works. The Phillips Property adjoined the Subject Property along its southerly lot limit and was located between the Subject Property and the Tyler Property.

[20] As described in paragraph 13 of the ASF, the Subject Property is improved with an industrial building which was purpose built as a cross-dock facility to the specifications of its sole tenant, Weston Bakeries, which is now known as Wonder Brands ("Weston-Wonder"). Weston-Wonder utilizes the so improved Subject Property as its distribution centre for bakery products in the Essex County and Windsor markets (the "Cross-Dock").

[21] The ASF refers to the lease between the Claimant and Weston-Wonder in paragraph 15. The lease which was in effect as at the Effective Date was produced and marked as Exhibit 2, Tab 16. The recitals in the lease indicate that it was a renewal for a five-year term ending May 31, 2017. The recitals also state that the original lease was for a ten-year term commencing on June 1, 1992, and that the lease had been successively renewed every five years thereafter. The evidence at the hearing was that Weston-Wonder continued to occupy the Subject Property pursuant to an extended lease, which as at the Hearing amounted to a period of occupation of the Subject Property for more than 32 years.

[22] Ross Moore, former distribution manager for Weston-Wonder, was called by the Respondent and testified as to the operations of Weston-Wonder at the Subject Property and the use of the Cross-Dock. He testified that the Cross-Dock receives two (2) deliveries of bakery goods by WB-19 transport truck five (5) days per week ("WB-19"). A WB-19 is a tractor semi-trailer transport truck having a 48 ft. (14.6 m.) trailer. He testified that upon arrival at the Cross-Dock the baked goods are off-loaded from the WB-19 and transferred onto six (6) or seven (7) smaller single-axle trucks and delivery vehicles for distribution to retailers within the Essex County and Windsor areas. Upon

arrival at the Subject Property, a WB-19 will approach the Cross-Dock on Outer Drive from the west, and upon entering the Subject Property must circle around the south side of the Cross-Dock as the loading docks are located on the east side of the building. Upon arrival at the east side of the Cross Dock the WB-19 must then maneuver into position and reverse up to one of the seven (7) loading docks. While circling the Cross-Dock to the south, the WB-19 transport trucks were permitted to pass over a portion of the Phillips Property. The smaller single-axel trucks and delivery vehicles also approach the Cross-Dock from the west on Outer Drive as in the case of the WB-19 rucks, but reverse up to the loading docks on the west side of the Cross-Dock to receive the bakery goods being off-loaded from the WB-19 transport trucks.

ANALYSIS AND FINDINGS

Claim to an Easement over and upon the Phillips Property

[23] The Claimant pleads that it enjoyed the benefit of an unregistered Easement over and upon the Phillips Property for the purpose of allowing transport trucks to enter the east side of the Subject Property and to perform the maneuvers required to reverse up to the loading docks on the east side of the Cross Dock. An easement is referred to in the Demise contained in Article 2 of the Claimant's Commercial lease with Weston-Wonder, "for the purpose of manoeuvring the Lessee's trucks into the loading bays of the Premises", but it is admitted in paragraph 9 of the ASF that such an easement was never registered on title to either the Subject Property or the Phillips Property.

[24] There are four essential characteristics to a valid easement. These are:

i) There must be a dominant and a servient tenement;

ii) An easement must accommodate the dominant tenement;

iii) The dominant and servient owners must be different persons;

iv) To amount to an easement a right must be capable of forming the subject matter of a grant.

[25] The evidence of Mario and paragraphs 1, 3, 4, and 6 of the ASF establishes that he was, as at the Effective Date, the beneficial owner of both the Subject Property and the Phillips Property. That fact that Mario was the beneficial owner of both Properties is further confirmed by the submission of counsel for the Claimant that “the Phillips Property and the Westin (*sic.)* Property were developed through one operating and controlling mind, who developed the Three Properties where each tenant would have access over abutting lands”.

