Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement local

ISSUE DATE: July 15, 2020 **CASE NO(S).:** LC200008

The Ontario Municipal Board (the "OMB") is continued under the name Local Planning Appeal Tribunal (the "Tribunal"), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

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

Claimant:	1758987 Ontario Inc.
Respondent:	Ministry of Transportation
Subject:	Land Compensation
Property Address/ Description:	Part of Lot 14, Concession 6
Municipality:	Town of Petawawa
LPAT Case No.:	LC200008
LPAT File No.:	LC200008
LPAT Case Name:	1758987 Ontario Inc v. Transportation (Ontario)

Heard: June 17, 2020 by Telephone Conference Call

APPEARANCES:

Parties	**Counsel*/Representative**
1758987 Ontario Inc	Blair Jones
Ministry of Transportation	Adam Mortimer

DECISION DELIVERED BY G. BURTON AND D.S. COLBOURNE AND ORDER OF THE TRIBUNAL

[1] On February 27, 2020, Blair Jones, representing the corporate owner 1758987 Ontario Inc. of three lots fronting on Murphy Road in the Town of Petawawa, served a Notice of Arbitration and Statement of Claim to the Local Planning Appeal Tribunal ("Tribunal"). This claimed compensation is for injurious affection damages, as provided for in section 26 of the *Expropriations Act* (the "*Act*"). The cause stated for the damages was the denial by the Minister of Transportation ("MTO") of access permits from Murphy Road to the parcels. Reply for the Ministry was filed on May 1, 2020 by Adam Mortimer, Counsel for MTO, in which he denied that any compensation is due to the owners. The Reply stated that there had not been any expropriation or injurious affection resulting from the denial of permits, or otherwise. The matter was set down for a Case Management Conference ("CMC") on June 17, 2020 held by telephone conference call ("TCC").

Factual Background

[2] This matter arose following the Ministry's denial of building and land use permits, commonly known as access or entrance permits, for driveways from Murphy Road into the owner's three parcels. The subject lots are designated as Parts 1 through 6 on Plan 49R-19013, in total constituting Lot 14, Concession 6, Geographic Township of Petawawa, Town of Petawawa, County of Renfrew. They are located west of a lot owned by the Town of Petawawa, itself adjacent to present provincial Highway 17 to the east. The approximately one-acre parcels had been created by consents to sever the former Lot 14, Concession 6. The consents were issued to (then) owner Mr. Jones by the approval authority, the County of Renfrew, on September 13, 2016. The present owner corporation acquired the three parcels on October 17, 2018 as transferee from Mr. Jones.

[3] The owner's applications for access permits were made on January 13, 2019, under subsection 38(2) in Part II of the *Public Transportation and Highway Improvement Act ("PTHIA").* By email of May 31, 2019, Lloyd Pacheco of MTO informed Mr. Jones that the permits would not be issued, because any driveways in this location from

Murphy Road would impact future construction plans of the Ministry. Reasons were set out in Mr. Pacheco's letter of May 30, 2019. These included interfering with the Ministry's "extensive long-term plans…protecting of future improvements….[and] future plans for an interchange" at Highway 17 and Murphy Road.

The Owner's Notice of Arbitration

[4] Mr. Jones as counsel on behalf of the present owner 1758987 Ontario Inc., then filed the Notice of Arbitration. His reasons, in summary, were:

1. Denial of the access permits constituted substantial interference with the use and enjoyment, right of access and ability to use the land for the intended purpose of development parcels or residential lots, for which they otherwise qualified;

2. Denial of the permits had the same effect as if the lands had been expropriated, requiring compensation under the *Act* or purchase by the Ministry. The right to sue for damages is removed by section 12 of the *PTHIA,* he argued, which directs a person suffering such damages to the *Expropriations Act* only;

3. The permit denials, which amounted to an "expropriation", thus gave access to the remedies for injurious affection as defined in the *Act*; and

