Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: August 12, 2024 **CASE NO(S).:** OLT-22-004250

PROCEEDING COMMENCED UNDER section 26(b) of the *Expropriations Act,* R.S.O. 1990, c. E.27.

Claimant	Oakville Developments (2010) Inc.
Respondent	Metrolinx
Subject:	Expropriation / Land Compensation
Description:	Determination of compensation due to underpass being built at Lakeshore West GO.
Reference Number:	08-15-22-2016 and 08-15-22-2017
Property Address:	550 Kerr Street
Municipality/UT:	Oakville/Halton
OLT Case No:	OLT-22-004250
OLT Lead Case No:	OLT-22-004250
OLT Case Name:	Oakville Developments (2010) Inc. v. Metrolinx

PROCEEDING COMMENCED UNDER section 26(b) of the *Expropriations Act,* R.S.O. 1990, c. E.27.

Claimant:	Shoppers Realty Inc.
Respondent:	Metrolinx
Subject:	Expropriation / Land Compensation
Description:	Determination of compensation due to underpass being built at Lakeshore West GO.
Reference Number:	HR1779615
Property Address:	550 Kerr Street
Municipality/UT:	Oakville/Halton
OLT Case No:	OLT-22-004620
OLT Lead Case No:	OLT-22-004250
OLT Case Name:	Shoppers Realty Inc. v. Metrolinx

Heard:	February 13 to 29, 2024 inclusive; March 27, 2024 (final oral argument) by Video Hearing ("Hearing")

APPEARANCES:

Parties	**Counsel**
Oakville Developments (2010) Inc. ("Claimant" or "Oakville Developments")	Christopher Williams Andrea Skinner Ajay Gajaria
Metrolinx	Christel Higgs Ian Mathany Jessica Karban

DECISION DELIVERED BY WILLIAM MIDDLETON AND GWEN CROSER AND ORDER OF THE TRIBUNAL

Link to Final Order

INTRODUCTION

[1] This proceeding was brought by the Claimant under the *Expropriations Act* R.S.O. 1990, c. E.27 ("Act") and relates to the expropriation by Metrolinx of a portion of the lands owned by Oakville Developments ("Expropriation"), located at 550 Kerr Street in the Town of Oakville ("Town"), and seeks damages for the market value of the expropriated land (both in fee simple and a temporary easement), injurious affection, disturbance damages, and interest and costs. As established by the earlier April 11, 2023 Decision of this Tribunal, this is the first phase of a two-phased compensation hearing dealing with the market value of the taking (fee simple and temporary limited interest) and injurious affection flowing directly from the taking. The second phase will deal with other injurious affection and disturbance as it becomes known when and if Metrolinx completes the project (as further described in paragraph [7] below). Therefore, this phase of the hearing will address market value and injurious affection

compensation owed to the Claimant, which is known as of April 6, 2021 (the “Effective Date” as defined in paragraph [6] below).

[2] Shoppers Realty Inc. (“Shoppers”) is a tenant of the Claimant and has resolved its claims under the Act. The details of that resolution with Metrolinx were not disclosed to the Tribunal, and no evidence was tendered concerning Shoppers’ claims. However, in its final argument, Metrolinx has suggested that the Claimant’s claims must be reduced as a consequence of that undisclosed settlement.

[3] The materials delivered by the Parties for the Hearing and made Exhibits were:

- **Exhibit 1** – Joint Document Brief (3 Volumes);
- **Exhibit 2** – Claimant’s Visual Evidence Brief;
- **Exhibit 3** – Visual Evidence Brief of the Respondent, dated February 8, 2024;
- **Exhibit 4** – Request to Admit of the Respondent, dated January 19, 2024;
- **Exhibit 5** – Response to Request to Admit, dated February 8, 2024;
- **Exhibit 6** – Meeting of Planning Experts and Agreed Statement of Facts, dated January 16, 2024;
- **Exhibit 7** – Witness Statement Brief of the Claimant;
- **Exhibit 8** – Expert Reports and Witness Statement Brief of the Respondent, dated February 8, 2024;

- **Exhibit 9** – Parcel Abstract of PIN 24762-0349 for 83 East Street, Oakville;

- **Exhibit 10** – Bousfields Inc. – Planning & Urban Design Rationale for 166 South Service Road East, Oakville, dated June 2022;

- **Exhibit 11** – Acknowledgment of Expert's Duty of Andrew Ferancik;

- **Exhibit 12** – CV of Andrew Ferancik;

- **Exhibit 13** – Reply Witness Statement of Andrew Ferancik, dated December 15, 2023;

- **Exhibit 14** – Agreed Statement of Facts between the Planners of the Claimant and Shoppers Realty Inc., dated January 15, 2024;

- **Exhibit 15** – Mark-up of Plan 20R-18594 with easements;

- **Exhibit 16** – Town of Oakville Development Application Form;

- **Exhibit 17** – Extract from By-law 2014-014 – Map and Regulations;

- **Exhibit 18** – Acknowledgment of Experts Duty of Mr. Ryan Guetter, dated November 3, 2023;

- **Exhibit 19** – CV of Ryan Gutter;

- **Exhibit 20** – Redacted Proposal for Planning Services of Weston Consulting, dated April 3, 2023;

- **Exhibit 21** – Email chain re: 550 Kerr between Paul Barrette, Town of Oakville and Robert MacFarlane, Zelinka Priamo, dated September 13, 2019 to November 14, 2019;

- **Exhibit 22** – Email chain re: 550 Kerr St. between Paul Barrette and Robert MacFarlane, dated September 13, 2019 to December 4, 2019;

- **Exhibit 23** – Town of Oakville: Pre-consultation Form completed by Rock Developments (Rocco Tullio) c/o Zelinka Priamo Ltd. for 550 Kerr Street, dated August 29, 2019;

- **Exhibit 24** – Letter correspondence re: Application for Zoning By-law Amendment – Oakville Developments (2010) Inc. – 550 Kerr Street, Oakville, Ontario, from Rob MacFarlane, Zelinka Priamo to the Town of Oakville, dated September 4, 2019 ;

- **Exhibit 25** – Letter correspondence re: Notice of Complete Application, Zoning By-law Amendment – 550 Kerr Street – File No. Z1616.55, from Paul Barrette, Town of Oakville, dated September 13, 2019;

- **Exhibit 26** – Meeting Minutes re: Upper Kerr Village – OLT Hearing and Official Plan Amendment ("OPA") Submission – Pre-Consultation Meeting re: OPA Submission, Meeting of October 5, 2021 – 10:00 am to 11:00 am – Attendees: York Region Staff, Town of Oakville Staff, Urban Strategies, prepared by Urban Strategies Inc.;

- **Exhibit 27** – Letter correspondence re: Appeal under subsections 22(7) of *Planning Act* – Applicants: Oakville Developments (2010) Inc., April Investments Limited, 527079 Ontario Limited and Trans Country Development Corporation – Location: Northwest Corner of Kerr St. and

Speers Road, Oakville – File Nos.: OPA 1-By-law 2022-089, from Patrick Harrington, Aird & Berlis LLP, dated December 13, 2022;

- **Exhibit 28** – Planning and Development Council Meeting December 5, 2022 - Comments Received Regarding Item 7.1 – Official Plan Amendment – File No.: OPA.1616.56;

- **Exhibit 29** – Markup of Ex. 3, pg. 68;

- **Exhibit 30** – The Humber Bay Shores: Urban Design Guidelines Update and Public Realm Plan, dated January 2008;

- **Exhibit 31** – Excerpt of Chapter 8, Section 8.4 from Geometric Design Guide for Canadian Roads, prepared by Transportation Association of Canada, dated June 2017 ("TAC");

- **Exhibit 32** – Amar Lad Alterations to TAC June 2017;

- **Exhibit 33** – Excerpt of Chapter 8, Section 8.8.1 – Corner Clearances from TAC;

- **Exhibit 34** – Corrected page 82 – Chart of Comparable Market Indices, of Cushman & Wakefield Expert Report found at Exhibit 7, Tab 2;

- **Exhibit 35** – Revised Redacted engagement letter of Cushman & Wakefield and MH Lawyers;

- **Exhibit 36** – Marketing material from Cushman & Wakefield re: 166 South Service Road, Oakville, comp sale number 1;

- **Exhibit 37** – Bullpen Report;