[26] The Tribunal finds that a valid Easement was not created as the dominant and servient tenements were owned by the same person. In addition, the area of the Phillips Property that would have been subject to the alleged Easement was imprecise and undefined. The Tribunal therefore finds that in addition, a valid Easement was not created as the alleged right could not have been the subject of Grant. Counsel for the MTO has referred the Tribunal to the transcript of the Examination for Discovery of Franz Dalla Bona, and his admission that if Weston-Wonder vacated the Subject Property and the new tenant did not have the requirement to drive vehicles upon the Phillips Property, the new tenant would not be given an “easement”.

[27] Having considered all of the evidence and submissions of counsel, the Tribunal determines that the provision in the lease, in the absence of any registration on title, and in view of the admission of revocability, is consistent with and indicates the Claimant’s intention to grant a permission only in the form of a personal licence to Weston-Wonder, permitting it to use a portion of the Phillips Lands for the purpose of manoeuvring trucks into the loading bays of the Cross-Dock. Such a licence is revocable, non-transferable and more importantly, does not run with the land.

[28] Having considered all the evidence, the written and oral submissions of the counsel, and the law, the Tribunal finds that the Subject Property did not enjoy the benefit of an Easement over and upon the Phillips Property.

Market Value and Injurious Affection

Injurious Affection – Claim that Access to Loading Docks Lost

[29] The Claimant called Ray Bower to provide the Tribunal with appraisal evidence. Mr. Bower was qualified on consent to provide opinion evidence to the Tribunal. Mr. Bower had produced an appraisal report dated February 10, 2016 (the "2016 Appraisal"), appraising the market value of the Subject Property as at the Effective Date, as improved, which was filed as Exhibit 2, Tab 20. Mr. Bower employed both the cost approach and the direct comparison approach in the 2016 Appraisal.

[30] As Mr. Bower employed the before and after method of appraisal, determining the overall diminution in the Market Value of the Subject Property, the Tribunal will consider the issues of the Market Value of the taking and damages for Injurious Affection together.

[31] In his Cost Approach analysis in the 2016 Appraisal, Mr. Bower estimated the market value of the Subject Property as if vacant and unimproved, as at the Effective Date, by relying on five land sales ranging from $6.89 per sq. ft. to $8.45 per sq. ft. and having a weighted and average price of $6.89 to $7.22 per sq. ft. Mr. Bower concluded that the Subject Property as vacant, would have been valued at $7 to $8 per sq. ft. as at the Effective date and concluded its market value, as if vacant, to have been $470,000.

[32] Relying upon the general costs estimates provided by the Marshall & Swift/BOECKH Commercial Valuation System, August 2010 version, and a Replacement Costs Evaluation Report prepared by Hanna Ghobrial & Associates Ltd. in 2010, Mr. Bower estimated the depreciated value of the improvements to have been $759,682 as at the Effective Date. The result of his cost approach analysis was that Mr. Bower concluded a Market Value for the Subject Property, as improved and as at the Effective Date, of $1,230,000.

[33] In the 2016 Appraisal, Mr. Bower then considered the market value of the Subject Property, as improved, using the direct comparison approach. In his direct comparison analysis, Mr. Bower relied on six (6) comparable sales of improved properties having sale prices ranging from $16.67 per sq. ft. to $61.89 per sq. ft. He concluded a market value of $965,000 for the Subject Property as at the Effective Date using the direct comparison approach. Mr. Bower reconciled the results of his cost approach analysis and direct comparison approach analysis by arriving at a final estimate of the market value of the Subject Property as improved, of $1,100,000 as at the Effective Date.

[34] Mr. Bower also prepared an Appraisal Report dated January 25, 2021 (the "2021 Appraisal"), which was filed as Exhibit 2, Tab 29, in which he estimated the market value of the partial fee simple taking and the overall diminution in market value of the Subject Property as damages for injurious affection. The 2021 Appraisal is a Before and After Appraisal employing the direct comparison approach and concludes that there has been a diminution in the market value of the Subject Property resulting from the Expropriation, in the sum of $144,700. In arriving at this determination Mr. Bower relied upon the evidence of Dennis Pupulin, the Claimant's Transportation Engineer, to the effect that as a consequence of the Expropriation of the Phillips Property, the Subject Property could no longer feasibly function as a cross-dock facility. After the Expropriation the highest and best use of the Subject Property had therefore been downgraded, and was for its improvements to be converted to a general light industrial or warehouse use.