4. To fit within the definition of injurious affection in the *Act*, "construction" could be found in the MTO plans for a new cloverleaf design at the nearby intersection of Highway 17/ Murphy Road. The "preliminary stage" of the MTO plans is tantamount to expropriation of lands under the *Act*. Mr. Jones cited both recent discussions and an older Expropriation Plan 129282 (P-6099-14) [shown at Exhibit J of Mr. Jones' affidavit]. Proof of these future plans, he said, was evident in a February 28, 2019 meeting of the County,

> Town and MTO. A map was introduced then showing an "expanded area of interest" and a "hypothetical service road". Expenditure of funds on the creation of this map constituted a "step in the construction process", he stated. Both the Expropriation Plan and this map were proof of "construction", thus providing access to the *Act's* remedies for injurious affection.

[5] Mr. Jones claimed financial compensation, consisting of the aggregate market value of the three lots. For valuations he relied on certain offers to purchase, Municipal Property Assessment Corporation value figures, and recent equivalent sales. He also requested "compensation for time spent by the Executives of the Claimant", that is, for himself as Counsel to the corporate owner.

Ministry's Reply

[6] In Mr. Mortimer's May 1, 2020 Reply for MTO, he denied that any action constituting *expropriation* as defined had happened here. Nor was it "tantamount to" an expropriation, or a deemed expropriation at common law, since no interest in the owner's land or in any nearby land was acquired by MTO. The owner has no common law right of access in this situation, as claimed, since access is controlled by MTO by statute. Therefore the Tribunal has no jurisdiction to consider a claim for expropriation or injurious affection under the *Act.*

[7] Mr. Mortimer argued that the refusal of access permits was an administrative decision of the Ministry and is not reviewable by the Tribunal. The fact of unspecified future plans for an intersection of Highway 17 and Murphy Road is not an "expanded area of interest", constituting steps leading to an expropriation, as claimed. The permit denials were instead an exercise of MTO's duty under Part II of the *PTHIA* and section 1.6.8 of the 2014 Provincial Policy Statement ("PPS") to protect controlled-access highways from inconsistent development. A ramp/loop of the future interchange would be located exactly where the proposed driveway entrances to Murphy Road would be situated. Recent reconsideration of interchange locations and designs (as shown in Ex.

4, Affidavit of Neville McAnuff) did not constitute “preliminary stages” of “construction” of public works, so as to give rise to any claim under the *Act.*

[8] Notice of the Ministry’s intent to place a ramp at a new intersection, Mr. Mortimer stated, had been available to the owner as of August 8, 2017, even in advance of his rezoning and severances of the original parcel (Ex. 2, Reply, para. 17). By subsection 53(5) of the *Planning Act,* the consent authority must provide advance notice of an application to all public bodies prescribed. The County of Renfrew failed to follow this requirement; or in any event the Ministry received no notice of the severance applications from the County of Renfrew when they were made. It was thus unable to warn of its plans for Highway 17 intersections before the owner’s severances were granted. Therefore, the owner had no formal notice that access permits would not be granted before obtaining the consents. However, Mr. Jones had attended a Petawawa Town Council meeting on the aforementioned date, August 8, 2017, where an email from MTO was read. This outlined its position that no access permits would be granted from Murphy Road to the subject parcels due to the location of a future intersection.

[9] Mr. Mortimer would reject the owner’s claims for compensation and costs, “as it has advanced an unreasonable and baseless claim that does not involve expropriation or injurious affection as contemplated in the *Expropriations Act.”* (Exhibit 2, Reply, para. 51).

MTO Motion to Dismiss

[10] Mr. Mortimer than filed a Notice of Motion to Dismiss the claim with costs on May 26, 2020, on the ground of lack of jurisdiction. The reasons were similar to the objections in the Reply. This Motion was supported by the affidavit of Mr. Neville McAnuff dated June 5, 2020. Mr. McAnuff is Senior Property Officer, Corridor and Property Office of the Ministry. He was present in the Motion hearing.