- **Exhibit 38** – TREB Report;
- **Exhibit 39** – Stats Canada Report;
- **Exhibit 40** – Revised Summary of Development efficiency, omitting northern parcel pre- and post-expropriation, taken from Cushman & Wakefield report, page 104;
- **Exhibit 41** – Metrolinx's Read-in brief, dated February 26, 2024;
- **Exhibit 42** – Letter from Zelinka Priamo to Paul Barrette, dated December 17, 2019;
- **Exhibit 43** – Email exchange between Robert MacFarlane and Paul Barrette, dated December 19, 2019;
- **Exhibit 44** – Town of Oakville Staff Report, dated March 9, 2021;
- **Exhibit 45** – Appendix A to Exhibit 43;
- **Exhibit 46** – Aerial Image of 58-62 Shepherd Road, from Altus; and
- **Exhibit 47** – Claimant's Evidence Read-Ins

[4] The other materials delivered by the Parties include the transcripts of each day of the hearing and also the opening and final argument submissions as follows:

- Outline of Opening Argument of the Claimant, comprising 13 pages;

- Opening Written Submissions of the Respondent, comprising 29 pages;
- Closing Submissions of the Claimant, comprising 79 pages;
- Brief of Authorities of the Claimant, comprising 197 pages;
- Closing Submissions of the Respondent, comprising 76 pages;
- Closing Brief of Authorities of the Respondent, comprising 280 pages;
- Claimant's Responding Written Submissions, comprising 69 pages; and
- Closing Reply Submissions of the Respondent, comprising 14 pages;

[5] The issues that must be determined by this Tribunal are the following:

A. Highest and Best Use of the Expropriated Property;

B. Market Value of the Expropriated Property

(a) Temporary Easement,

(b) Fee Simple Taking;

C. Injurious Affection Claim;

D. Interest Payable under the *Expropriations Act*;

E. Impact of the Unknown Shoppers Realty Claim & Settlement; and

F. Conclusions

This Decision will be organized under those issues.

A. Highest and Best Use of the Expropriated Property

[6] The claims in this appeal arise from the Expropriation by Metrolinx of a fee simple interest and a temporary limited interest of a 0.545 acre ("ac") parcel of property from an approximately 2.5 ac parcel at 550 Kerr Street ("Subject Property") located within a medium-sized 1960s commercial plaza, ("Oaktown Plaza") in the Kerr Village area of Oakville ("Expropriation"). According to the Claimant, the Expropriation first commenced on February 5, 2019, with an effective date of April 6, 2021 ("Effective Date")

[7] The Claimant's counsel submits that future claims for injurious affection (i.e., beyond those described below in Part C.) flowing from the construction and use of the project, being a grade separation to allow Metrolinx to improve service on its Lakeshore line and any disturbance damages, are to be dealt with in the second phase of the Hearing "when such damages will become known." The construction of the project has been deferred by Metrolinx (which noted that only the Expropriation Plan was registered in April 2021).

[8] Thus, Metrolinx's counsel pointed out in the final argument that:

> As a result, and at all times following the registration of the Expropriation Plan on April 6, 2021, the Claimant and its tenants have had the benefit of and have continued to make productive use of the Expropriated Lands… In fact, there has been no physical occupation by Metrolinx of the Expropriated Lands to date, and the Claimant, prior to the date it sold the Remaining Lands, collected rent from its tenants without abatement for the loss of the Fee Simple Lands…

[9] In the Claimant's view, the evidence regarding land use planning focused on the highest and best use for the Subject Property to determine the appropriate fair market value based on redevelopment for higher-order, mixed commercial, high-density

residential uses. This was expressed by all planners as the reasonably probable use of the Subject Property based upon the knowledge base existing at the valuation date of April 6, 2021.

[10] Metrolinx agrees that the test for determining highest and best use is “that the highest and best use conclusion must be probable” but disagrees that the case put forward by the Claimant satisfies that standard in respect of the land development planning scheme put forward by the Claimant’s experts.

[11] On the other hand, the Claimant contends that Metrolinx has proposed an unworkable approach to the determination of highest and best use: the future development of the Subject Property that essentially requires a ‘joint venture’ approach by all neighbouring landowners pursuant to an assemblage of five properties. In turn, Metrolinx argues that the existing reciprocal easement rights in favour of the various landowners render the Claimant’s proposed stand-alone development scheme unreasonable and not ‘probable.’

[12] It is this dispute between the Parties concerning the proper highest and best use of the Subject Property, as described above in paragraphs [10] and [11], that must be resolved by this Tribunal. There are many ancillary facts, as discussed below, that also require the Tribunal’s consideration.

[13] Both Parties called land use planning experts on this issue. For the Claimant, Mr. Robert MacFarlane was qualified to provide such opinion evidence. Metrolinx tendered Mr. Ryan Guetter, who was also qualified by the Tribunal. As a result of an evidentiary dispute that arose during the Hearing, Mr. Andrew Ferancik was summoned by the Claimant to provide his opinions on planning matters. Mr. Ferancik had acted for Shoppers in respect of its (now settled) claim and had reached certain conclusions on the highest and best use issue.

[14] Metrolinx makes much of the critical comments from the Town planning staff and the back-and-forth dialogue concerning the Zoning By-law Amendment ("ZBA") application put forward by Mr. MacFarlane and notes that the Claimant launched an appeal of the ZBA application to the Tribunal (not at issue here). Metrolinx further argues that the reciprocal easements issue is critical:

> The impact of the existing easements burdening the property is significant to this case and their importance should not be underestimated. Indeed, the existence of the easements and how they are managed in any redevelopment scenario affects the entirety of this case, including: (1) the approach to redevelopment (i.e. standalone versus a comprehensive, coordinated approach); (2) the timing of redevelopment; (3) the comparable sales selected to value the Subject Property; and (4) determining actual losses post-expropriation (i.e. how much buildable GFA was actually lost as a result of the Expropriation).

[15] Metrolinx further noted that eventually, the Claimant adjourned its ZBA appeal and participated in a joint coordinated OPA Application for all of the adjoining parcel, including the Subject Property:

> Confirmatory of Metrolinx's position in the case herein, the Planning Justification Report submitted on behalf of the Oaktown Plaza owners (including the Claimant) for the coordinated OPA Application states that,
>
> 'The intent of this OPA is to permit a Comprehensive Development Plan which will enable the delivery of a mixed-use complete vertical community containing urban development blocks with building heights ranging from eight to 28 storeys, a total GFA of 194,200 square metres, and a density of 3.4 FSI, outlined in Table 1 below. Overall, the Comprehensive Development Plan is consistent and conforms with Provincial, Regional, and Town policies and guidelines related to planning for growth in a manner that creates a transit-oriented, complete, and liveable community.

[16] Counsel for the Claimant pointed out in the final argument that Mr. MacFarlane recognized that several reasonably probable redevelopment scenarios exist for the Subject Property. He opined that the reasonably probable highest and best use of the Subject Property, absent the Expropriation and the underpass project, would be the

concept shown on the detailed plans developed by Turner Fleischer Architects Inc. (TFAI) as set out on page 21 of his Planning Report. This would result in a gross Floor Space Index ("FSI") of 4.82 and a Gross Floor Area ("GFA") of approximately 49,792.3 square metres ("sq m") within buildings up to 16 storeys in height.

[17] In Mr. MacFarlane's opinion, the development concept, described in paragraph [16] above, was intentionally conservative because there would be several ways that GFA could be deployed on the site, and the redevelopment concept seeks only to implement the in-effect Official Plan ("OP"), even though there was an opportunity to pursue an OPA for the Subject Property. He testified that a condominium project directly across the street from the Subject Property (the Rain Condos) had been approved in 2010. Since then, the policy context has changed, placing greater emphasis on growth within the built boundary. Mr. MacFarlane further confirmed that he took a conservative approach as a result of the Town's refusal of the ZBA application, even though he believed that the staff comments that refusal could have been satisfactorily addressed in a resubmission of that ZBA application.

[18] In any event, the Town's refusal of the ZBA is under a separate appeal to the OLT, which has not yet been adjudicated. Indeed, as both Mr. MacFarlane and Mr. Guetter agreed during their testimony, the Town's refusal of a development application does not necessarily determine whether that development is feasible or represents good planning since the merits of an application stand on the ultimate good planning test and public interest test. In certain cases, for a variety of reasons, elected officials may occasionally make decisions that may not necessarily represent what the Tribunal's ultimate determination may be.

