Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: September 14, 2022 **CASE NO(S).:** OLT-22-002573 (Formerly LC130003)

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

Claimants:	IN SOON CHO, SUN HI CHO, SUNNY YONG CHO, and JOE SUP CHO
Respondent:	Ministry of Transportation
Subject:	Land Compensation
Property Address/ Description:	Part of Lot 1, Concession 1
Municipality:	Durham R/Ajax
OLT Lead Case No.:	OLT-22-002573
Legacy Lead Case No.:	LC130003
OLT Case No.:	OLT-22-003573
Legacy Case No.:	LC130003
OLT Case Name:	CHO v. Ontario (Transportation)

PROCEEDING COMMENCED UNDER subsection 12(1) of the *Ontario Land Tribunal Act*, 2021, S.O. 2021, c. 4, Sched. 6, and the Tribunal's Rules of Practice and Procedure

Request by:	IN SOON CHO, SUN HI CHO, SUNNY YONG CHO, and JOE SUP CHO
Request for:	Motion for Direction

Heard: August 17, 2022 by video hearing

APPEARANCES:

Parties	**Counsel**
Claimants In Soon Cho, Sun Hi Cho, Sonny Yong Cho and Joe Sup Cho ("Claimants"):	Charles Loopstra, Q.C.

Her Majesty the Queen in Right of Ontario
(Ministry of Transportation of Ontario "MTO"): Robert Lawson

DECISION DELIVERED BY WILLIAM R. MIDDLETON AND ORDER OF THE TRIBUNAL

Part One: Introduction

[1] This matter arises in relation to an expropriation on March 7, 2011, by the MTO of a portion of the Claimants' property ("Expropriation") located at 456 Lake Ridge Road South in the Town of Ajax, Regional Municipality of Durham ("Subject Property").

[2] The Claimants brought a Motion returnable before the Ontario Land Tribunal ("Tribunal" or "OLT") on August 17, 2022 which was conducted by Video Hearing on that date ("VH").

[3] The Claimants' Notice of Motion sought the following:

(a) A Declaration that the Ministry of Transportation's ("MTO") offer made under Section 25(1)(a) of the *Expropriations Act,* R.S.O. 1990, c E.26 ("EA") dated May 31, 2011 became a binding and enforceable contract between MTO and the Claimants once the Claimants accepted the offer in writing on December 14, 2021 ("Accepted Offer");

(b) A Declaration that MTO has no authority to withdraw an offer made under Section 25 once served on the registered land-owner;

(c) A Declaration that the new Section 25(1)(a) offer by the MTO dated December 20, 2013 was not made in compliance with the requirements under section 25 of the EA, and is of no force and effect;

(d) An Order of the Tribunal directing that MTO pay the Claimants the sum of

$458,000.00 (being the Accepted Offer) in full satisfaction of all claims, excluding the payment of costs and interests under sections 32 and 33 of the EA and subject to deduction for the $24,400.00 advance payment already received by the Claimants;

(e) An Order of the Tribunal directing that MTO pay the Claimants' interest on the sum of $458,000.00, outstanding from time to time, at the rate of 6% from July 12, 2011 in accordance with section 33 of the EA;

(f) An Order of the Tribunal directing that MTO reimburse the Claimants' reasonable legal, appraisal, and other costs actually incurred by the Claimants for the purposes of determining the compensation payable, in accordance with section 32 of the EA; and

(g) The costs of this Motion.

[4] The grounds alleged by the Claimants were:

(a) On March 7, 2011, MTO expropriated a fee simple interest over a trapezoidal shaped strip along the entire frontage of the Subject Property comprising of approximately 0.81 acres;

(b) The Expropriation was for the purposes of the construction of the new Highway 407 East Transportation Corridor, specifically the West Durham Link which connects Highway 401 with Highway 407 East ("Project");

(c) The Expropriation created a remainder parcel in the Subject Property of approximately 13.02 acres ("Remaining Lands"). The Expropriation eliminated access to the Remaining Lands, rendering them entirely landlocked and non-viable. Accordingly, the Remaining Lands and improvements thereon have a nil value as a direct result of the Expropriation;

(d) On May 31, 2011, the MTO made offers of compensation to the Owners with respect to the Expropriation in accordance with Section 25 of the EA ("EA Offers") which comprised (i) an Offer of Total Compensation for All Interests in the amount of $458,000.00 "for the land and all interests in the land expropriated, and for any damages necessarily resulting from the expropriation or the exercise of any statutory authority including any injurious affection to lands not so taken" ("Original Section 25(1)(a) Offer"); and (ii) an Offer of Immediate Payment for Your Joint Interests in the amount of $24,400.00 for "the market value of the land as estimated by the expropriating authority. Payment and receipt of this sum is without prejudice to the rights conferred by the above Act in respect of the determination of compensation but is subject to adjustment in accordance with any compensation that may subsequently be determined or agreed upon." ("Section 25(1)(b) Offer");

(e) The EA Offers were based on an appraisal report from Mr. Murray Visser at Central Ontario Appraisals Inc. ("Section 25 Appraisal"), which was contemporaneously served on the Claimants. The Section 25 Appraisal opined on the market value of the lands taken and injurious affection based on the Remaining Lands being landlocked and nonviable. The Section 25 Appraisal opined that the market value of the taking was $24,400 and injurious affection amounted to $433,000 pursuant to s. 14(3) of the EA;

(f) On July 12, 2011, MTO took possession of the lands under the Expropriation ("Possession Date"). The Remaining Lands have been abandoned and the residence vandalized and uninhabitable since 2011;

(g) The Claimants accepted the Section 25(1)(b) Offer, and MTO paid the Owners $24,400.00 in 2012. At no point did the Claimants reject the Original Section 25(1)(a) Offer;

(h) On June 6, 2012, MTO changed its position and advised the Claimants that after further investigation, access can be maintained to the Subject Property from Lake Ridge Road during and after construction. Then on December 20, 2013, almost three years after the Expropriation, MTO withdrew the Original Section 25(1)(a) Offer, because it determined that access will be available to the Remaining Lands and alleged that there would be no injurious affection to the Remaining Lands. MTO substituted the Original Section 25(1)(a) Offer with a new Section 25(1)(a) Offer of $24,400 ("New Section 25(1)(a) Offer"). However, MTO did not serve an appraisal report along with the New Section 25(1)(a) Offer; and

(i) On December 14, 2021, the Claimants accepted the Original Section 25(1)(a) Offer, excluding the payment of costs and interest under sections 32 and 33 of the EA. The Claimants allege that the MTO could not rescind the Original Section 25(1)(a) Offer and that it remained open for acceptance by the Claimants once made.

[5] The materials before the Tribunal at the VH were:

(a) Motion Record of the Claimants, comprising 117 pages;

(b) Responding Motion Record of the MTO, comprising 28 pages;

(c) Factum of the Claimants, comprising 27 pages; and

(d) Claimants' Book of Authorities, comprising 365 pages together with one additional case comprising 2 pages.