[35] Mr. Bower relied upon the same five comparable sales as in his 2016 Appraisal, concluding the same unit value of between $7.00 and $8.00 per sq. ft., and market value of the Subject Property as if vacant and prior to the taking, of $469,500. Using a unit value of between $7.00 and $8.00 per sq. ft., Mr. Bower also concluded that the market value of the fee simple taking was $16,500.

[36] In estimating the market value of the Subject Property before the taking, Mr. Bower relied upon the same six comparable sales as in the 2016 Appraisal, but added an adjustment to reflect the Subject Property's superior zoning which permits numerous additional uses compared to the typical industrial zone. In this regard he considered seven additional vacant industrial land sales, which included three sales which included cross-dock facilities. As a result of his analysis Mr. Bower determined that the improvements on the Subject Property had a market value of between $40 and $45 per sq. ft. as at the Effective Date, and that the Subject Property, as improved and as a cross-dock, had a market value before the taking of $964,700.

[37] In estimating the market value of the Subject Property after the taking, Mr. Bower's analysis and conclusions were premised upon the Claimant's contention that the Subject Property could no longer feasibly function as a cross-dock facility, and that it required conversion to accommodate a general light industrial or warehouse use. Mr. Bower relied on six further comparable sales, these being sales of improved general light industrial properties. He concluded an average and median residual building value of $30 and $33 per sq. ft. and a market value of the Subject Property after the taking of $820,000. The diminution in the market value is inclusive of the estimated market value of the Expropriated Lands in the amount of $16,500.

[38] The 2021 Appraisal included consideration of a cost estimate which Mr. Bower testified the Claimant had provided to him for the conversion of the Cross-Dock to a general light industrial building. The estimate had been produced and marked as Exhibit 2, Tab 30, was in the amount of $324,000, and had been provided by Bear Construction & Engineering Ltd. ("Bear"). David Medved, a principal of Bear testified on behalf of the Claimant respecting the cost estimate and that it had been provided in 2020 and was quoting 2020 construction costs. Mr. Bower therefore adjusted the estimate downwards by 23% to adjust for the increase in construction costs since the Effective Date and testified as to his opinion that the adjusted amount for the conversion costs was the sum of $249,000.

[39] In summary, Mr. Bower valuation opinions are as follows:

Value of Property “Before” the Expropriation:	$964,700
Value of Property “After” the Expropriation:	(820,000)
Diminution in market Value:	$144,700
Conversion Costs:	$249,000
Total Loss in Market Value:	$393,700

[40] The Respondent called Dan Van Houtte to provide the Tribunal with appraisal evidence. Mr. Van Houtte was qualified on consent to provide opinion evidence to the Tribunal, and had produced two appraisal reports. The first appraisal was dated February 17, 2010 (the “Feb. 2010 Appraisal”), appraising the market value of the Respondent’s fee simple requirement as at July 7, 2009, which was filed as Exhibit 1, Tab 8. Utilizing the direct comparison approach, Mr. Van Houtte concluded that the market value of the requirement at July 7, 2009, was $6,000. Mr. Van Houtte’s second appraisal was dated October 22, 2010 and was prepared in accordance with Section 25 of the Act (the “Section 25 Appraisal”), and was filed as Exhibit 1, Tab 14. Mr. Van Houtte again employed the direct comparison approach concluding that the market value of the Expropriated Lands was $6,000. He also concluded that the HBU of the Subject Property was unchanged after the Expropriation and that there were no damages for Injurious Affection suffered as a result of the Expropriation.

[41] Dennis Pupulin, P. Eng. is a transportation engineer who was called by the Claimant and qualified by the Tribunal on consent to provide opinion evidence regarding the transportation issues in this Proceeding. He produced a report which was filed as Exhibit 2, Tab 21. Mr. Pupulin testified that using a copy of a Site Plan for the Subject Property, he overlaid the route which a WB-19 would follow while accessing the east side loading docks of the Cross-Dock. He testified that he included the Part 1 Lands as being available to the WB-19, but not the additional area of the Phillips Property which had been available prior to the Expropriation, and that he used the AutoTurn computer