[19] Metrolinx noted that under Mr. MacFarlane's development proposal, the FSI for the Subject Property actually increased. However, this was countered by Mr. MacFarlane, who testified that while there is an overall increase in FSI in the post-Expropriation scenario because land is lost (5.24 vs 4.81), there is a loss of approximately 7,329.9 sq m of developable floor area and approximately 64 dwelling

units. In addition, the Claimant contends that the Expropriation results in impacts on existing site function and site design challenges, primarily related to the grade separation. Mr. MacFarlane opined that the grade separation inherent in the Expropriation could reduce or remove the exposure of, and accessibility to, future active ground-level uses that are encouraged by OP policy and would create site design challenges from the perspective of commercial/retail street-presence, access, phasing of development, uncertainties associated with the impending grade change, and the potential need for temporary retaining walls, all of which would come at a cost or be considered a “risk” from the perspective of a hypothetical purchaser.

[20] Mr. Guetter, for Metrolinx, during his cross-examination, confirmed that prior to being engaged by counsel for Metrolinx, he had not done any analysis of any of the properties – the Subject Property or the four other adjoining properties. Thus, the Tribunal understood that he side-stepped the direct analysis of what would be the highest and best use of solely the Subject Property. Instead, as directed by counsel, he undertook an analysis of the optimal use of the ‘assemblage’ of five properties, including the Subject Property. However interesting that exercise might be from a theoretical standpoint, the Tribunal agrees that this is not directly relevant to its task in this proceeding. The five properties’ collective best use is not an issue for determination here, and the proposal of an assemblage theory unduly complicates and obscures the matter currently before the Tribunal. Unfortunately, it also served to skew the work of Metrolinx’s appraisal expert, Mr. Parsons, who relied on Mr. Guetter’s opinions and approach (as further discussed below in Part B).

[21] Mr. Guetter also relied heavily on the OPA application later filed by the adjoining landowners after the Expropriation Effective Date, which he characterized as a ‘comprehensive, coordinated development approach’ versus the ‘piecemeal approach’ fostered by Mr. MacFarlane’s work. Again, the relative merits of the OPA application are not matters to be determined by this Tribunal in this proceeding (although it is possible that in a future appeal under the *Planning Act*, the Tribunal may well be required to separately adjudicate that issue).

[22] Expropriation hearings are, by their nature, almost always defined by the adversarial efforts undertaken by opposing Parties and their counsel. Thus, it is certainly understandable that Metrolinx decided to proffer the approach taken by Mr. Guetter (and followed by Mr. Parsons) as a way to counter the impact of the Claimant's case based on Mr. MacFarlane's planning analysis. This effort by Metrolinx and its counsel (and experts) is both creative and thoughtful. However, on balance, the Tribunal prefers the Claimant's approach to the highest and best use of the Subject Property because, simply put, it focuses solely on that property and does not require consideration of the impact of an expropriation of other separate land parcels and the disparate interests of adjoining landowners. The Tribunal is also loathe to make any findings in this proceeding that might impact future expropriation claims brought by other claimants and is of the view that it would be extremely difficult to avoid doing so if it accepted the arguments of Metrolinx.

[23] Therefore, the Tribunal accepts the overall approach taken by Mr. MacFarlane, coupled with the arguments of counsel for the Claimant, comprising a site-specific approach to the redevelopment of the Subject Property in the context of a comprehensive development plan demonstrating the potential full build-out of the surrounding lands in the block. Mr. Guetter did not persuade the Tribunal that a standalone development of the Subject Property, together with a comprehensive development plan that conforms to the OP, would not be optimal or reasonably probable.

[24] The planning evidence of Mr. Ferancik, taken as a whole, supports the opinions of Mr. MacFarlane, and in the Tribunal's view – given the posture of their respective clients – this is unsurprising, of course. The Agreed Statement of Facts between these two experts, dated January 16, 2024, and made Exhibit 14 to the Hearing, noted the following salient points (emphasis added below):

(a) The comprehensive development plan required by Policy 23.7.1a) of the Livable Oakville Plan, is to "demonstrate the potential" development of other lands. Accordingly, Policy 23.7.1a) does not require that a comprehensive development plan be agreed upon by all owners of lands included in the plan, nor would a singular application establish a plan with which all future development must comply. The development plan is a plan that would be used to inform the review of an application, but the development plan would not, itself, be given formal approval requiring compliance of future applications;

(b) Policy 23.7.1a) of the Livable Oakville Plan does not prevent the development of an individual parcel. Rather, the policy provides the opportunity for development of a single parcel in a manner that takes into account the intended future uses of surrounding lands, including public purposes, and does not prejudice the ability of the other parcels to attain their intended long term development potential;

(c) Policy 23.4.1.f) requires that redevelopment "anticipate" the extension of Shepherd Road and St. Augustine Drive through the lands for which Policy 23.7.1a) applies, but not that redevelopment be precluded from proceeding in the absence of these municipal road extensions;

(d) Policy 23.8.1 states that that development within Kerr Village will "be coordinated with the provision of infrastructure," however it does not preclude development of individual parcels from proceeding independently and contributing to the provision of the "infrastructure" components necessary to support said development within the context of the area.

[25] However, Mr. Ferancik testified that Mr. MacFarlane's proposed development scheme was too conservative. Instead, he opined that those taller buildings in the range of 25 storeys on the Subject Property would still have generally conformed to the overall policy context and could have been reasonably pursued at the Effective Date through an OPA application. He remained steadfast that Mr. MacFarlane's proposed scheme was reasonably probable despite a thorough cross-examination by counsel for Metrolinx, and he disagreed with the proposition that the OPA application by four of the five landowners in the block was a testament to the notion that Mr. Guetter's 'assemblage theory' was more probable. Mr. Ferancik also did not think that the reciprocal easements issue was an insurmountable problem or that it rendered Mr. MacFarlane's proposal less probable of success. The Tribunal found Mr. Ferancik to be an articulate and convincing witness and accepted his evidence and opinions.

[26] Interestingly, the land parcel assembly approach favoured by Mr. Guetter and put forward by Metrolinx – as reflected in part by the OPA application made well after the effective date of the Expropriation – also required the agreement of adjoining landowners with respect to lot lines and easements. It can be seen as simply one example of how such agreements are often reached, but nonetheless, it reflects that such concurrence can be reached. The Tribunal does not accept the implied suggestion that a joint OPA application represents the only way that such matters can be negotiated. During his cross-examination, Mr. Ferancik essentially confirmed that such prospects exist:

> I think I have stated clearly in my report, my witness statement that the easements were something that were there and, you know, needed to be released. And I think Mr. Guetter, in section 2.2 of his own witness statement says that he assumed that the easements would be removed in his development scenario. So, I am not sure there is any difference there.

[27] It is, therefore, the Tribunal's view, in agreement with the Claimant's position, that the planning evidence at this hearing supports the conclusions that the reasonably probable use of the Subject Property is redevelopment for higher order mixed-commercial residential development; there are a number of development scenarios that are reasonably probable; and that there was no requirement for a joint/consolidated application by all adjoining landowners. Additional analysis as to the highest and best use issue and how it relates to value is set out in Part B below.

[28] As a final note on this issue, the Tribunal does not accept Metrolinx's argument that Mr. MacFarlane's proposal is unrealistic because it ignores the fact that the Subject Property is 'landlocked.' Metrolinx contended that "there was no reasonable explanation proffered as to how residents of its proposed residential development would access the Subject Property without traversing private property." The Tribunal agrees that Metrolinx's Expropriation has legally landlocked the Subject Property by eliminating its only independent access onto a municipal right-of-way. There was extensive evidence on the issue of access, and the Tribunal found that the Owner lost access to Kerr Street and the development potential option of using the Kerr Street entrance for

both construction and future use. The Tribunal accepts the transportation planning evidence of Mr. William Maria that the proposed development access would be from the Sheppard Road extension identified in the OP and that a future developer could utilize the Kerr Street existing legal access absent the expropriation. The Tribunal also notes that Mr. MacFarlane's planning opinion was that the OP policies would permit this interim access based on principles of good planning.

B. Market Value of the Expropriated Property

(a) Temporary Easement

[29] In addition to a fee simple taking, Metrolinx, on April 6, 2021, also expropriated a two-year temporary limited interest for the free, exclusive, uninterrupted, and unobstructed use for an unidentified two-year period floating over a five-year period in time from the Expropriation date. The temporary easement comprised 0.203 ac of the Subject Property. The image below shows both the fee simple taking and the temporary easement:

Subject Property Aerial Image with Expropriation Overlay

Altus Appraisal Report Page 7

[30] Whether the Tribunal uses the MacFarlane development horizon or the Weston/OPA Application development horizon, all or a majority of the temporary easement term would be within the residential redevelopment timeframe. The Claimant argues that based on the track record of delays in transit projects, most market participants would assume that when a five-year window is taken, the use will likely be at the later portion of the window. As a result, the Claimant contends that the valuation should be based on the highest and best use of redevelopment lands and its appraiser, Mr. Robert Solnick from Altus Appraisals, applied a unit rate of $40 per square foot ("sq ft") buildable (also used to value the fee simple taking).