Part Two: Decision Summary

[6] The Tribunal finds that the counsel for the MTO has been unable to establish that the unusual course of action taken by the MTO in withdrawing its Original Section

25(1)(a) Offer and in purporting to deliver a New Section 25(1)(a) Offer as described in Part Three below is in accordance with the provisions of the EA. Instead, the Tribunal is of the opinion that the Claimants have demonstrated that the MTO's conduct is not permitted by the EA.

[7] Specifically, the Tribunal determines that in the circumstances of this case the MTO did not effectively withdraw or rescind the Original Section 25(1)(a) Offer made to the Claimants. Therefore, even though the Claimants did not accept it until ten years after it was originally made by the MTO – and eight years after the MTO purported to make its New Section 25(1)(a) Offer – the Claimants' acceptance was valid.

[8] The Tribunal's findings are specific to the circumstances of this case only. This Decision should not be considered to be a ruling that an expropriating authority can never withdraw or rescind an offer made pursuant to Section 25(1)(a) of the EA. It was unnecessary for the OLT to decide that general question on this Motion, even though that ruling was urged upon the Tribunal by the Claimants' counsel.

Part Three: Issues Analysis and Evidentiary Matters

1) The Relevant Provisions of the EA

[9] As described in Part One and Part Two above, the conduct of both the MTO and the Claimants was unusual. Neither counsel for the Claimants nor for the MTO could cite any jurisprudence dealing with a fact situation directly comparable to this case.

[10] It is important to review the sections of the EA that are applicable to the circumstances set out in this proceeding. They include the following:

> **Application of Act**
>
> **2** (1) Despite any general or special Act, where land is expropriated or injurious affection is caused by a statutory authority, this Act applies. R.S.O. 1990, c. E.26, s. 2 (1).
>
> **References in other Acts**

(2) The provisions of any general or special Act providing procedures with respect to the expropriation of land or the compensation payable for land expropriated or for injurious affection that refer to another Act shall be deemed to refer to this Act and not to the other Act. 2002, c. 17, Sched. F, Table.

… Conflict

(4) Where there is conflict between a provision of this Act and a provision of any other general or special Act, the provision of this Act prevails. R.S.O. 1990, c. E.26, s. 2 (4).

…

Reparation

11 Where land is expropriated or is injuriously affected by a statutory authority, the statutory authority may, before the compensation is agreed upon or determined, undertake to make alterations or additions or to construct additional work or to grant other lands, in which case, the compensation shall be determined having regard to such undertaking, and, if the undertaking has not already been carried out, the Tribunal may declare that, in addition to the compensation determined, if any, the owner is entitled to have such alteration or addition made or such additional work constructed or such grant made to the owner. R.S.O. 1990, c. E.26, s. 11; 2017, c. 23, Sched. 5, s. 29.

…

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).

Increase by Tribunal

15 Upon application therefor, the Tribunal shall, by order, after fixing the market value of lands used for residential purposes of the owner under subsection 14 (1), award such additional amount of compensation as, in the opinion of the Tribunal, is necessary to enable the owner to relocate his or her residence in accommodation that is at least equivalent to the accommodation expropriated. 2017, c. 23, Sched. 5, s. 31

….

Compensation for injurious affection

21 A statutory authority shall compensate the owner of land for loss or damage caused by injurious affection. R.S.O. 1990, c. E.26, s. 21.

Claim for compensation for 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. R.S.O. 1990, c. E.26, s. 22 (1).

…

Offer

25 (1) <u>Where no agreement as to compensation has been made with the owner, the expropriating authority shall, within three months after the registration of a plan under section 9 and before taking possession of the land</u>,

(a) <u>serve upon the registered owner</u>,

(i) <u>an offer of an amount in full compensation for the registered owner's interest</u>, and

(ii) where the registered owner is not a tenant, a statement of the total compensation being offered for all interests in the land,

excepting compensation for business loss for which the determination is postponed under subsection 19 (1); and

(b) <u>offer the registered owner immediate payment of 100 per cent of the amount of the market value of the owner's land as estimated by the expropriating authority, and the payment and receipt of that sum is without prejudice to the rights conferred by this Act in respect of the determination of compensation</u> and is subject to adjustment in accordance with any compensation that may subsequently be determined in accordance with this Act or agreed upon. R.S.O.

1990, c. E.26, s. 25 (1); 1993, c. 27, Sched.

Furnishing appraisal report

(2) The expropriating authority shall base its offer of compensation made under subsection (1) upon a report appraising the market value of the lands being taken and damages for injurious affection, and shall serve a copy of the appraisal report upon the owner at the time the offer is made. R.S.O. 1990, c. E.26, s. 25 (2).

Extension of time

(3) The expropriating authority may, within the period mentioned in subsection (1) and before taking possession of the land, upon giving at least two days notice to the registered owner, apply to the judge for an order extending the time referred to in subsection (1), and the judge may in his or her order authorize the statutory authority to take possession of the land before the expiration of the extended time for serving the offer or statement under clause (1) (a) upon such conditions as may be specified in the order. R.S.O. 1990, c. E.26, s. 25 (3).

Failure to serve

(4) If any registered owner is not served with the offer required to be served on the owner under subsection (1) within the time limited by subsection (1) or by an order of a judge under subsection (3) or by agreement, the failure does not invalidate the expropriation but interest upon the unpaid portion of any compensation payable to such registered owner shall be calculated from the date of registration of the plan. R.S.O. 1990, c. E.26, s. 25 (4).

Application, if compensation not agreed to

26 (1) If the statutory authority and the owner do not agree on the compensation payable under this Act, the statutory authority or the owner may, subject to subsection (2), apply to the Tribunal for the determination of compensation by way of a hearing or as otherwise provided for under the *Ontario Land Tribunal Act, 2021*. 2021, c. 4, Sched. 6, s. 48 (6).

Same

(2) Subsection (1) applies,

(a) in the case of injurious affection, if section 22 has been complied with; or

(b) in the case of expropriation, if section 25 has been complied with or the time for complying with it has expired. 2021, c. 4, Sched. 6, s. 48 (6).

…

Costs

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

Same

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

Interest

33 (1) Subject to subsection 25 (4), the owner of lands expropriated is entitled to be paid interest on the portion of the market value of the owner's interest in the land and on the portion of any allowance for injurious affection to which the owner is entitled, outstanding from time to time, at the rate of 6 per cent a year calculated from the date the owner ceases to reside on or make productive use of the lands. R.S.O. 1990, c. E.26, s. 33 (1).

…

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

[all of the above emphasis added]

2) Tribunal Ruling on Evidentiary Dispute

[11] This Tribunal found it interesting that although the Claimants filed a lengthy Affidavit from one of its counsel, Ms. Ng, who also appeared on the record at the VH, the MTO's counsel did not seek to cross-examine on that Affidavit. The Tribunal notes that it was appropriate in this situation that Ms. Ng made no submissions at the hearing of the Motion.