program to plot the path of the tractor unit and of the trailer of a WB-19 entering the loading dock area on the east side of the Cross-Dock while two WB-19 are occupying the first and third loading docks. He testified as to his opinion that, in the situation described, the east side loading docks cannot be accessed by a WB-19 if any of the first four loading docks are occupied by a WB-19 with the tractor unit attached to the trailer, if only the Part 1 Lands are available for maneuvering. Exhibit 7 also shows an alternative scenario, which illustrates that a WB-19 could maneuver into position at the third loading dock while the first is occupied, by traversing in addition to the Part 1 Lands, a significant portion of the Phillips Property which is no longer available as it is now a part of the Works.

[42] Jamshid Zohrehheydariha, P.Eng. is a transportation engineer who was called by the MTO and was qualified on consent to provide opinion evidence regarding the transportation issues in this Proceeding. He produced a report which was marked as Exhibit 3, Tab 39. Mr. Zohrehheydariha testified that he also used the AutoTurn program to illustrate the vehicle path of a WB-19 and to produce two animations showing a WB-19 entering and leaving the loading dock area on the east side of the Cross-Dock while another WB-19 is present at the first loading dock. He testified that he included the Part 1 Lands as being available to the WB-19 for maneuvering. The animation was marked as Exhibit 20, and showed that a WB-19 can enter and leave the Subject Property without obstruction while a full size 48 foot trailer was parked at the first loading dock with the tractor unit disconnected and moved elsewhere. Both engineers agreed that a WB-19 could access any of the remaining loading docks if a 48 foot trailer was parked at any of the first four docks with the tractor unit removed. Dr. Zohrehheydariha's testified that his report shows that when used in this manner with the Part 1 Lands, the Subject Property and Cross-Dock have no access issues.

[43] The evidence from Ross Moore was that Weston-Wonder has no full-time employees at the Subject Property, and all of the offloading of the WB-19s and loading of delivery truck and vehicles is done by independent contractors. Significantly, Mr. Moore testified that Weston-Wonder has never received a complaint from a driver with

respect to access to the loading docks on the east side of the Cross-Dock and that to his knowledge, access has never been an issue.

[44] The Tribunal observes that the Cross-Dock was constructed to the specifications of Weston-Wonder and the evidence was that as at the date of the Hearing, Weston-Wonder has continued to occupy the Subject Property and to use Cross-Dock for its intended purpose, and to pay rent to the Claimant without objection, abatement or adjustment.

[45] The evidence of Mario was that the Cross-Dock was designed to simultaneously accommodate seven WB-19 transport trucks backed up for off-loading to all seven east side loading docks, with tractor unit attached. The Claimant refers to the AutoTurn animation marked as Exhibit 20, and submits that it demonstrates that, as a result of the Expropriation of the Phillips Property, it is no longer possible for a WB-19 to access the east side loading docks if any of the first four loading docks are occupied by a WB-19 was the tractor unit attached. The Tribunal observes that the AutoTurn animation marked as Exhibit 20 does show that if a WB-19 is backed up to the first loading dock with tractor attached, that the path of an entering truck will be obstructed by the tractor unit, and that if the tractor is removed, there is no obstruction.

[46] Mr. Moore testified that it is the policy of Weston-Wonder to always disconnect the tractor unit from the trailer and to move the tractor to a different location while its trailer is being either loaded or off-loaded. Mario testified that he is the holder of an AZ licence, that he has experience operating WB-19 transport trucks, and that it is his preference to leave the trailer connected to the tractor unit during loading and off-loading for safety reasons. The Tribunal prefers the evidence of Mr. Moore because it is the preference of Weston-Wonder, the sole tenant who has occupied the Cross-Dock for a period in excess of 32 years, to disconnect the tractor unit prior to off-loading. The evidence of Mr. Moore was that Weston-Wonder has continued to operate in this way for the 14 years since the Expropriation and that it had operated in that fashion in the years prior to the Expropriation.