[31] Metrolinx maintains that, given the deferral of the Project and in accordance with section 41 of the Act, on November 14, 2023, Metrolinx registered a Declaration of Abandonment on title to the Subject Property, thereby abandoning the Temporary Easement. Metrolinx also points out that the Claimant "has not repaid that portion of the section 25 payment already paid to the Claimant for the market value of the Temporary Easement."

[32] The appraiser acting for Metrolinx was Mr. Michael Parsons from the firm Cushman Wakefield. In his view, the temporary easement should be valued based on the interim use of the Subject Property to arrive at a unit rate of $2,000,000 per ac, then apply an income approach using a capitalization rate of 5.75%. This produces a valuation of $50,000.

[33] Metrolinx contends that Mr. Parsons' approach to valuing the temporary easement should be preferred as it reflects the opinion shared by both Parties that the highest and best use of the Subject Property includes an interim continuation of the existing use as a commercial retail plaza, pending redevelopment approvals. In Mr. Parsons' opinion, valuing the temporary easement based on the Subject Property's interim use is appropriate from an appraisal perspective as it is reflective of how the market operates.

[34] Metrolinx also argues that the Claimant's position on the value of the temporary easement ignores the fact that it was removed from title on November 14, 2023, as described above in paragraph [31].

[35] The Claimant disagrees with Mr. Parson's approach of using a commercial land rate of $2,000,000 per ac for the temporary easement is incorrect and only serves as the best evidence of the economic incentive for the owners to renegotiate the existing easements to proceed with higher order mixed-use redevelopment on their own

standalone developments. Thus, the Claimant relies on Mr. Solnick's view that the temporary interest should be valued at $238,690.

[36] The Tribunal finds that in these unique circumstances and the absence of solid, persuasive evidence that Mr. MacFarlane's proposed redevelopment plan could have moved forward to completion by the date of 'abandonment' by Metrolinx, the temporary easement should be valued at $50,000 as opined by Mr. Parsons.

(b) Fee Simple Taking

[37] The Owner's position is that a fair, reasonable and conservative amount of its entitlement arising from the taking by Metrolinx on April 6, 2021, following a two-year delay between its notice of intention to expropriate and the registration of its Expropriation Plan, 21.36% of the Owner's land area being 0.545 ac or 23,741 sq ft in an L shape configuration is $4,577,265 for the market value of its fee simple lands. In turn, this is based on the appraisal report of Mr. Solnick.

[38] The Subject Property is part of the Oakville Commons Plaza, comprised of four parcels under separate ownerships – 588 Kerr Street, the Subject Property (550 Kerr Street), 530 Kerr Street, and 131 Speers Road. To the west of the Plaza is 171 Speers Road, which is the fifth property that comprises the "block" located northwest of the intersection of Kerr Street and Speers Road in the Town. The buildings and adjoining buildings in the broader plaza were constructed in 1964.

[39] The appraisal evidence of Mr. Solnick is that there are mutual party walls between the Subject Property and adjacent properties, mutual overhand easements, building eaves, and column overhangs that are registered on title and encroach over abutting properties. There are various cross-parking, cross-access, mutual cross-parking, and cross-access agreements to the other properties as well. In the pre-expropriation condition, this is how access, ingress, egress, and parking operate on the site and adjoining properties.

[40] Mr. Solnick testified that both he and Mr. Parsons agree that either proposed development concept plan (Mr. MacFarlane's or Mr. Guetter's) is financially feasible, physically possible, and maximally productive – and that the highest and best use is for a mixed-use residential redevelopment on the Subject Property with an interim continuation of the existing commercial uses.

[41] The Claimant argues that there is a clear economic incentive for the adjoining parcel owners to develop their properties into mixed-use developments on their own timeline. Therefore, for any of the property owners to redevelop and unlock substantial value, the existing easements in place would require renegotiation. This is true in the development concepts presented by the Claimant and the development concepts presented by Metrolinx and any other form of mixed-use redevelopment, including all or a portion of the owners of lands. The Claimant further maintains that this type of scenario is not unusual for properties/blocks similar to those at the Oakville Commons Plaza.

[42] The highest and best-use conclusion of Mr. Solnick's appraisal is that a reasonably probable use for the Subject Property is a mixed-use redevelopment with an overall gross density of 4.82 coverage. The reasonably probable development concept utilized by the Altus Appraisal to derive a site value is based on three towers, 16 storeys in height and 510 dwelling units, with a resultant FSI of 4.82 (as proposed by Mr. MacFarlane). The purpose of using development concepts in the highest and best-use analysis is to derive site statistics to be used in adjusting comparable properties and to arrive at an overall site value, which is then applied to the area taken.

[43] As noted above in **Part A**, this Tribunal has accepted the position put forward by the Claimant on the highest and best use. This is notwithstanding Metrolinx's insistence that the test to be applied is to ascertain the "most" or "more" probable development concept. This Tribunal agrees that the objective test recognizes that the theoretical

prospective purchaser of the property would typically have many reasonably probable redevelopment scenarios to consider.

[44] Metrolinx relies on *Re Farlinger Developments Ltd. and Borough of East York* (1975) 9 O.R. (2d) 553 (CA) ("Farlinger"), but the Claimant points out that it does not stand for the "most" or "more" probable test. In Farlinger, the Ontario Court of Appeal considered an appeal by the Corporation of the Borough of East York (East York) from the order of the Land Compensation Board, dated August 31, 1973, that Farlinger Developments Limited (Farlinger) was entitled to $982,900 as compensation for the market value of its land which had been expropriated, together with interest at 6% per annum from July 22, 1969, on the unpaid portion of such amount. One of the two main issues concerned the highest and best use of the expropriated property – as a single-family residential development or a high-density apartment development. Justice Howland, for the majority, stated (below emphasis added):

> 44 The majority of the Board charged itself with the duty of basing highest and best use on a reasonable anticipation or probability of the lands being zoned for apartment development. The majority correctly recognized the test as one of probability.
>
> 45 The determination of highest and best use, including as part and parcel thereof the probability of rezoning, is a matter on which the evidence of experts in the field of planning was required. On the other hand, once the highest and best use has been determined, the amount of compensation to be paid is one on which expert appraisal evidence is necessary. In this case the Board had the benefit of three expert witnesses in the field of planning, Bousfield, Jones and McWilliam…
>
> 46 It must be borne in mind that such a rezoning may take place even though the municipality opposes it. Under s. 35 [am. 1972, c. 118, s. 6(1)] of the *Planning Act*, R.S.O. 1970, c. 349, the council of a municipality may pass by-laws prohibiting or regulating the use of land or the erection or use of buildings. Section 35 (22) provides that: 35(22) Where an application to the council for an amendment to a by-law passed under this section or a predecessor of this section, or any by-law deemed to be consistent with this section by subsection 3 of section 13 of *The Municipal Amendment Act, 1941*, is refused or the council refuses or neglects to make a decision thereon within one month after the receipt by the clerk of the application, the applicant may appeal to the Municipal Board and the Municipal Board shall hear the appeal and dismiss the same or direct that the by-law be amended in accordance with its order.

[45] In this Tribunal's view, the decision in Farlinger turned on what the majority found to be a misapprehension of the expert evidence, not on the basis that the test to be applied is the "most" probable development concept (below emphasis added):

> 54 In my opinion the majority of the Board misapprehended the evidence of Bousfield as to the probability of rezoning. At p. 205 of vol. 1 he testified as follows: The conclusions drawn from the Goulding site is that the mere fact that this land was designated R-1, was no deterrent, in my thinking, to its possibilities for another use; if that use could be shown to be a proper one. The word "possibilities" which Bousfield used falls far short of what was required to conclude that there was a probability of it being rezoned for a high-density apartment development. The evidence of the other planners did not assist the majority of the Board on this point. The witness Jones expressed no view as to what the opinion of the Ontario Municipal Board would be on an application for rezoning. The witness McWilliam did not think there was a possibility of the Goulding property being rezoned for an apartment development.
>
> 55 In my view the majority of the Board erred in principle in determining that the highest and best use of the Goulding property was as a site for a high-density apartment development. It was not justified on the evidence before it in concluding that the rezoning of the Goulding property for its highest and best use as an apartment development was a probability. Before an owner of expropriated land is entitled to compensation on the basis of a higher and better use, the probability of such use must be clearly established.