[12] However, counsel for the MTO did file a responding Affidavit of Mr. McAnnuff on August 8, 2022, approximately nine (9) days before the VH. Counsel for the Claimants also did not seek to cross-examine on this Affidavit. However, he argued at the VH that he was concerned that the time that it would take to schedule and complete such a cross-examination would put in jeopardy the Motion hearing date of August 17, 2022. On the other hand, the Claimants' counsel strongly objected to much of the contents of the Affidavit of Mr. McAnnuff filed by the MTO in support of its position.

[13] Counsel for the Claimants argued that the evidence tendered by Mr. McAnnuff was self-serving and prejudicial because it was improperly intended to 'colour' the Motion proceedings by suggesting that the current value of the Subject Property may be quite high, thus raising the prospect of a 'windfall' if the Claimants' Motion was granted. Thus, the Claimants' counsel argued that the Tribunal ought to strike those portions of Mr. McAnnuff's Affidavit that referred to the relatively recent sale of a property directly adjacent to the Subject Property. The Claimants' counsel maintained that this was not proper evidence on value and that the MTO never served upon the Claimants new appraisal report to support the New Section 25(1)(a) Offer or as evidence of the value of the Subject Property, contrary to section 25(2) of the EA.

[14] Counsel for the MTO opposed the *de facto* Motion to expunge any portion of the Affidavit of Mr. McAnnuff. He pointed out that section 4 of the Affidavit of Ms. Ng tended to suggest that the Subject Property had a present-day 'nil value' and that Mr. McAnnuff was entitled to counter this assertion. However, as noted in paragraph [12] above, counsel for the MTO did not request to cross-examine Ms. Ng on this point. The Claimants' counsel rejected the notion that Ms. Ng was commenting on the current value of the Subject Property in this portion of her Affidavit, arguing that it was reasonable to infer that she was merely referring to the impact of the Expropriation in the circumstances that existed in 2011.

[15] Clearly, the provisions of Rule 10 of the OLT *Rules of Practice and Procedure* ("Rule") with respect to the Claimants' counsel's request to expunge a portion of the Affidavit of Mr. McAnnuff were not followed since this argument was first made at the outset of the VH. However, counsel for the MTO did not press that point and the Tribunal exercised its discretion under Rule 10.10 which permits a Motion to "…*be made at an in person or electronic hearing event with leave of and in accordance with any procedures ordered by the presiding Tribunal Member*…". The Tribunal therefore entertained the Claimants' Motion during the hearing and heard full submissions from counsel for both Parties.

[16] The Tribunal declined to rule that any portion of the Affidavit of Mr. McAnnuff be struck. However, the Tribunal also determined that it would afford little weight to particularly paragraphs 17 and 21 of that Affidavit for two main reasons: firstly, they refer to anecdotal evidence as to the sale price of an adjacent property to the Subject Property and there was no effort made by the MTO to provide independent expert evidence on value to assist the Tribunal; secondly, it is apparent to the Tribunal that the real purpose of this anecdotal evidence was to raise the spectre of a possible 'windfall' to the Claimants if the OLT was to rule that the Claimants' acceptance of the Original Section 25(1)(a) Offer was valid. In this Tribunal's view, such a contention should have been supported by proper independent valuation evidence. More importantly, the current value of the Subject Property and any alleged future profit accruing to the Claimants upon its sale is both speculative and also completely irrelevant to the main issues of this Motion, as further elaborated upon in paragraph [17] and [18] below.

3. <u>What Evidence is Relevant to the Key Issue on the Motion?</u>

[17] It is important to note that this Motion does *<u>not</u>* involve a request for a determination as to the value of the portion of the Subject Lands under expropriation. Nor does the motion formally seek a determination of the total compensation payable to the Claimants arising from the Expropriation, pursuant to section 26 of the EA. Thus, the Tribunal was not being called upon to adjudicate those issues. Moreover, the facts stand as pleaded in the Claimants' Amended Notice of Arbitration and Fresh as Amended Statement of Claim contained in the Claimants' Motion Record – and in any Reply delivered by the MTO (none was included in the motion materials or is otherwise available in the Tribunal's file but presumably the MTO has delivered or will deliver a Reply to the Statement of Claim).

[18] In the Tribunal's view the material facts as pleaded were not formally or properly contested on this Motion as they might be, for example, in a summary judgment motion aimed at determining the value of the Subject Lands or the compensation due to the Claimants under the EA.

[19] Therefore, it is unnecessary for this Tribunal to resolve the incomplete debate between the Parties pertaining to issues related to the value of the lands under Expropriation as set out in the motion materials or as claimed during the oral argument made by the Parties' counsel at the VH. Again, that debate is irrelevant to the key relief sought by the Claimants on this Motion, which was summarized in the Claimants' *Factum* as follows:

> This motion raises a discreet [sic] legal issue: whether MTO has the authority to withdraw an offer dated May 31, 2011 made under section 25 of the Expropriations Act … and substitute it with a new section 25 offer dated December 20, 2013, based on facts not known on the Valuation Date, being March 20, 2011.

[20] Counsel for the MTO appeared to recognize this in the MTO Responding Motion Record although only as set out in the affidavit of Mr. McAnnuff as follows:

> 12. MTO's position is that read properly section 25 of the Expropriations Act provides for alternative offers. Once an owner elects between the two offers, the offer is 'spent'. If this were not the case, expropriating authorities would be placed in the untenable position of expending time and resources defending Claims only to have wasted those resources where an owner subsequently elects to accept the section 25(1)(a) offer of total compensation for all interests.

[21] Leaving aside the issue of whether such a statement of legal opinion/argument is properly made in a supporting Affidavit (somewhat surprisingly no objection was made by the Claimants' counsel on this point), in the Tribunal's view much of the content in that Affidavit and also of the Affidavit of Ms. Ng, and indeed many of the written and oral submissions of counsel for both Parties, were devoted to matters that do not directly relate to the central questions raised by the Claimants' Motion.

[22] Clearly, the motion ruling in favour of the Claimants' position necessarily means that the Original Section 25(1)(a) Offer has been duly accepted. Moreover, it may well be the case that there will be no hearing on the merits of all claims set out in the Fresh as Amended Statement of Claim – although it is unnecessary for this Tribunal to make a ruling in that regard, and, in the Tribunal's view, this was not formally requested in the Claimants' Notice of Motion.

[23] Therefore, it is the Tribunal's view that many of the submissions made by the MTO's counsel in reliance on Mr. McAnnuff's Affidavit and also in the responding arguments of counsel for the Claimants on those points are misdirected. In particular, this Motion was not the venue for the Tribunal to determine whether the Remaining Lands have remained 'landlocked' or have legal access restrictions, nor was there sufficient evidence tendered at the VH to enable the Tribunal to make such rulings even if the Claimants' Motion had sought such determinations.