[11] The Tribunal then determined to hear the Motion on the subject of its jurisdiction prior to a hearing on the merits of the claim. It found authority in subsection 4.6 of the *Statutory Powers Procedure Act*, R.S.O 1990, c. 22 (the "SPPA"), and in Rule 10.11 of its *Rules of Practice and Procedure* ("Rules") to initiate a Motion at any stage to inquire as to its jurisdiction. It provided directions to the parties for abridged filing dates, relying on Rule 10.5 for reduction in the time frames for Motion filings and for electronic filings. Authority is also found in recent O. Reg. 73/20. This allows the Tribunal to lift the suspension of any timelines in the Tribunal's Orders, and to require the fulfillment of directions by specified dates.

[12] Thus the Tribunal proceeded to hear the Motion to Dismiss made on the date scheduled for a CMC in the matter, June 17, 2020. The time frames were abridged, as stated above. Should the Motion not succeed, the Tribunal stated, a new date would be fixed for a CMC.

[13] Section 38 of the *PTHIA* governing controlled access highways states:

> **38 (1)** In this section,
>
> "centre point of an intersection" is the point where the centre line of the through part or parts of a controlled-access highway meets the centre line of or the centre line of the prolongation of any other highway that intersects or meets the controlled-access highway; ….
>
> 2) Despite any general or special Act, regulation, by-law or other authority, no person shall, except under a permit therefor from the Minister,
>
> > (a) place, erect or alter any building, fence, gasoline pump or other structure or any road, or perform any grading upon or within 45 metres of any limit of a controlled-access highway or upon or within 395 metres of the centre point of an intersection;…."

[14] This prohibition was the reason for the MTO refusal of the access permits, so that the requested driveways would not conflict with a future intersection design. They would inevitably do so given the distances involved. They would be located where a proposed cloverleaf would be placed.

[15] In response to the MTO Motion, Mr. Jones filed several documents on June 12, 2020, including an Affidavit, Legal Argument and Authorities and a Book of Authorities. Mr. Mortimer objected to the Affidavit, as it contained extensive legal argument contrary to the Tribunal's Rules. He also objected to any further filing of materials prior to a future hearing on the merits, as this would be a breach of procedural fairness and would prejudice the Ministry. Mr. Jones countered with the argument that while the affidavit did cite sections of legislation, pleadings and *case law*, these were statements of fact only. Case quotations merely illustrated some definitions of relevant terms.

[16] In his Affidavit (Ex. 5) Mr. Jones expanded upon the Claim's statements. By denying the permits, the Ministry's action had the same effect as if it had expropriated portions of the parcels. This provided access to compensation for injurious affection. The refusals were essentially caused by "construction" of public works at its preliminary stage, because of the Ministry's "expansion of the area of interest" (Ex. 5, para 54). He submitted that this could mean any of pending, active and past construction, relying on the decision of the Supreme Court of Canada in *Imperial Oil Ltd. v. R.,* 1973 CanLII 155 (SCC), [1974] SCR 623.

[17] There the claimant was required to move its pipes to permit dredging of the Hamilton Harbour. The Court found that injurious affection could be caused even in advance of construction of a public work. It was because of the decision to proceed with the public works that the pipes had to be moved. The fact that this was done before the public works were "constructed" afforded no ground for assuming that the injurious affection was not occasioned "by the construction of any public work".

[18] As to the causation, Mr. Jones cited *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, 1997 CanLII 400 (SCC), [1997] 1 SCR 32 ("*Dell Holdings*"), where the Supreme Court found that the approach to damages under the Act was based on causation, and not on a time frame. The result was that an expropriated party is entitled to recover the damages caused by an expropriation, but one which occurs prior to the actual date of expropriation. The Act of expropriation was found to be part of a continuing

process; therefore the approach to damages should not be a temporal one but rather should be based upon causation. In *Dell Holdings*, the increased costs to the Appellant's development business between the announcement of an expropriation and the actual taking were found to be caused by the expropriation. Thus, they were compensable as disturbance damages, since the developer claimant could undertake no steps in mitigation during the delay.

[19] Mr. Jones claimed that the Ministry interfered with the owner's right of access to the subject parcels (and other rights) for which it would be liable under the tort of nuisance, but for the statutory authority to control access. The Ministry's "conduct" denying permits had affected any sale of the lots for the intended purpose, and also the market value. Thus, it could also be liable for business damages under the *Act*.