[46] Of course, the Tribunal must be satisfied that a proposed development scheme is a probability and, naturally, will likely end up being persuaded by the evidence tendered with respect to one proposal versus another. This is, in fact, the situation here, and this Tribunal has accepted that Mr. MacFarlane's redevelopment proposal (supported by Mr. Ferancik) is probable and prefers it to the more complicated 'joint landowner development' scheme put forward by Mr. Guetter. Naturally, there is a speculative component to this exercise as undertaken by both the planning experts and the Tribunal since the actual approval of the competing development schemes will not be determined in this proceeding. It is even possible in the future that both of these schemes could be approved or that all landowners will together negotiate an entirely different outcome with the Town.

[47] Interestingly, the remaining two ac of the Subject Property were sold in the fall of 2023 for $25,000,000, including a vendor takeback mortgage. This equates to

$12,400,000 per ac. The Claimant argues that this sale is a confirmation of how conservative the Solnick appraisal is on market value (his valuation is $8,400,000 per ac). It is very rare to have such evidence available; as Mr. Solnick testified before the Tribunal, one would be hard-pressed to find an appraiser who would disagree that the best indication of market value for a property is the sale of that property.

[48] Metrolinx argues that the sale of the large portion described in paragraph [47] means that this Tribunal must be careful not to award ‘double compensation’ or ‘overcompensation.’ On the other hand, the Claimant maintains that the sale is not an indication of an absence of injurious affection. There is no identical paired sale available in the marketplace, with the issues caused by Metrolinx’s taking to suggest the value would not have been higher for the remainder or grossed up for the full site absent the taking. In other words, there is no evidence about what the entire Subject Property would have sold for in the fall of 2023 had the Expropriation never occurred. The Claimant argues that this is hardly a demonstration of a ‘windfall’ or an erosion of the injurious affection claim. In its view, it is instead strong, objective market evidence which confirms that the market value for the taking should be at least the $4,570,000 ascribed by Mr. Solnick in his opinion.

[49] Mr. Solnick, in his report, focussed on sales of similar land parcels within Oakville. He identified five comparable sales to determine the value of the Subject Property and, in turn, the land taken, as shown in the chart below:

Comparable Area Land Sales Chart

Sale No.	Address / Municipality	Closing Date	Sale Price	Total Site Area (SF)	Buildable GFA (SF)	Official Plan	Underlying Zoning	Sale Price Per Dev. Acre	Price Per SF Buildable
Subject	550 Kerr Street, Oakville	--	--	111,122	535,957	Kerr Village Growth Area / Urban Core	H1-MU3 - Holding One Provision - Urban Centre (Mixed Use Zone)	--	--
1A	83 East Street & 2266 Lakeshore Road West, Oakville	May-12-2021	$9,500,000	25,875	217,140	Bronte Village Growth Area/ Main Street 2	H1-MU1 - Holding One Provision - Main Street 1 (Mixed Use Zone)	$15,993,266	$70
1B	83 East Street & 2266 Lakeshore Road West, Oakville	May-8-2020	$7,000,000	25,875	169,133	Bronte Village Growth Area/ Main Street 2	H1-MU1 - Holding One Provision - Main Street 1 (Mixed Use Zone)	$11,784,512	$41
2	2430 Old Bronte Rd, Oakville	April-7-2020	$4,600,000	24,634	98,300	Palermo Village Growth Area/ Urban Centre	H1-MU3 - Holding One Provision - Urban Centre (Mixed Use Zone)	$8,199,643	$47
3	123 Maurice Drive, Oakville	Apr-30-2019	$7,050,000	31,424	107,360	Kerr Village Growth Area/ Main Street 1	CBD - Central Business District	$9,778,086	$66
4	28 Lakeshore Road West, Oakville	Nov-22-2018	$5,750,000	25,163	85,936	Kerr Village Growth Area/ Main Street 1	CBD sp:17 - Central Business District - Special Provision 17	$9,948,097	$67
5	157 Cross Avenue, Oakville	Jul-12-2017	$7,000,000	41,118	292,249	Midtown Oakville Growth Area/ Urban Centre and Urban Core	C3A - Arterial Commercial & MTC - Midtown Transitional Commercial	$7,415,254	$24

[50] In the Tribunal's view, in his testimony, Mr. Solnick made reasonable adjustments to the above-noted comparables for financing, changes in time or market conditions, size, location, planning, land use, development time and characteristics, property site characteristics, and interim income potential or capability.

[51] On the other hand, Metrolinx contends that contrary to the rule against overcompensation, Mr. Solnick used a methodology which results in an overvaluation of the loss to the Claimant. Despite the Claimant's own planning evidence that the expropriation resulted in a loss of GFA of 7,329.90 sq. m (78,899 sq. ft.), Mr. Solnick did not calculate compensation on that basis. Counsel for the Claimant counters that this is, in a nutshell, Metrolinx's erroneous argument that "value to the owner" is the current law of expropriation (see part (c) below). They further argue that under a comparable sales analysis, the task is what the purchaser considered to be reasonably probable in achievable density to derive a price-per-foot ratio to the sale price.

[52] Metrolinx also argues that contrary to the mixed-use development sites chosen by Metrolinx's appraiser, the market evidence relied on by Mr. Solnick is smaller, predominately "net" sites with all sales relied upon as direct market evidence being smaller than one ac in size and of a substantially different scale of development than the Subject Property.

[53] After careful consideration, the Tribunal is persuaded that the valuation proffered by Mr. Solnick is reasonable and is based on reliable evidence as described above. Thus, the Tribunal accepts that the market value of the fee simple taking under the Expropriation is $4,570,000 – not the $3,760,000 proposed by Metrolinx and its appraisal expert, Mr. Parsons.

(c) <u>The Section 13(2) versus the Section 14(3) Dispute</u>

[54] Considerable time at the Hearing and in both written and oral final argument was taken up by a vociferous disagreement between counsel for Metrolinx and counsel for the Claimant concerning the proper approach to market valuation of the fee simple interest taken under the Act.

[55] In fact, Metrolinx's position, which arrived at a valuation of $3,760,000 as set out in paragraph [53] above, is its *alternative* position – its primary argument was to instead

insist that under section 14(3) of the Act, a before and after method of valuation ought to be undertaken whereby the market value of the remaining lands is subtracted from the market value of the Subject Property (prior to the Expropriation). This would result in a valuation outcome of $1,763,280, as maintained by Metrolinx and its appraisal expert, Mr. Parsons. Thus, Metrolinx contends that this amount is the actual loss sustained by the Claimant, and anything more constitutes 'overcompensation.'

[56] Section 13 of the Act provides as follows (below emphasis added):

> **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

[57] Section 14 sets out that (below emphasis added):

> **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 there from the market value of the owner's land after the taking.

[58] Section 14(3) of the Act, by its express provisions, is triggered when only a portion of a claimant owner's lands are taken (the case here) and "…*such part is of a size, shape or nature for which there is no general demand or market*…". This aspect is the key bone of contention in this aspect of the proceeding.

[59] Metrolinx, as supported by the evidence in chief of its appraisal expert, Mr. Parsons, argues that (below emphasis added):

> "As testified to by Mr. Parsons, the use of the before and after method and Section 14(3) of the Act is appropriate in this case as it captures the actual economic loss to the owner (which is the loss of GFA) and avoids overcompensation resulting from the disproportionate loss of land relative to the loss of GFA:
>
> [...] the before and after seems to more accurately capture the economic impact that is being suffered in a case like this…
>
> where there is a disproportionate loss of land relative to the underlying economic attribute that establishes value, I think it is certainly reasonable to consider, at minimum, the before and after method does seem to more accurately reflect the damage that has been suffered by the claimant."