Part Four: Analysis and Conclusions Regarding the Only Issue to be Determined

[24] The Claimants' counsel argues that:

> the modern approach to statutory interpretation applies to interpret the powers of the expropriating authority under section 25 of the *Expropriations Act*….so as to protect the public interests of landowners whose rights have been affected, ensure full and fair compensation, encourage the settlement of claims, and treat expropriated owners fairly.

[25] The best statement of the applicable principles of statutory interpretation in this context was set out by the Supreme Court of Canada in *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority,* [1997] 1 S.C.R. 32, 1997 CarswellOnt 78 as follows:

> The expropriation of property is one of the ultimate exercises of governmental authority. To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the power of an expropriating authority should be strictly construed in favour of those whose rights have been affected. This principle has been stressed by eminent writers and emphasized in decisions of this Court…
>
> Further, since the *Expropriations Act* is a remedial statute, it must be given a broad and liberal interpretation consistent with its purpose. Substance, not form, is the governing factor. See *Pacific Coast Coin Exchange of Canada v. Ontario (Securities Commission)*, [1978] 2 S.C.R. 112, at p. 127. In *Laidlaw v. Metropolitan Toronto (Municipality)*, [1978] 2 S.C.R. 736, at p. 748, it was observed that "[a] remedial statute should not be interpreted, in the event of an ambiguity, to deprive one of common law rights unless that is the plain provision of the statute….
>
> The application of these principles has resulted in the presumption that whenever land is expropriated, compensation will be paid. This has been the consistent approach of this Court. In *British Columbia v. Tener*, [1985] 1 S.C.R. 533, at p. 559, Estey J. writing for the majority, relied on a passage of Lord Atkinson in *Attorney-General v. De Keyser's Royal Hotel*

> *Ltd.*, [1920] A.C. 508 (H.L.), at p. 542:
>
> ... unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.
>
> …It follows that the *Expropriations Act* should be read in a broad and purposive manner in order to comply with the aim of the Act to fully compensate a land owner whose property has been taken.

[26] The Tribunal agrees with the proposition that The *Expropriations Act* is intended to provide a complete code governing the expropriation process and compensation (see the decision of the Ontario Court of Appeal in *Tripp v. Ontario (Ministry of Transportation*) [1999] O.J. No. 2832 and the cases cited therein. Therefore, counsel for the Claimants maintain that:

> …Nowhere in the *Expropriations Act* does it confer on the expropriating authority the power to withdraw or substitute a section 25 offer. If this was the legislature's intention, the legislature would have explicitly provided such a power in the *Expropriations Act* …[therefore]…an expropriating authority has no authority to withdraw a section 25 offer and substitute it with a new section 25 offer. To hold otherwise would be inconsistent with the ordinary and plain reading of the words, the scheme, object and purpose of section 25 and the *Expropriations Act*…

[27] The Claimants' counsel thus takes the position that once delivered a section 25(1)(a) offer remains open for acceptance. Admittedly, he could not cite any jurisprudence on point but argued that since expropriation legislation in other provinces does contain the right to withdraw or amend an offer then the absence of analogous enabling language in the EA helps to support the inference that the Ontario Legislature deliberately chose not to similarly permit the withdrawal or amendment of a section 25 offer - because it would have been a straightforward matter to do so.

[28] In particular, Claimants' counsel noted the following statutory provisions in other provincial expropriation legislation:

> Manitoba: subsection 16(6) of Manitoba's *The Expropriation Act,* C.C.S.M. c. E.190, which requires an authority to serve certain offers within a prescribed period, specifically allows an authority to amend the offer before the offer is accepted or certified by serving the owner with an amended offer:

Offer to be held open for acceptance
16(6)
Where the authority makes an offer to an owner under this section, the authority

(a) shall hold open the offer for acceptance by the owner until an amount is certified under subsection 15(2); and
(b) may, from time to time before the offer is accepted by the owner or an amount is certified under subsection 15(2), amend the offer by serving the owner with an amended offer.

Application to commission to determine compensation
15(1)
After an offer of compensation is served under section 16, the authority or an owner of the land may, subject to section 37 (time limits), apply to the commission, in accordance with the rules of the commission, for the determination of compensation payable by the authority to the owner for the expropriation.

Certification of amount by commission
15(2)
On receiving an application under subsection (1), the commission shall give the authority and owner of the land an opportunity to be heard and shall determine and certify the compensation payable by the authority to the owner.

Certified amount is binding
15(3)
Subject to subsection (6) and section 44 (appeal), an amount certified by the commission under subsection (2) is binding on the authority and the owner.

Authority to pay prescribed fee
15(4)
The authority shall pay any fee or charge that is prescribed in respect of a proceeding under subsection (2).
Commission may vary certified amount
15(5)
Where new evidence is available after an amount is certified under subsection (2), the authority or owner may, within 30 days after the date of the certificate, apply to the commission for a variation of the certified amount, and the commission may, where it is satisfied that the new evidence was not available at the time of the certification, vary the certified amount and, where the amount is varied, the commission shall certify the new amount of compensation payable.

British Columbia: Subsection 20(12) of British Columbia's *Expropriation Act* specifically permits the expropriating authority to increase the amount of its advance payment at anytime before 10 days before the beginning of a hearing:

Advance payment

20 (1) Within 30 days after

(a) an order is filed under section 5 (4) (b),

(b) the approving authority complies with section 18 (2) or (3), or

(c) an agreement is made under section 3 (1),

the expropriating authority must

(d) pay to the owner the amount the expropriating authority estimates is or will be payable to that owner as compensation, other than for business loss referred to in section 34 (3), and

(e) serve on the owner a copy of all appraisal and other reports on which the payment is based.

(2) A payment is deemed to be made under subsection (1) (d) at the time that the expropriating authority tenders the amount of the payment to or to the order of the owner in cash or by cheque, draft, telegraphic or electronic transfer or any other prescribed method.

(3) The appraisal report must be prepared by a person who has been accredited by an institute or body prescribed by the Lieutenant Governor in Council, must be reasonably detailed and must include

(a) a description of the land,

(b) the date of the valuation, which date must be within 6 months of the date of the endorsement by the registrar under section 7 (1),

(c) factual data necessary for the value estimate and the reasoning on which the estimate is based,

(d) the zoning, the highest and best use of the land and any provisions of an official community plan under the *Local Government Act* that are relevant to a determination of the highest and best use, and

(a) the final estimate of the value of the land.

(4) If, before taking action under subsection (1), the expropriating authority is in doubt as to whether a person is an owner or, if an owner, as to the nature and extent of his or her interest, it may apply to the court for

(a) a determination respecting the state of title to the land, and

(b) an order respecting the nature and extent of the interest of any owner of the land for the purpose of determining to whom and in what amounts the payment proposed to be made by the authority under subsection (1) is to be distributed.

(5) The expropriating authority must serve a copy of the application on all persons who it considers would be affected by the application.