FINDINGS AND DECISION

Power to Dismiss without a Hearing

[20] The Tribunal granted the Ministry's Motion and dismissed the Claim, with reasons to follow. The authority to do so is found, as mentioned, in the SPPA (rather than the usual *Planning Act* provision):

> **4.6(1)** Subject to subsections (5) and (6), a tribunal may dismiss a proceeding without a hearing if, …..(b) the proceeding relates to matters that are outside the jurisdiction of the tribunal; …" (emphasis added).

Subsections (5) and (6) require notice of this possibility and an opportunity to respond. The Tribunal accepts as adequate fulfilment of this requirement the MTO Notice of Motion and all subsequent interchanges of submissions.

Challenge to Affidavit

[21] The Tribunal ruled in favour of accepting Mr. Jones' affidavit, while agreeing that it might nor meet the definition of "affidavit" in Tribunal Rule 1.2:

> *"affidavit"* means a written statement made under oath or affirmation that is confined to facts or other evidence the deponent could give if testifying as a witness before the Tribunal that is substantially in the form set out in Rule 4D of the *Rules of Civil Procedure*;"

[22] In accepting it the Tribunal relied on its Rules 1.3, 1.5 and 1.6 respecting a liberal interpretation, substantial compliance, and power to exempt where "necessary and appropriate, to ensure that the real questions in issue are determined in a just, expeditious and cost-effective manner." (1.6). It also accepted the reduced time frames for required filings, relying on the same Rules, as well as on O. Reg. 73/20 permitting present suspension of deadlines in Orders and directions due to the pandemic.

[23] As Mr. Jones argued, the nature of MTO's Motion is such that it requires an examination of legal issues. Thus he provided both references to *caselaw* as well as facts and "personal commentary", which he argued demonstrate that this proceeding relates to legal matters within the jurisdiction of the Tribunal. The Tribunal agreed with him that the question of jurisdiction over his Claim is more expeditiously resolved by acceptance of his affidavit at this stage. It indeed led to the resolution that the Tribunal was able to reach after hearing the Motion.

Claim for Damages for Injurious Affection

[24] The *Expropriations Act*, R.S.O. 1990, Chapter E.26, was argued to have application to this claim. There are three hurdles that this claimant for compensation under the *Act* must surmount: first, do any of the actions of MTO meet the definition of "expropriation"; second, if so, does the owner qualify for damages under the Act for "injurious affection" as defined; and lastly, does the MTO have any liability to compensate the owner in the circumstances?

[25] Subsection 1(1) of the *Act* contains these definitions:

> "expropriate" means the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers;

"expropriating authority" means the Crown or any person empowered by statute to expropriate land; …

"injurious affection" means,…..

(b) where the statutory authority does not acquire part of the land of an owner,

(i) such reduction in the market value of the land of the owner, and

(ii) such personal and business damages,

resulting from the **construction** and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute, *(emphasis added)*….

"statutory authority" means the Crown or any person empowered by statute to expropriate land or cause injurious affection;

"Tribunal" means the Local Planning Appeal Tribunal.

Subsection 2(1) of the *Act* provides that it applies despite any other Act, where land is expropriated or injurious affection is caused by a statutory authority. By section 13, where land is expropriated, the expropriating authority shall pay the owner such compensation as is determined in accordance with the Act. It goes on:

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

c) damages for injurious affection; and

(d) any special difficulties in relocation,…..

Respecting compensation for injurious affection, sections 21 and 22 provide that:

21 A statutory authority shall compensate the owner of land for loss or damage caused by injurious affection.

22 (1) Subject to subsection (2), a claim for compensation for injurious affection shall be made by the person suffering the damage or loss in writing with particulars of the claim within one year after the damage was sustained or after it became known to the person, and, if not so made, the right to compensation is forever barred.