[60] What Metrolinx relies on as the underpinning for the argument made in paragraph [55] are the following contentions (below emphasis added):

> "Although the Subject Property has lost approximately 21.4 percent of land on account of the expropriation, it has only lost approximately 10 percent of buildable GFA. This is because the buildable GFA can be redeployed within

the Remaining Lands, such that greater efficiency is achieved on a square foot basis in the 'after' scenario compared to the 'before'. This is evident from the fact that FSI goes up in both parties' 'after' development concepts (from 5.28x to 6.04x (Metrolinx) and 4.8x to 5.23x (the Claimant))

…

Metrolinx's Evidence re Loss of GFA – 550 Kerr St

Weston Comprehensive Development "Before"	Weston Comprehensive Development "After"	Estimated Loss of GFA	Cushman Rate per Square Foot	Actual Loss to Claimant
586,221 sq. ft.	**527,445 sq. ft.**	**58,776 sq. ft.**	**$30.00**	**$1,763,280**

…

Indeed, the 2023 sale of the Subject Property, which was marketed and sold on the basis of its GFA potential, confirms two significant issues: (1) the loss of GFA resulting from the Expropriation is disproportionate to the loss of land and (2) the amount of achievable GFA is the critical value issue in the marketplace…

The Absurd Result: the Sum of the Parts is Greater than the Whole

Altus "Before" value of the Entire Parcel	Altus market value of the Fee Simple Lands	Remaining GFA post expropriation (MacFarlane stand-alone approach)	Altus Rate per Square Foot	Value of Remaining Lands based on Mr. MacFarlane's GFA Analysis
$21,438,400 (535,960 sq.ft. @ $40.00 per sq. f.)	**$4,577,265**	**457,061**	**$40.00**	**$18,282,440**

The sum of the value of the Fee Simple Lands as opined by Altus [Mr. Solnick], being $4,577,265, and the value of the Remaining Lands at $18,282,440 (457,061 sq. ft. @ $40.00 per sq. f.), based on Mr. MacFarland's after GFA of 457,061 at Altus' $40.00 per square (assuming no injurious affection), being $22,859,705, is greater than Altus' before value of $21,438,400. The logic of this approach must fail as any award on this basis results in a windfall to the Claimant.

[61] The above contentions by Metrolinx are creative and clever. However, in the Tribunal's view, there was no persuasive evidence called by Metrolinx to establish the necessary prerequisite for the application of section 14(3) as referred to above in paragraph [58]. Perhaps ironically, Metrolinx, in its argument referencing the post-Expropriation sale of the Claimant's property in 2023, seems to demonstrate that the opposite may be true.

[62] The Claimant adamantly maintains that the position advanced by Metrolinx calling for a 'before and after' valuation approach based on the application of section 14(3) of the Act is completely without merit (below emphasis added):

> Metrolinx, in its legal submissions (unsupported by any evidence and not put to any planning witnesses) focuses on the independent developability of the 0.545 taking parcel. The Act does not say "where there is no independent developability of a partial taking, the 14(3) approach is used". Section 14(3) is used only where there is no market for the taking. Metrolinx presented absolutely no market evidence to suggest that this is the case. Mr. Solnick's reply expert report, and his evidence before the Tribunal, expressly pointed out the following:
>
> a. "Cushman has not concluded that there is no general demand or market for the Subject Property Taking."
>
> b. "This is a pre requisite starting point in order to conduct a further analysis under section 14(3) of the Expropriations Act."
>
> c. "Given the size of the Taking (0.545 acres), its location within Oakville, as well as its frontage along an arterial road, there likely would be significant demand for this portion of the Subject Property if it were offered for sale.

[63] The Tribunal agrees that the above points made by Mr. Solnick were not challenged in cross-examination by Metrolinx's counsel and that no effort was made by Metrolinx during the direct testimony of Mr. Parsons to explore this point with him, let alone to refute the contrary conclusions of Mr. Solnick. Thus, it seemed to the Tribunal that Metrolinx relied solely on the power of its assertion that an "overcompensation windfall" for the Claimant would result unless the Tribunal applied section 14(3) – regardless of whether the condition-precedent spelled out in that provision had been established.

[64] In its responding argument, counsel for Metrolinx attempted to flip the analysis by arguing that the Claimant had a duty to prove that there was a market for the partial taking and that because Metrolinx contends that the Claimant did not do so (which ignores the evidence of Mr. Solnick referenced above), then section 14(3) is somehow clearly applicable. Metrolinx further argued that since all the Claimant could contend is that the partial taking would have had contributory value to the balance of the Subject Property, this makes a mockery of section 14(3) since every similarly situated Claimant could be expected to make the same argument in similar circumstances. The Tribunal disagrees and rejects this line of argument of Metrolinx. Simply put, the Tribunal sees nothing in section 14(3) that exclusively requires a claimant to prove any element. Instead, the Tribunal is of the view that the party which asserts the application of section 14(3) should tender cogent evidence to support its relevance and applicability.

[65] In the Tribunal's view, the cases cited by Metrolinx, including the Court of Appeal's decision in *747926 Ontario Ltd. v. Wellington (County) Board of Education*, [2001] O.J. No. 3909, 2001 CarswellOnt 3483 ("Wellington"), do not support its arguments here. In Wellington, the Claimants sought compensation for: (a) the market value of the expropriated land, (b) damages for injurious affection based on the reduced value of lots adjacent to the school site, and (c) lost developer's profit as disturbance damages. The Ontario Municipal Board ("OMB") adopted the evidence of the Claimants' experts regarding the market value of the expropriated land and ordered $2,478,000 as market value compensation. However, the OMB denied the Claimants' claim for lost developer's profit as disturbance damages, ruling that such profit is not compensable under the Act as disturbance damages or at all.

[66] In Wellington, the Claimants appealed to the Divisional Court and argued against the OMB's refusal to award the lost developer's profit as damages attributable to disturbance. The Parties agreed that the quantum of the lost developer's profit was $437,000. The Divisional Court allowed this appeal and ordered compensation for lost developer's profit in the amount agreed upon and awarded interest on this award. The

School Board cross-appealed on the basis that section 14(3) of the Act precludes the application of the before and after methodology that the Claimants' experts used to determine market value. The Divisional Court dismissed the cross-appeal on the basis that it related to factual and evidentiary matters and that the School Board failed to establish any manifest errors or misapprehension of the evidence by the OMB.

[67] The Court of Appeal in Wellington summarized the issues on appeal as follows (below emphasis added):

> "The Claimants' problem is that there is no evidence in this case that the Claimants suffered actual damage as a result of the expropriation. They had asserted that the unexpropriated land suffered damage by way of injurious affection but the OMB rejected this on a factual basis. I can conceive that in a proper case, an expropriation might reduce the profitability of the lots developed from the unexpropriated lands to a figure that is less per lot than would have been available if such developed lots were part of the larger pre-expropriation holding, but that is not what is being put forward here. Further, unlike the claimant in *Dell Holdings*, the Claimants are not seeking compensation for business losses that arose before expropriation. Rather, the lost developer's profit claimed is the prospective profit that the Claimants anticipate they would have received sometime after the valuation date upon the sale of the expropriated lands. Having failed, properly in my view, to obtain compensation for the loss of a prospective profit on the expropriated segment of the intended development, the Claimants attempted to recover this same prospective profit under the guise of disturbance damages."

[68] On the applicability of section 14(3), the Court of Appeal in Wellington opined (below emphasis added):

> "I agree with the School Board that ss.14(3) is not of general application. This provision is directed to the taking of strips of land for road widening or easements for public utilities across large tracts of land. In those circumstances the property expropriated has no sale value or, in some cases, no value whatsoever except to the expropriating authority. Subsection 14(3) of the *Act* has no application to a 7.86 acre parcel of land that may be viewed as a stand alone subdivision the taking of which, in the contention of the Claimants, deprived them of a developer's profit of $437,000.00…That being said, the Claimants' appraiser did not regard this section as the only authority for the use of a before and after methodology. Subsection 14(3) was put briefly to the Claimants' appraiser in cross-examination. But the transcript excerpt that was filed on this appeal as well as the appraisal report makes it clear that the Claimants' appraiser relied on the before and after methodology because the direct comparison approach couldn't be used and because, in his opinion, the before and after methodology best screened out

> the expropriation from the valuation process. The OMB accepted this methodology for similar reasons. In my view, ss. 14(3) is simply one permitted use of the before and after methodology. I would leave to another time any discussion as to when a before and after approach is appropriate… Reverting to the four issues in this appeal, I would answer them as follows: (a) the Divisional Court erred in finding that a loss of developer's profit is compensable as disturbance damages under the *Act*; (b) the Divisional Court erred in concluding that *Dell Holdings*, supra, resolves this matter; (c) the OMB did not err in relation to ss. 14(3) of the *Act*; and (d) the Divisional Court erred in awarding interest on the award for lost developer's profit."

[69] In the Tribunal's view, read carefully, the Court of Appeal's actual holding in Wellington simply affirmed that the OLT's predecessor Tribunal had the power and discretion under the Act to consider whether to accept the before and after valuation methodology. The facts of Wellington are quite different from those in this proceeding. There is no directive by the Court of Appeal that requires this Tribunal to utilize section 14(3) of the Act or to use the before and after valuation approach as advocated by Metrolinx. In fact, the Court of Appeal did not offer any exhaustive analysis whatsoever of section 14(3). It expressly declined to comment generally as to in what circumstances the before and after approach is appropriate.