(6) After hearing an application under subsection (4), the court may, in respect of the payment that the expropriating authority proposes to pay to an owner to comply with this section, order

(a) to whom and in what amounts payment must be made, or
(b) that money be paid into court to be paid out as the court may subsequently direct.

(7) On complying with an order made under subsection (6), the expropriating authority is deemed to have complied with subsection (1).

(8) To assist the expropriating authority in making payment under this section, an owner must, on the authority's request, provide the authority with any information relevant to estimate the compensation to which the owner is or will be entitled.

(9) An owner who withholds relevant information may be penalized by the court in costs and interest to which he or she would otherwise be entitled.

(10) Payment and receipt of compensation under this section is without prejudice to the right of the owner who receives the compensation to have the amount determined in the manner provided for in this Act.

(11) The court may, on application by the expropriating authority and on being satisfied that the authority cannot practicably comply with subsection (1), extend, subject to conditions the court considers appropriate, the period within which the payment is required to be made under that subsection.

(12) <u>The expropriating authority may, at any time before 10 days before the beginning of a hearing to determine compensation, increase the amount of its advance payment made under subsection (1)</u>.

[all above emphasis added]

[29] The Claimants' counsel also made reference to the *Federal Expropriations Act* R.S.C., 1985, c. E-21 ("Federal Act") which provides, in part, as follows:

Set-off and recovery of excess compensation

35 If any compensation has been paid to a person in respect of an expropriated interest or right pursuant to an offer made to them under section 16, the amount so paid to that person is to be deducted from the amount of the compensation adjudged by the Court under this Part to be payable to them in respect of that interest or right, and when the paid amount exceeds the amount so adjudged to be payable, the excess constitutes a debt due to the Crown and may be recovered by the Crown in any court of competent jurisdiction.

Copies to be sent and offer of full compensation to be made

16 (1) When a notice of confirmation has been registered, the Minister shall,

(a) immediately after the registration of the notice, cause a copy of the notice to be sent to each of the persons then appearing to have any estate, interest or right in the land, so far as the Attorney General of Canada has been able to ascertain them, and each other person who

served an objection on the Minister under section 9; and

(b) within 90 days after the day on which the notice is registered, or, if at any time before the expiration of those 90 days an application has been made under section 18, within the later of

(i) 90 days after the day on which the notice is registered, or

(ii) 30 days after the day on which the application is finally disposed of, make to each person who is entitled to compensation under this Part, in respect of an expropriated interest or right to which the notice of confirmation relates, an offer in writing of compensation, in an amount estimated by the Minister to be equal to the compensation to which that person is then entitled under this Part in respect of that interest or right, not conditional on the provision by that person of any release or releases and without prejudice to the right of that person, if the person accepts the offer, to claim additional compensation in respect thereof.

If delay in offer

(2) If, in any case, it is not practicable for the Minister to make an offer of compensation under this section in respect of an expropriated interest or right within the applicable period described in paragraph (1)(b), the Minister shall make such an offer as soon as practicable after the expiration of that period and in any event before any compensation is adjudged by the Court to be payable under this Part in respect of that interest or right, in which case, interest as described in subsection 36(4) is payable in addition to any other interest payable under section 36 to the person entitled to compensation in respect of that interest or right.

…

Where offer accepted

17 Where an offer of compensation has been made to any person under section 16, the full amount thereof shall, forthwith on the acceptance of the offer, be paid to that person.

Notice to negotiate settlement of compensation payable

30 (1) If, after an offer of compensation in respect of an expropriated interest or right has been made under section16 to any person entitled to compensation, that person and the Minister are unable to agree on the amount of the compensation, either the person or the Minister may, within 60 days after the day on which the offer is made, serve on the other a notice to negotiate settlement of the compensation to which the person is then entitled.

…

(4) Immediately after any notice to negotiate is served on the Minister or a person entitled to compensation in accordance with this section, the Minister shall refer the matter to a negotiator appointed under subsection (3) who shall, on reasonable notice to that person and the Minister, meet with them or their authorized representatives, make any inspection of the land that he or she deems necessary, receive and consider any appraisals, valuations or other written or oral evidence submitted to him or her on which either the person or the Minister relies for his or her estimation of the amount of the compensation payable, whether or not the evidence would be admissible in proceedings before a court, and endeavour to effect a settlement of the compensation payable.

[30] The provisions of the Federal Act summarized above in paragraph [29] may contemplate the making of an additional offer by the expropriating authority subsequent to its offer made pursuant to section 16 of that Act. However, the Claimants' counsel cited the decision of Mr. Justice Marceau of the Federal Court of Canada in *Desjardins v. Canada (National Capital Commission)* 1981 CarswellNat 791 for the proposition that once the expropriating authority makes an offer under the provision in the Federal act analogous to section 25 of the EA, such offer cannot be withdrawn. The Desjardins case was unusual in that the expropriating authority essentially pleaded that its accepted offer could be somehow 'undone'. Marceau, J. stated at paragraphs 9 through 11 of his decision that:

> There was here an offer duly made under s. 14, and this offer was accepted. The proceedings were brought by plaintiff to recover, for the interest of which he had been deprived by the expropriation, a larger compensation than that which had been offered, accepted and paid. It is the situation contemplated by subpara. (ii) of the section. The Court is called upon to determine the compensation to which plaintiff was entitled and on the basis of its determination to allow or reject the request for greater compensation.
>
> A first conclusion can be drawn from this. Plaintiff could not seek by his action a determination of only a part of the compensation due to him. The offer which he accepted while reserving the right to claim that it was inadequate is a total offer, which covered all the rights which the expropriation had taken from him, that is, his interest in Part 8, with the buildings and the secondary residence thereon, and his interest in Part 7. The fact that he stated his satisfaction with certain component parts of this offer, at the time when it was made and during the negotiations, clearly cannot have the effect of limiting the subject- matter of the action and of circumscribing the function of the Court, which is to determine the compensation as a whole.
>
> However, a further conclusion may also be drawn. Defendant cannot present a defence to the action which disregards the effects of the offer made by it, and accepted. This offer is imposed by statute, it is the initial step required in determining the compensation and there is no basis in the statute for its being withdrawn at will. It might perhaps be judicially vacated on grounds of, for example, fraud or mistake, but at the least there would have to be a specific adjudication to that effect, and defendant is not here pleading fraud or mistake, and does not ask that the offer be vacated. In my opinion, this offer is binding on defendant, and I do not consider that its conclusions for reimbursement are admissible and can be considered in light of the action as initiated. In determining compensation, the Judge is not bound by the offer and the result of his findings may be that the amount paid will appear to have been too high, in which case there will be a duty to reimburse. However, I do not feel that a claim for reimbursement can be joined to the action before

> judgment, and brought as a counterclaim regardless of the offer made, accepted and paid. Defendant may undoubtedly attempt to submit evidence to persuade the Court that the compensation allowable is less than that at first set by it; but before a judgment is rendered to this effect, the statutory consequences of its offer remain unchanged, and the offer itself, with the valuation report on which it was based, continues to be a fundamental part of the case.