[26] Does the “Expropriation Plan”, Ex. J to Mr. Jones’ Affidavit provide proof of MTO “recent” plans to construct Highway 17 expansion? The Tribunal cannot so find, as it was registered on November 30, 1972. The consultant Report shown to the owners on February 28, 2019 illustrated a concept for a new intersection, together with a possible municipal access road to the rear of the subject parcels. Mr. Jones indicated the latter prospect was not in fact possible, but this changes nothing in his argument about MTO’s planned “construction”.

[27] Both the MTO’s statutory and policy authority to preserve and protect highway corridors for future expansions provide more than sufficient authority to refuse these access permits. The exercise of these permit powers cannot constitute an expropriation, given ss. 6 and 12 of the *PTHIA.* No one can build within the numerical limits in section 38 of the *Act* unless permitted. It is a statutory prohibition. It makes no sense to say that the Ministry’s refusal of these access permits equalled an acquisition of an interest, even in the abstract, therefore requiring compensation of any kind under the *Expropriations Act.* As Mr. Mortimer argued, an access permit or its refusal cannot constitute “construction”, or the protection of highway corridors by permit would always be considered compensable “construction” (Ex. 7, para. 44).

Loss of market value

[28] The Ministry cited the decision of Power, J., in *Rodriguez Holding Corp. v. Vaughan (City),* 2006 CanLII 28338 (ON SC), aff’d 2007 ONCA 256, where the Court stated:

> [71] We have been referred to no Canadian case in which the decline of economic value of land, on its own, has been held to be the loss of an interest in land. Several cases, on the contrary, recognize the distinction between the value of ownership and ownership itself. This suggests that the loss of economic value of land is not the loss of an interest in land within the meaning of the Expropriation Act. This conclusion is, in my view, strongly supported by the overall scheme of compensation established by the Act and by judicial interpretation of it.

> [72] The loss of interests in land and the loss of the value of land have been treated distinctly by both the common law and the Expropriation Act. In my view, this distinct treatment supports the conclusion that decline in value of land, even when drastic, is not the loss of an interest in land. To understand this point, it is necessary to consider briefly compensation for "injurious affection", that is, injury to lands retained by the owner which results from the taking. ….
>
> [82] It follows that, where the effect of land use regulation is to eliminate virtually all the normal incidents of ownership, this will be reflected in the market value of the land. It is not, however, the decline in market value that constitutes the loss of an interest in land, but the taking away of the incidents of ownership reflected in that decline.
>
> [83] We have been referred to only three Canadian cases in which compensation has been ordered where governmental regulatory action has been held to be a de facto expropriation: Tener, Casamiro and Manitoba Fisheries *(citations omitted).* I have already reviewed these cases earlier in my reasons. Judging by these cases, de facto expropriations are very rare in Canada and they require proof of **virtual extinction of an identifiable interest in land** (or, in Manitoba Fisheries, of an interest in property)." (emphasis added).

[29] In the view of the Tribunal, this decision (though dealing with planning controls and not highways) puts to rest the owner's argument that any reduction in the value of their land resulting from the Ministry's refusal of access permits can be the reason for compensation for injurious affection under the *Act*. There has been no virtual extinction of an identifiable interest in land or property. Access permits are not merely at MTO discretion but, as here, their refusal is mandated where the statutory distance rules are breached.

[30] Longstanding support for the Ministry's authority to grant or refuse permits near controlled access highways is seen in *Multi-Malls Inc. v. Ontario (Minister of Transportation & Communications),* 1976 CarswellOnt 860 (ONCA). The Court stated in paras 38 and 39:

> 38 The introduction of such designations, justifiable on the basis of the public need for faster traffic between certain points, involved a sacrifice of private convenience. Long setbacks were required, the erection of distracting signs had to be prohibited, and the construction of entrance or access roads had to be controlled. Yet obviously there are situations in which it would be unfair to so prohibit, especially where the greater public interest would not be unduly harmed. Thus the provision presently dealt

> with was made for the granting of permits to persons wishing to do that which would otherwise conflict with the general prohibitions.
>
> 39 The discretion to issue permits should be construed with the concept in mind that it was intended to alleviate the restriction to private action otherwise imposed by the public requirements of traffic planning for controlled access. The discretion to refuse or grant the permit requested must be exercised having regard to traffic planning requirements…

[31] There was no suggestion in that case that refusal of a permit would result in compensation to owners. Paragraph 40 also provides no assistance to Mr. Jones, concluding as it did that: "Apparently it was the legislature's intent that neither The Planning Act (a general Act) nor zoning by-laws override this Act." (that is, the PTHIA). The severances acquired for development purposes can be overridden by the refusal of access permits, in the public interest.