[47] Counsel for the Claimant submits that the evidence shows that only three of the seven loading docks are available at the same time. However, the Tribunal observes that it was Mr. Moore's evidence that Weston-Wonder receives only two deliveries per day by WB-19, which means that there has never more than two of the seven loading docks on the east side of the Cross-Dock occupied at the same time. The summation of Mr. Moore's evidence was that access to the loading docks has not been impeded in any way. The Tribunal finds that it is also non-issue for the Claimant so long as Weston-Wonder continues to pay rent without abatement or adjustment, which it has done.

[48] The Tribunal notes there was no evidence of so much as a single conflict occurring between a parked WB-19 with tractor unit attached to the trailer, and a WB-19 attempting to enter or exit the east side of the Cross-Dock.

[49] Counsel for the Claimant submits that, in the event that Weston-Wonder vacates the Subject Property at some point in the future, the list of prospective replacement tenants would be limited to those requiring access to no more than three of the seven loading docks. However, the Tribunal observes the provisions of the ASF that:

a. at all material times Mario was the sole beneficial owner of all three properties;

b. that Mario had caused the original single parcel to be severed into three smaller parcels of which the Subject Property was one;

c. that Mario caused each of the three parcels created by the severance to be improved with industrial buildings which were then leased to industrial tenants;

d. that Mario was well aware that the three parcels, as improved, were undersized for some industrial uses, which is a situation he created, as reflected by paragraph 9 of the ASF, which states "given the sizes of each

of the Three Lots, the tenants of each of the Three Lots were permitted to, and did, drive upon the lands that abutted the Lot that the Tenant had….”

e. that Mario chose not to formalize the foregoing arrangements by the registration of easements on title to the three properties.

[50] The Tribunal observes that Weston-Wonder has occupied the Subject Property for over 32 years and that there is no evidence that Weston-Wonder may be planning to relocate from the Subject Property and that there is no evidence indicating that the pool of prospective tenants would be limited in any meaningful way by the simultaneous availability of only three out of the seven loading docks.

[51] Counsel for the MTO submits that the Claimant’s position is to the effect that, unless access, by WB-19, is available continually to all seven loading docks, with the tractor unit attached to every WB-19 at a loading docks, that access has been lost as a result of the Expropriation, the utility of the Cross-Dock has been diminished and that damages for Injurious Affection have been suffered. Counsel for the Respondent submits that in fact the evidence shows that the use of the Subject Property has not been altered, that the utility of the Cross-Dock has not been impacted and that no damages have been suffered.

[52] After careful evaluation of the competing written and oral evidence tendered by the Parties and consideration of the Written Submissions of Counsel, the Tribunal prefers, accepts and relies on the evidence of Mr. Moore and the opinion evidence of Mr. Zohrehheydariha in strong preference to that of Mario and Mr. Pupulin. The Tribunal finds that, as a result of the conveyance of the Part 1 Lands, there has been no loss of access to the east side loading docks as claimed. Engineering witnesses for the Claimant and the Respondent, assumed that the Part 1 Lands would be conveyed and prepared simulations illustrating truck movements using the AutoTurn program. The simulations prepared by Mr. Zohrehheydariha showed that a WB-19 could access the east side loading docks with a full-size trailer parked in the first dock with the tractor detached from the trailer. Mr. Pupulin, the Claimant’s Engineering Expert agreed. Mr.

Moore, Director of Distribution for Weston-Wonder, the current and only tenant at the building since 1992, testified that it was the policy of Weston-Wonder to always detach the tractor during loading and off-loading operations. The Claimant's position that, in the event that at some point in the future Weston-Wonder vacates the Subject Property, that a replacement tenant may be difficult to find because such a tenant may require simultaneous access by WB-19 to all seven loading docks, is far too speculative to support any claim for consequential damages on the principle of remoteness.The Tribunal finds that, following the conveyance of the Part 1 Lands to the Claimant, there has been no loss of access to the east side loading dock area of the Subject Property. The Tribunal therefore finds that, aside from loss of the market value of the Expropriated Lands, there has been no diminution in the market value of the Subject Property and that the Claimant has not suffered damages for Injurious Affection resulting from the alleged loss of access.