[31] Although of interest, the Desjardins case is clearly not on point with the underlying circumstances of this proceeding before the Tribunal, nor does it constitute a binding precedent. Counsel for the Claimants also relied upon the brief statement made by author Eric Todd in The Law of *Expropriation and Compensation in Canada,* (Toronto: The Carswell Company Limited, 1976). Mr. Todd reviewed provisions comparable to section 25 in various jurisdictions in Canada, and concluded that:

> there appears to be no power under any of the statutes for the expropriating authority to withdraw the statutory offer.

[32] Of course, there have been other leading texts published in the 46 years since Mr. Todd's treatise described in paragraph [31] above. In the chapter relating to offers made under EA section 25, author Stephen Waque′ commented at section 2:339 in the most recent digital edition of his text *The New Law of Expropriation, (2022* Thomson Reuters) as follows:

> Where an expropriating authority served an owner with an offer of an amount in full compensation for its interest pursuant to subsection 25(1) and the offer was accepted pursuant to clause 25(1)(a) (i.e., in full satisfaction of its claim for compensation), the authority subsequently attempted to withdraw the offer on the ground that it had been made in error. The offer was regular on its face, even though it was $164,000 more than the authority should have offered, and the court refused to allow the authority to withdraw the offer on the basis of mutual mistake. The offer and acceptance constituted a binding contract and the owner was entitled to judgment for the amount offered together with interest at the rate payable under the mortgage on the subject property from the date of acceptance of the authority's offer: Nil Ultra Investments Ltd. v. Burlington (City) (1979), 17 L.C.R. 304, 1979 CarswellOnt 716 (Ont. H.C.), affirmed (1980), 20 L.C.R. 360, 1980 CarswellOnt 1775 (C.A.), leave to appeal to S.C.C. refused October 8, 1980.

[33] Claimants' counsel relied on the decision in Nil Ultra Investments to argue that:

> Similarly, MTO should not be allowed to withdraw its Section 25(1)(a) Offer, which was regular on its face and made unequivocally to the [Claimants]. The fact that MTO later determined that the lands are no longer landlocked almost three years after the offer was made does not provide a legal basis to withdraw the initial offer.

[34] Of course, the clear difference between the circumstances in this proceeding is that the offer in Nil Ultra Investments was accepted before the attempted withdrawal that occurred in the Claimants' case.

[35] Another current legal text in this field is *Expropriations Law in Ontario, (*2021, LexisNexis Canada), by Christopher Williams et al. However, in his text Mr. Williams does not comment on the issue of whether an expropriating authority is permitted under the EA to withdraw a section 25 offer, but makes the following general statement:

> As a practical matter, the subsection 25(1)(a) offer is almost never accepted by owners, as the subsection 25(1)(b) offer allows for an immediate payment for market value (as assessed by the expropriating authority), with the possibility of the Tribunal increasing the market value compensation and awarding further compensation for disturbance damages, injurious affection, and compensation for special difficulties in relocation, as the case may be. Because the Act provides that owners may be entitled to full indemnity for legal and other costs incurred in the process of determining compensation, owners are incentivized to accept the subsection 25(1)(b) offer and continue to pursue further compensation through the negotiation and arbitration process.

[36] The analysis by Mr. Williams tends to support the notion that the 25(1)(a) and 25(1)(b) offers are separate – a point discussed below in this Part Four.

[37] The Claimants' counsel also points out that Subsection 25(3) of the EA provides the expropriating authority with the option to apply to a Judge for an order extending the time to serve the section 25 offer, and the Judge may in his or her order authorize the statutory authority to take possession of the land before the expiration of the extended time for serving the section 25(1)(a) offer of full compensation. Thus, counsel for the Claimants maintains that if the MTO needed additional time to formulate its section 25(1) offer it could have sought relief under section 25(3) and further argued that:

> …it is not necessary for the expropriating authority to have the power to withdraw and substitute a section 25 offer at a later time…[because]…If the expropriating authority cannot determine the amount of compensation for the section 25 offer within the prescribed time, rather than serving an "uncertain" offer which may later require amendment, the expropriating authority could exercise its option to extend the time for service of the section 25 offer…

[38] The Tribunal further notes that section 25(3) is the only provision in the EA that constitutes any sort of modification to the requirement that a section 25(1)(a) offer must be delivered and, again, it does not contain any language permitting the withdrawal of such an offer. As noted, the MTO's counsel filed only the Affidavit of Mr. McAnnuff and chose not to file any responding motion materials, written legal argument or jurisprudence in opposition to the Claimants' Motion, factum and brief of authorities. Counsel for the MTO was content to make oral argument only and did not contest the arguments made by the Claimants' counsel as to the expropriation legislation in other Canadian jurisdictions as summarized in paragraphs above in this Part Four. On the other hand, he interestingly argued that section 11 of the EA was relevant on this Motion as it permits the Tribunal to take into account certain remedial matters undertaken by an expropriating authority – alleging that in this case the MTO addressed or improved the access and 'landlocking' of the Claimants' property. As noted, the Tribunal is not in a position to determine that factual dispute for the reasons stated in Part Three – in any event, in the Tribunal's opinion section 11 of the EA is relevant to the determination of compensation for injurious affection which is not the subject matter of this Motion. This is consistent with the findings of the Divisional Court in *Desapio v. Ontario* (Minister of Transportation & Communications) 1978 CarswellOnt 753, [1978] 2 A.C.W.S. 412, where Mr. Justice Steele stated:

> …3. Section 11 of *The Expropriations Act* reads as follows:
>
> 11. Where land is expropriated or is injuriously affected by a statutory authority, the statutory authority may, before the compensation is agreed upon or determined, undertake to make alterations or additions or to construct additional work or to grant other lands, in which case, the compensation shall be determined having regard to such undertaking, and, if the undertaking has not already been carried out, the Board may declare that, in addition to the compensation determined, if any, the owner is entitled to have such alteration or addition made or such additional work constructed or such grant made to him.
>
> 4. I interpret this as providing that the authority may undertake to grant

> other lands (which has been done in this case), and if it does, the Board shall, in coming to its conclusion, have regard to that undertaking….

[39] The MTO's counsel additionally argued that the decision of the Federal Court of Appeal in *Cotton v. R.* (1976) CarswellNat 511 pertaining to an expropriation under the *Federal Expropriation Act* stands for the proposition that an expropriating authority may amend an offer made under a section analogous to section 25(1)(a) of the EA**.** The Tribunal acknowledges this creative argument but is of the opinion that (a) the completely distinguishable circumstances in Cotton involved 2 compensation offers, both of which were accepted by the landowners, the second being incrementally additional to the first; (b) on appeal the appellant's counsel unsuccessfully attempted to argue that the second amended additional offer was a mere *ex gratia* payment only; and (c) the Court's decision cannot be seen as either persuasive or binding on the OLT. In a similar vein, the Tribunal is of the opinion that the comments of the Ontario Court of Appeal in the similarly distinguishable *Shergar Development Inc. v. Windsor* (City) 2020 ONCA 490 decision concerning the impact from the standpoint of a costs order made under section 32 of the EA of an increased settlement offer made by the expropriating authority do not materially assist the MTO's position on this Motion.