[32] Mr. Jones' arguments in favour of damages for injurious affection can be reduced to this: the Ministry's permit denial caused damage to the marketability of the parcels, therefore MTO is responsible under the *Act* for injurious affection and, in effect, business damages. As Mr. Mortimer argued, the permit refusals were entirely within MTO's obligation to fulfil its statutory duty to preserve corridors for controlled access highways. The refusals may have resulted in a diminution of the parcels' value, but the Ministry took no land from the owner, or from owners nearby. On the simple face of it then there was no expropriation, and thus no access to injurious affection damages. Nor can the Tribunal determine the question of whether conduct is "tantamount to" expropriation, nor a "deemed" expropriation, as such jurisdiction is exclusively the Court's (Ex. 7, para 54-56).

[33] MTO argued, rightly in the Tribunal's view, that that the owner had confused the withholding of a permit with the denial of a right (para. 33, Ex. 20). The permit would legitimize an access, which is entirely within the power of MTO. The owner has no "right" to it, since the *PTHIA* places control within the discretion of the Minister.

[34] The Tribunal has some sympathy with Mr. Jones, who appears to have been a victim of a consent authority's failure to provide formal notice of a consent application to all authorities, as required under the *Planning Act* and Regulations. As Mr. Mortimer stated, had MTO known of the applications, it would have informed Mr. Jones directly and immediately upon receipt of them that access permits could not be granted. Its plans for the intersection of Murphy Road and Highway 17, however unformed and inchoate in 2017, were at least sufficiently determined that Mr. Jones may not have then gone to the trouble of seeking either rezoning or consents for the original parcel. We do not find that the oral reading of an email from MTO to Petawawa Council in 2017 constitutes actual notice to Mr. Jones of the Ministry's intent respecting the intersection. (Ex. 2, para. 17). Mr. Jones denied having heard the reading of this notice. However, as a land developer, given the parcels' proximity to Highway 17, he might have performed a closer inspection of the legislative and planning circumstances even before the consents were sought. Section 38 of the *PTHIA,* where there are prohibitions of any building within certain distances from controlled access highways, has long been part of the *Act*.

[35] The circumstances of this Claim cannot be seen to give rise to a claim for expropriation damages, where there has been no actual or even planned "construction". The *Act's* definition of injurious affection cannot be extended this far. There is no ambiguity here, as there is no "taking" by the Ministry, and no pending taking as in *Dell Holdings* where the intention to acquire was known. The Tribunal also distinguishes the *Imperial Oil decision* on the facts. Extension of this claim to business or disturbance damages as requested would stretch it to an impossible extent. There has been no "construction" present or future as set out by the courts. Long-term planning for expansion of Highway 17 to four lanes, placement of intersections, and even acceptance of contemporary design standards have not brought the claim within the usual understanding of "construction". Thus injurious affection damages are not available.

[36] The Ministry referred to a breach of a limitation period in filing the claim. Because of the uncertainty after the application made in January of 2019 and Mr. Pacheco's email and letter in May of that year, the Tribunal will not consider that a limitation period was breached.

[37] In light of the finding on lack of jurisdiction, it is not necessary to make a finding on the method for determining the value of the three parcels.

ORDER

[38] The Tribunal orders:

1. The Motion to Dismiss without a hearing is granted.
2. The owner's Claim is denied for lack of jurisdiction.

"D.S. Colbourne"

D.S. COLBOURNE
MEMBER

"G. Burton"

G. BURTON
MEMBER