[70] The Claimant's counsel characterizes the insistence by Metrolinx on the application of section 14(3) as an improper attempt to invoke the 'value to owner' principle long ago discarded under the Act. This was described by authors Coates and Waque in the New Law of Expropriation ("New Law") in an excerpt located at Tab 10 of Metrolinx's Brief of Authorities as follows (below emphasis added):

> Subsection 14(3) represents a marked departure from the common law approach, which approach was to determine compensation for the "value to the owner" of the lands taken and damages for injurious affection to the remaining lands, jointly, on the "before and after" method. Under the present Act, the joint assessments of claims for compensation for the market value of lands taken and damages for injurious affection by the "before and after" method is limited to cases coming within the provisions of subsection 14(3), i.e., to those cases where the land taken is of "a size, shape or nature for which there is no general demand or market." This reverses the common law approach and makes market value plus damages for injurious affection to the remainder the general approach and the "before and after" test the exception.

[71] In the New Law, the authors note the case of *Eddy v. Ontario (Minister of Transportation & Communications)* (1974), 7 L.C.R. 120, 1974 CarswellOnt 1286 (Ont. L.C.B.) ("Eddy") as an illustration of the stated principle. While neither the counsel for the Claimants nor Metrolinx included this case in their filed Briefs of Authorities, it was included as an appendix to the Reply Written Submissions of the Claimant.

[72] In Eddy, the Tribunal's predecessor noted:

> "Kellough, the appraiser called on behalf of Eddy, made it clear that his basic approach to the claim was to determine the market value of the lands taken and the damages for injurious affection, jointly on the "before and after" method of valuation. It appears that this was a usual method of valuation of claims for market value and injurious affection under the old Act. However clearly now it is only proper if the claimant satisfies the onus of establishing that he is entitled to claim jointly, under s. 14(3) [of the Expropriations Act, R.S.O. 1970, c. 154], without distinguishing the amount of market value for lands taken from the damages for injurious affection. If the claimant is not entitled to claim by the before and after method of s. 14(3), it is the duty of the claimant to specify the nature and amount of each bracket of his claim: see a decision of the Board, Blatchford Feeds Ltd. v. Board of Education for City of Toronto, April 18, 1974, as yet unreported [since reported 6 L.C.R. 355]."

[73] Given that both counsels have noted this reference to Eddy in New Law, the Tribunal must assume that there is no controversy between them on this point.

[74] The Tribunal also agrees that the premise of 'lack of independent developability' of a given partial land taking (as contended by Metrolinx) is nowhere captured in section 14(3). The Tribunal disagrees that section 14(3) must be applied on this basis and is also not persuaded by the bare legal argument of Metrolinx that the fee simple taking under the Expropriation was incapable of any development potential. There was insufficient evidence on this point, in the Tribunal's view. In any event, the Tribunal declines to exercise its discretion to apply the before and after valuation methodology in this proceeding based on the arguments on this issue made by Metrolinx as described above.

[75] In the Tribunal's view, Metrolinx also cites no persuasive authority for its 'windfall' argument, and the Act provides no basis for the Tribunal to apply an expansive discretionary principle to fashion a remedy to require the outcome urged by Metrolinx. The Supreme Court's seminal ruling in *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority* [1997] 1 S.C.R. 32, 1997 ("Dell Holdings") merely contains a statement of recognition by that Court that 'double recovery' is to be avoided, as reproduced by Metrolinx in its written submissions:

> "I agree with the view expressed by K. J. Boyd in Expropriation in Canada (1988), at p. 109, that the objective of these provisions is to ensure "that on the one hand double recovery does not occur, and on the other hand that no legitimate item of claim is overlooked". Indeed, the overriding objective of the entire Act is to provide fair and proper indemnity for the owner of the expropriated land."

The Tribunal does not agree that 'double recovery' to the Claimant will occur here if market value compensation is properly awarded pursuant to section 13 of the Act.

C. Injurious Affection Claim

[76] This is another area of fundamental disagreement between the Parties. Metrolinx argues that the Claimant has not proven that it has any entitlement to injurious affection damages under section 13(2) (as reproduced in paragraph [56] above). The Claimant, on the other hand, presents a significant claim as depicted below:

Total Injurious Affection Value Estimate	
Various Redevelopment Risks (Impact to Commercial Tenants / Parking Risks)	$1,321,061
Plus	+
Loss of Parking Spaces	$136,875
Equals	=
Total Injurious Affection	**$1,457,936**

[77] Section 1(1) of the Act defines injurious affection as follows (below emphasis added):

> "injurious affection" means,
>
> (a) where a statutory authority acquires part of the land of an owner,
>
> (i) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and
>
> (ii) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute…

[78] The Claimant argues that the Expropriation has or will cause shape and grade separation, including a significant grade differential on the two frontages of the Subject Property, resulting in a detriment to the value of the remainder. The Expropriation of a large L-shaped parcel of land across the site's only direct street access clearly triggers a diminishment in value to the remaining lands, which the Claimant argues constitutes injurious affection.

[79] Mr. Solnick's evidence for the Claimant, both in his report and witness statement and in his oral evidence, can be summarized in a chart contained in his appraisal report:

Injurious Affection Value Estimate	
Subject Property Value Prior To or 'Before' the Expropriation (535,960 square feet X $40.00 per buildable square foot)	$21,438,400
Less	-
Fee Simple Land Requirement (23,741 square feet X 4.82 FSI X $40.00)	$4,577,265
Less	-
Subject Property Value Subsequent To or 'After' the Expropriation (457,061 square feet X $34.00 per buildable square foot)	$15,540,074
Injurious Affection	**$1,321,061**

[80] Mr. Solnick based his above summary and conclusions on the information provided to him by Mr. MacFarlane's planning analysis, which he, in turn, summarized as follows:

Key Statistics	Without Expropriation	With Expropriation	Difference
Building Floor Area (above grade and prior to any exclusions)	49,792.3 sq.m 535,960 sq.ft	42,462.4 sq.m 457,061 sq. ft	**7,329.9 sq.m** **78,899 sq.ft**

Source: Zelinka Priamo Ltd.

[81] To this, Mr. Solnick would add the loss of parking spaces (referred to in paragraph [76] above), which he described in his report and his *viva voce* evidence as follows:

> Given the foregoing, it is our opinion that the Subject Property has suffered additional injurious affection as a result of the 60 lost surface parking spaces (currently utilized by the commercial tenants) during the holding period prior to redevelopment. In order to quantify this loss, we have estimated the cost to rent 60 similar parking spaces in the Town of Oakville over the duration of the estimated development timeline…We conclude that a parking rate of $2.50 per day per space is reasonable to use for the purposes of analysis herein. Therefore, our injurious affection estimate is calculated as follows: $2.50 per parking space per day x loss of 60 parking spaces x 30 months = $136,875…

[82] In its final argument, the Claimant further rejects the notion put forward by Metrolinx that the eventual sale price achieved in 2023 for the Subject Property serves to reduce or eliminate any injurious affection claim:

> The sale is not an indication of an absence of injurious affection. There is no identical paired sale available in the marketplace with the issues caused by Metrolinx's taking to suggest the value would not have been higher for the remainder or grossed up for the full site absent the taking. In other words, there is no evidence about what the full 550 Kerr property would have sold for in the fall of 2023, had the expropriation never occurred…this is hardly a demonstration of a 'windfall' or an erosion of the injurious affection claim. It is strong, objective market evidence which confirms that the market value for the taking should be at least $4.57 million, likely higher.

[83] Metrolinx argues that the Claimant's witnesses asserted various alleged impacts arising from the grade separation stemming from the Expropriation 'without evidence,' including that the grade separation would result in site design challenges, which would increase costs associated with development. However, based on the transcripts available to the Tribunal and a review of Mr. MacFarlane's two witness statements, it is

the Tribunal's view that there was some analysis of these issues – from at least a planning perspective - and that Mr. MacFarlane's evidence in this respect was largely corroborated by Mr. Ferancik, albeit again from solely a planning standpoint. Moreover, while it was open to Metrolinx to call its own countervailing expert evidence to support its "zero dollar" position, it did not do so.