[40] Another novel argument made by counsel for the MTO for the first time in relation to this Motion was that its Original Section 25(1)(a) Offer became "spent" once the Claimants had accepted the MTO's separate Section 25(1)(b) offer – thus somehow entitling the MTO to make a new Section 25(1)(a) Offer presumably whenever it subsequently chose to do so. This position was uniquely advanced in paragraph 12 of the McAnnuff Affidavit as follows:

> MTO's position is that read properly section 25 of the *Expropriations Act* provides for alternative offers. Once an owner elects between the two offers, the offer is 'spent'. If this were not the case, expropriating authorities would be placed in the untenable position of expending time and resources defending Claims only to have wasted those resources where an owner subsequently elects to accept the section 25(l)(a) offer of total compensation for all interests.

[41] The position described in paragraph [40] was not communicated to the Claimants when they notified the MTO on December 14, 2021 that they were accepting the

Original Section 25(1)(b) Offer. Moreover, no statutory or caselaw authority was advanced by counsel for MTO at the VH to support this argument - and the Tribunal does not agree with these contentions. The policy counterpoints raised by the Claimants' counsel cited the legislative history of the modern EA and the findings and recommendations of the McRuer Report of 1968 (also extensively cited by the Supreme Court in Dell Holdings) was as follows:

> The McRuer Report examined the argument against obliging expropriating authorities to offer the full amount of compensation before taking possession – the argument is that "if it should subsequently be found that overpayment has been made, the expropriating authority might have difficulty in recovering the difference." The McRuer Report rejected this argument, stating that:
>
> This may be a possibility in some cases, but the advantages of full payment to the owner prior to his giving up possession significantly outweigh the small risks that expropriating authorities would incur in the circumstances. The risk is one that should be borne by expropriating authorities. Owners of expropriated properties ought not to be required to provide insurance against this risk.
>
> In other words, if, in the opinion of the expropriating authority, it subsequently finds that it overpaid the owner in its section 25 offer, the advantages of a section 25 offer which provides full payment to the owner before the owner gives up possession significantly outweighs the small risks that expropriating authorities would incur in the unlikely event of an overpayment. This risk should be borne by the expropriating authority, and not the expropriated owners.
>
> …If an expropriating authority can, at anytime, withdraw the section 25 offer served upon a registered owner and substitute it with a new section 25 offer, a registered owner would have no certainty of the amount of payment to use for relocation, because such offers can be withdrawn and substituted at any time…Owners would be pressured to accept a section 25 offer immediately for the fear that the same offers can be withdrawn and substituted at anytime, which would be unfair and unreasonable to the owners. Owners have the right to choose not to accept a section 25 offer… [without penalty see: Section 33(3) of the EA in paragraph [10] above]… Because an owner cannot rely on a section 25 offer that could be withdrawn or changed at anytime to determine an expropriating authority's position on compensation and decide how to proceed, an owner would be more inclined to commence an arbitration proceeding under section 26 of the *Expropriations Act* [which is]…contrary to the spirit of the *Expropriations Act* which is intended to encourage the settlement of claims…
>
> [above emphasis added]

[42] The Claimants' counsel also contends that the MTO's position that its Original Section 25(1)(a) was somehow spent once the Claimants accepted the MTO's Section 25(1)(b) offer is not only illogical but was also contradicted by the MTO's own conduct:

> …The offer of full compensation under subsection 25(1)(a) and the offer of immediate payment under subsection 25(1)(b) are two separate offers. In *Simpson Bros. Machine Co. v. Metropolitan Toronto (Municipality),* the Ontario Land Compensation Board concluded that the offers under subsection 25(1)(a) and subsection 25(1)(b) are separable… This is evident by subsection 25(3) which relates to the taking of possession of land before the expiration of the extended time for serving the offer provided for in subsection 25(1)(a), but not subsection 25(1)(b)… Further, the fact that MTO withdrew the Original Section 25(1)(a) Offer and substituted it with the New Section 25(1)(a) Offer, but did not withdraw the Section 25(1)(b) Offer, shows that MTO interprets the subsection 25(1)(a) and subsection 25(1)(b) offers as separate offers…

[43] Finally, the Claimants' counsel points out that there would appear to be no need for the sanctions aspect of section 32 of the EA if a section 25(1)(b) offer becomes "spent" as alleged by the MTO's counsel. The Tribunal agrees.

[44] In the Simpson Bros Machine Co. case [1972] CarswellOnt 1318 (Ontario Land Compensation Board), the Board had to adjudicate the compensation and interest due to the landowners under the then-existing EA in circumstances quite different from those present in the Claimant's proceeding. However, the Board did consider the two types of section 35 offers and briefly stated at paragraph [33] of its Decision as follows:

> …Subsections (3) and (4) of s. 25 appear accordingly to relate only to service of the offer provided for in s. 25(1)(*a*) and lead to the conclusion that cls. (*a*) and (*b*) of s. 25(1) are separable.

[45] Although this Tribunal is unsure that the statement made 50 years ago by the Land Compensation Board described in paragraph [44] adds much beyond a simple plain meaning interpretation of section 25 of the EA, the Tribunal agrees with the arguments advanced by the Claimants as described above in this Part Four and rejects the position taken by counsel for the MTO as summarizedabove.

[46] A final branch of the argument made by Claimants' counsel was that even if MTO could lawfully and unilaterally withdraw and amend its Original Section 25(1)(a) Offer, its

New Section 25(1)(a) Offer was a nullity because it did not meet the requirements of section 25 of the EA. Specifically, the MTO failed to deliver a new appraisal report to demonstrate the basis of the New Section 25(1)(a) Offer, as is explicitly required by section 25(2) of the EA.