Market Value of the Fee Simple Taking

[53] In the 2021 Appraisal, Mr. Bower concluded that the Market Value of the fee simple taking was $16,500 based upon a unit value of between $7.00 and $8.00 per sq. ft. In contrast, Mr. Van Houte used one acre as his unit of comparison in the Section 25 Appraisal, which he determined had a market value of $110,000 per acre as at the Effective Date. Since the area of the taking comprised 0.05 acres, Mr. Van Houtte calculated that the market value of the taking was $6,000 (which amount was the result of rounding upwards). Mr. Van Houtte testified that Mr. Bower's higher unit value resulted from the fact that all of his comparable sales were located in areas outside the South Sandwich Industrial Park within which the Subject Property was located, and that the areas within which Mr. Bower's comparable sales were located were superior and hence more valuable.

[54] Mr. Van Houtte relied on five comparable sales in his section 25 appraisal. Four of the five comparable sales involved sales comprising parcels which were 0.1, 0.3, 1.2 and 1.7 acres in size. The fifth comparable sale was for a parcel comprising 5 acres.

The Tribunal considers that Mr. Van Houtte's unit of comparison of one acre is not appropriate as the fee simple taking being appraised comprises only 0.05 of an acre or 2,193 sq. ft. The larger unit of comparison has a built-in bias as a result of economies of scale in the sale of larger parcels. The Tribunal prefers Mr. Bower's unit of comparison of one square foot and determines that the Market Value of the fee simple taking was $16,500 as at the Effective Date.

Injurious Affection – Claims Relating to Septic System

[55] The Respondent called Gary Knight, of Glen Knight Septic Tank Services, who testified regarding the repairs completed to the septic system at the Subject Property at the Respondent's cost, and that an inspector from the Town of Tecumseh had inspected the repairs and had certified that the system had passed the inspection. Paragraph 29 of the ASF states that the Claimant agrees that the repairs were done with its consent at no cost to it, and that the repairs had been inspected by the municipality and had passed the inspection.

[56] Prior to the Hearing the MTO provided the Claimant with its undertaking to transfer to it the portion of the Expropriated Lands within which the Claimant's tile field is situate. Notwithstanding this undertaking, the Claimant has refused to accept the transfer and maintains that, in addition to the damage caused by the Respondent's contractors, the septic system has been damaged and compromised as a result of the Expropriation and the construction of the Works, and that it is entitled to damages for Injurious Affection in the sum of $205,000 plus HST for the cost of constructing a new relocated septic system.

[57] Mr. Pupulin testified that when he attended at the Subject Property, he observed that the area within which the tile field is located was wet and speculated that this may indicate that water was pooling in the area because of elevation and grade changes caused by the construction of the Works. There was no evidence tendered as to whether there had in fact been such elevation and grade changes or any drainage changes. The Tribunal observes that Mr. Pupulin was called by the Claimant, and was

qualified by the Tribunal, to provide opinion evidence regarding transportation engineering issues only, and that he was not qualified to provide opinion evidence regarding drainage engineering or septic system engineering issues. The Tribunal finds that there is no admissible evidence before it that the septic system has been compromised by the construction of the Works or that it must be relocated. The Tribunal therefore finds that there has been no diminution in the market value of the Subject Property, or damages incurred in this regard as the septic system does not require relocation as a result of the Expropriation or the construction of the works.

[58] The Tribunal also finds that there has been no diminution in the market value of the Subject Property arising from the location of a part of its septic system within the Expropriated Lands, or because of any damage which may have been caused by the Respondent's contractor. Any such damages have been fully cured and mitigated by the Respondent's repairs to the septic system at its cost prior to the commencement of the hearing, and by the Respondent's undertaking to convey the portion of the Expropriated Lands within which the Claimant's tile field is located to the Claimant at no cost to it, and without deduction from the claim for payment of the market value of the Expropriated Lands. In this regard, the Tribunal finds that the Claimant's refusal to accept the conveyance of the portion of the Expropriated Lands within which its septic system is located is unreasonable and constitutes a failure on the part of the Claimant to take reasonable steps to mitigate its damages.