[47] Waque′ et al in the *New Law of Expropriation* comments on section 25(2) as follows:

> While the Act does not define "appraisal report," the Divisional Court expressed the view that the person whose property is being expropriated should be given more than a two-page mimeographed statement expressing an opinion as to value and containing a schedule showing the sale price of three other properties in the location of the owner's lands. "The person whose property is being expropriated should be able to determine from the appraisal report if he should proceed to arbitration or should accept the offer which has been made": Bambrough v. Ontario (Minister of Housing) (1914), 7 L.C.R. 103, 5 O.R. (2d) 386, 1974 CarswellOnt 859 (Ont. Div. Ct.), varied at (1975), 7 L.C.R. 103 at 105, 7 O.R. (2d) 183, 1974 CarswellOnt 880 (C.A.), at pages 105—106. The Ontario Municipal Board applied the decision in Bambrough v. Ontario (Minister of Housing) (1914), 7 L.C.R. 103, 5 O.R. (2d) 386, 1974 CarswellOnt 859 (Ont. Div. Ct.), varied at (1975), 7 L.C.R. 103, 7 O.R. (2d) 183, 1974 CarswellOnt 880 (C.A.), in Taylor v. Cumberland (Township) (1987), 38 L.C.R. 73, 1987 CarswellOnt 3819 (O.M.B.), at page 81, where two letters of opinion from the property officer were deemed to contain less information than the report in *Bambrough.* Reports which misstate the acreage, do not show how the appraised value has been estimated and include no comparable sales will be ruled insufficient to comply with the requirements of the section. Where the report at least identifies the property and provides particulars of some comparable sales, while it may be categorized as "sparse," it will be accepted as meeting the definition of an "appraisal report": e.g., Gentle v. Ottawa-Carleton (Regional Municipality) (1977), 14 L.C.R. 167, 1977 CarswellOnt 1472 (L.C.B.), at page 172; Ploeg v. Ontario (Ministry of Transportation & Communications) (No. 2) (1978), 15 L.C.R. 126, 1978 CarswellOnt 1707 (L.C.B.), at page 131.

[48] In this Tribunal's view, the failure of MTO to deliver any form of underlying appraisal to explain how it arrived at a value to support its New Section 25(1)(a) Offer was contrary to section 25(2) of the EA and clearly does not meet the requirements set out in the caselaw briefly noted above in paragraph [47]. Therefore, in this Tribunal's view, even if MTO could have lawfully withdrawn its Original Section 25(1)(a) offer in favour of a new and significantly decreased offer, its New Section 25(1)(a) Offer would have been invalid. Thus, in such an event, the Original Section 25(1)(a) offer remained

in effect and was capable of being accepted by the Claimants.

Part Five: Remedies to be Granted by the OLT

[49] As noted, in addition to other related relief, the Claimants' Motion seeks 'a Declaration that the MTO offer made under Section 25(1)(a) of the EA dated May 31, 2011 became a binding and enforceable contract between MTO and the Claimants once the Claimants' accepted the offer in writing on December 14, 2021'. On this issue, Waque´ notes at s. 2:339 :

> It is also to be observed that while clauses 25(1)(a) and (b) provide for offers, there is no language which in specific terms requires the authority to pay the owner forthwith after he or she accepts an offer. Some expropriating authorities endeavour to impose conditions on the payment of the amount offered and delay payment pending agreement. As the intention of the section is clear, it would seem that an owner can compel payment either by bringing an application for an order in the nature of mandamus pursuant to the Judicial Review Procedure Act, or by bringing an action in debt.

[50] The Tribunalis prepared to rule that the Original Section 25(1)(a) Offer remained in force available for acceptance and that this offer was accepted by the Claimants on December 14, 2021. However, the Tribunal declines to rule that these events result in "a binding and enforceable contract between MTO and the Claimants". In the Tribunal's view, such a ruling is unnecessary and moreover is not a proper exercise of its jurisdiction under the *Ontario Land Tribunal Act*, S.O. 2021. While the Tribunal will make the Orders in this Decision set out below it will not provide any further elaboration on how its Orders may or should be enforced. This is a matter best dealt with by a Court of competent jurisdiction should for some reason the MTO refuse to pay out to the Claimants the amounts noted in the Orders made in this Decision. This seems at least implicitly recognized in the factum of the Claimants' counsel where he noted:

> …If MTO fails to pay the Owners in accordance with the Original Section 25(1)(a) Offer, MTO would be in breach of the contract, and the Owners will be entitled to an action for damages or other equitable remedies…

[51] The Tribunal also finds it unnecessary to make the requested 'Declarations that

the MTO has no authority to withdraw an offer made under Section 25 once served on the registered owner…and that the new Section 25(1)(a) offer by the MTO was not made in compliance with the requirements under section 25 of the EA'. The Orders set out below appropriately arise from the Tribunal's Decision in this proceeding and no further formal declaratory relief or legal ruling on the meaning of section 25 of the EA or on the general question of whether or how a section 25(1)(a) offer could be withdrawn or amended is required

[52] As a final matter, the Tribunal noted that the Parties' counsel spent little time on the issue of the Claimants' entitlement to costs and interest under sections 32 and 33 of the EA. Given the highly unusual facts of this case, in the event that the Parties cannot agree on the quantum of costs and interest owing to the Claimants, the Parties may seek a further determination from the Tribunal as is contemplated under paragraph [54] of the Tribunal's Order.

ORDERS

[53] For the reasons described in Parts Two to Five inclusive above, the Tribunal Orders that:

(a) The offer of $458,000.00 made by the MTO on May 31, 2011 ("Offer Amount") remained in effect and was accepted by the Claimants on December 14, 2021;

(b) The Offer Amount shall be reduced by the sum of $24,400.00 received by the Claimants from the MTO in 2012 to the net amount of $433,600 ("Net Offer Amount");

(c) The MTO shall pay interest on the Net Offer Amount ("Interest") in accordance with section 33 of the *Expropriations Act*, R.S.O. 1990, c E.26, as amended ("Act") in an amount as agreed upon by the Parties or as determined by the Tribunal pursuant to paragraph [54] below;

(d) The MTO shall reimburse the Claimants' reasonable legal, appraisal, and other costs incurred by the Claimants for the purposes of determining the compensation payable in this proceeding, in accordance with section 32 of the Act, together with the fixed amount of $5,000 for the costs of this Motion (collectively, "Total Costs"); and

(e) The Total Costs shall comprise the amount agreed upon by the Parties or, failing such agreement, an amount as assessed by this Tribunal in accordance with section 32 of the Act and the OLT *Rules of Practice and Procedure*.

[54] This Tribunal Member shall remain seized in order to assist the Parties with the implementation of the above Orders. In the event of a dispute concerning the quantum of Interest or of the Total Costs as described in paragraph [53], the Claimants shall notify the Tribunal within ninety (90) days of the date of issuance of this Decision, following which the Tribunal may, in its sole discretion, determine that the dispute be resolved by written submissions only or may convene a further hearing event for that purpose.

[55] If the Claimants do not so notify the Tribunal within ninety (90) days of the date of issuance of this Decision of such dispute as described in paragraph [54], then no further written or oral proceedings will be held to determine the quantum of Interest or the Total Costs as described in paragraph [53], and the Parties shall be deemed to have reached an agreement on same.

"William R. Middleton"

WILLIAM R. MIDDLETON
MEMBER

The Conservation Review Board, the Environmental Review Tribunal, the Local Planning Appeal Tribunal and the Mining and Lands Tribunal are amalgamated and continued as the Ontario Land Tribunal ("Tribunal"). Any reference to the preceding tribunals or the former Ontario Municipal Board is deemed to be a reference to the Tribunal.