Claim that Notice of Abandonment Given Under Section 41

[59] Section 41 of the Act establishes a procedure for the abandonment of all or part of a taking by an Expropriating Authority prior to the determination of compensation. Section 41(1) provides that such an Expropriating Authority is to serve a Notice Abandonment upon the Expropriated Owner. Upon service of the Notice of Abandonment the Expropriated Owner shall elect to either take the land, estate or interest back, in which case the claim would be reduced to consequential damages

only, or elect to require the Authority to retain the land, estate or interest, in which case the Owner will retain the right to seek full compensation for the land, estate or interest.

[60] It is not disputed that a Notice of Abandonment has not been served. But Counsel for the Claimant submits that the Claimant has chosen to require the Respondent to retain the portion of the Expropriated Lands within which its tile field lies and points to the Respondent's offer of an undertaking to reconvey that portion of the Expropriated Lands as tantamount to giving Notice of Abandonment. Counsel for the Respondent disagrees, and submits that the Claimant is required to accept the reconveyance pursuant to its duty to mitigate its damages.

[61] Counsel for the Claimant cites the Decision of the Divisional Court the Decision of the Divisional Court in *Re Desapio et al. and Ministry of Transportation and Communications (1978), 15 L.C.R. 8 (Ont. Div. Ct.) at 8-9* and submits that the Desapio Decision is authority for the proposition that "there are no take-backs", because "when the Plan of Expropriation is registered, the Authority crosses a Rubicon". The Tribunal disagrees and finds that the Desapio Decision is distinguishable because it was concerned with Section 11 of the Act and not Section 41. In that case, pursuant to Section 11 of the Act, the former Ministry of Transportation and Communications ("MTC") had offered to transfer other lands to the Claimants which were of equal value to the lands which had been expropriated, in satisfaction of the Claimants' entitlement to compensation for the market value of the lands expropriated. The Claimants declined to accept the offer of substitution and the former Land Compensation Board ("LCB") declined to order that the Claimants do so. On appeal by the MTC, the Court found that the LCB was correct in its determination that it could not order what would amount to an exchange of properties between the parties to satisfy the Claimants' claim for compensation. The Desapio Decision is also distinguishable as, in the instant case, the Respondent's proposal does not concern other lands, but the return of a portion of the Expropriated Lands for the purpose of curing the non-compliance issue arising from the fact that, after the Expropriation, a portion of the Claimant's septic system is no longer located within lands that it owns and controls. The conveyance would entirely cure any

damages for injurious affection suffered on this account. In addition, the Desapio Decision is distinguishable from the instant case because the proposal by MTO is that the conveyance is to be made without regard to the Claimant's entitlement to be paid the full Market Value for the Expropriated Lands without deduction, whereas the proposal by the MTC in the Desapio Decision amounted to a land exchange.

[62] The Tribunal determines that section 41 of the Act is not engaged as, a Notice of Abandonment has not been served, and, prior to the determination of the amount of the compensation, the Respondent offered the Claimant an undertaking to transfer title in fee simple to the portion of the Expropriated Lands in issue, and to nevertheless pay to the Claimant the full Market Value of the entirety of the Expropriated Lands as at the Effective Date, as determined by this Tribunal.

[63] Counsel for the Claimant submits that the Respondent's proposal does not take into account the Claimant's claims for damages for injurious affection. The Tribunal refers to Section 41(1)(b) which provides in part that an Expropriated Owner may, by election in writing:

> (b) require the expropriating authority to retain the land, estate or interest, in which case the owner has the right to full compensation **therefor**. (emphasis added).

The Tribunal finds that by its wording, emphasized above, the application of section 41 is specifically limited to the market value of the "land, estate or interest" expropriated, and that the provisions of the section have no application to other claims under the Act, such as claims for damages for Injurious Affection.

ORDER

[64] **THE TRIBUNAL ORDERS** that:

a. The Respondent is to pay to the Claimant the sum of $16,500, less the sum of $6,000 paid to the Claimant pursuant to section 25 of the

Expropriations Act;

b. With the exception of statutory interest and costs, the balance of the claims be and the same are hereby dismissed;

c. In the event that the Parties are unable to reach agreement respecting statutory interest and costs, either party may file a Motion requesting that the Tribunal determine either or both matters.

[65] This Member remains seized and is available to assist the Parties should such assistance be required.

"Robert G. Ackerman"

ROBERT G. ACKERMAN
MEMBER