[84] Nonetheless, the Tribunal is of the view that without more directly relevant and specifically detailed engineering design evidence to better flesh out the redevelopment risks and engineering challenges generally asserted by Mr. MacFarlane, it must discount the value conclusions reached by Mr. Solnick based on inputs from solely Mr. MacFarlane (who admitted on cross-examination to some errors in his loss of parking space analysis, an area probably beyond his professional expertise in any event). Thus, although the Tribunal accepts the notion that injurious affection damages would flow from grade separation impacts of the Metrolinx project underlying the Expropriation, it will reduce those damages by deducting the value of $136,845 assigned to the loss of parking spaces. Thus, the figure of $1,457,936 is reduced to $1,321,061.

D. Interest Payable under the *Expropriations Act*

[85] Metrolinx takes the position that the Claimant is disentitled to interest under the Act calculated from the date of its registration of the Expropriation Plan on April 6, 2021. Instead, Metrolinx relies on section 33 of the Act, which provides (below emphasis added):

> **Interest**
> **33** (1) Subject to subsection 25 (4), the owner of lands expropriated is entitled to be paid interest on the portion of the market value of the owner's interest in the land and on the portion of any allowance for injurious affection to which the owner is entitled, outstanding from time to time, at the rate of 6 per cent a year calculated from the date the owner ceases to reside on or make productive use of the lands. R.S.O. 1990, c. E.26, s. 33 (1).
>
> **Variation of interest**
> (2) Subject to subsection (3), where the Tribunal is of the opinion that any delay in determining the compensation is attributable in whole or in part to the owner, it may refuse to allow the owner interest for the whole or any part

> of the time for which the owner might otherwise be entitled to interest, or may allow interest at such rate less than 6 per cent a year as appears reasonable.
>
> **Same**
> (3) The interest to which an owner is entitled under subsection (1) shall not be reduced for the reason only that the owner did not accept the offer made by the expropriating authority, although the compensation as finally determined is less than the offer. R.S.O. 1990, c. E.26, s. 33 (3).
>
> **Same**
> (4) Where the Tribunal is of the opinion that any delay in determining compensation is attributable in whole or in part to the expropriating authority, the Tribunal may order the expropriating authority to pay to the owner interest under subsection (1) at a rate exceeding 6 per cent a year but not exceeding 12 per cent a year.

[86] Metrolinx points out that the Claimant has remained in possession of the Subject Property since registration of the Expropriation Plan and that it continued to use that property at all material times for the same purposes as existed beforehand. It relies on the case of *Secemb Investments Ltd. v. M.T.O.* OLT Case No: OLT-22-002198, which was affirmed by the Divisional Court at *Eric Levin Holdings Inc. v. Ministry of Transportation* 2023 CarswellOnt 8470, 2023 ONSC 3284 ("Secemb").

[87] In Secemb, the Divisional Court considered a decision of now Vice Chair Taylor. Vice Chair Taylor dismissed the Appellant's claim that interest should run from a date prior to the formal date of expropriation and the Appellant's claim that interest should be paid at an increased rate of 12% rather than the rate of 6%. The Divisional Court noted that determining the date from which interest should run involved deciding two issues: (1) what was the productive use of the land and (2) when did that productive use cease. The Appellant in Secemb argued that the Tribunal erred in failing to recognize that the land had two productive uses - a rental building and redevelopment - and that the redevelopment use ceased on the date that it first became clear that the Respondent was going to expropriate the land. It also argued that the Tribunal erred in finding that if the productive use of the land was as a rental building, then that productive use only ceased when the Respondent formally expropriated the land. By the time of formal expropriation, the Subject Property was 62% vacant, with tenants leaving because the property was due to be expropriated.

[88] The Divisional Court in Secemb went on to state (below emphasis added):

> With respect to the first aspect of the Appellant's argument, the Appellant submits that the Tribunal erred in law in failing to recognize that a property could have two productive uses. According to the Appellant, the caselaw is clear that a property can have more than one productive use. There is no merit to this argument. The Tribunal recognized the possibility that the property could have a productive use as a redevelopment property. However, it found, based on the evidence before it, that such a productive use was not made out…
>
> The question of whether the Appellant had established a second productive use as a redevelopment property was a question of fact and the Tribunal's decision on this issue is subject to review on the standard of palpable and overriding error. The Tribunal heard Mr. Levin's testimony and found that there was no evidence that the Appellant's desires to expand the development of the property were never initiated…
>
> The decision as to when the Appellant's productive use of the property ceased is also a question of fact. The Appellant attempted to suggest that the Tribunal erred in law in conflating the issue of business losses with the issue of interest. It did so because the Tribunal made repeated references to the fact that the Appellant had received a settlement for its business losses. None of these references are sufficient to support the conclusion that the Tribunal was conflating two separate issues. Instead, the Tribunal's finding that the Appellant made productive use of the property until the formal date of expropriation is supported by the record before it, including the fact that the last three tenants did not vacate the building until that date. Further, its finding is supported by a line of authorities that it considered and followed. Those authorities hold that "profit or degrees of profit are not the test in determining productive use … If rental is at a loss, that does not constitute cessation of productive use."

[89] In reliance on Secemb, Metrolinx argued that there is no dispute that Metrolinx has not occupied the expropriated lands and that they are still being used for the same use for which they were used on the date of the Expropriation, which is as part of the Oaktown Plaza. Thus, on the facts, Metrolinx maintained that this is determinative of the issue: "the Claimant is entitled to no interest because it is continuing to make at least some productive use of the Expropriated Lands."

[90] In opposition to this, the Claimant submits that the fair, reasonable, and accurate method of setting interest here is to have interest run from the date of the plan registration – when the property right was turned over to Metrolinx by virtue of the Act. It further contends that no agreement was offered or made to delay possession of

Metrolinx's taking. Metrolinx's failure to manage its property by fencing off its ownership and/or by giving notice of possession should not serve as a basis to disentitle the Claimant from interest under the Act. Metrolinx allows third parties to use the Kerr Street entrance and parking as an interim condition pending the construction of the grade separation and/or dedication as a public right of way to insulate itself from a business loss claim by tenants at the Subject Property.

[91] The Claimant further argues that:

> Metrolinx's interest arguments are illogical in the context of a right-of-way work. Metrolinx's argument seems to be that because vehicles may have continued to cross the expropriated lands post-expropriation – lands which Metrolinx has the legal to control, including for example, by erecting signs or fences, repairing (or not) potholes or other issues on the property – interest should therefore never accrue. This is inconsistent with Dell Holdings. To suggest that interest would never run on a compelled sale is entirely contrary to the remedial nature of the statute dealing with compensation flowing from a forced sale of lands…
>
> The logical conclusion of Metrolinx's argument here is that for road widening expropriations, no matter how long compensation is delayed, no interest would be owing on market value because vehicles continue to use the right-of-way. This cannot be correct. It is fundamentally contrary to the objectives, the construction and the interpretation of the modern *Expropriations Act*…
>
> Furthermore, to suggest that the Claimant continued to have productive use of the lands post-expropriation – even in the hypothetical case where no signage or obstructions have been erected on the expropriated lands, they are kept in good repair, etc – is to misapprehend what it means for an owner to be able to enjoy productive use of its lands. Once the expropriation plan was registered, the Claimant lost the ability to use the lands as it saw fit, including to develop or sell the lands…
>
> Metrolinx obtained possession of the fee simple lands on October 16, 2021 pursuant to their Notice of Possession. Metrolinx would have this Tribunal make an order that, even though Metrolinx had legal ownership and possession of the expropriated lands, it de facto didn't. This would be a legal error. Under section 39(3) of the *Expropriations Act*, it open to the expropriating authority to apply to court to vary or amend the date for possession as specified in the notice of possession.12 This has a direct relationship to the date from which interest ought to run (if not from the date of registration of the expropriation plan). Metrolinx had the ability to change their date of possession and failed to do so - they should not be absolved from paying interest as a result of this failure.

[92] The Claimant finally argues that Secemb and the other cases referenced by Metrolinx are distinguishable and irrelevant. Secemb addressed a situation involving a

claim for interest *prior to* the date of expropriation and a settlement. Thus, the Claimant maintains that it cannot be relevant to the question of what interest is owing to the Claimant following the registration of an expropriation plan.

[93] There is no doubt that Secemb considered a claim for 'pre-expropriation' interest, which is not being made here. Thus, in the Tribunal's view, it cannot stand for the proposition that no interest is payable after the date of Expropriation in circumstances where a landowner continues to make use of the expropriated parcel. Metrolinx has not marshalled any other jurisprudence to support that argument.

[94] On the other hand, the Divisional Court in Secemb clearly affirmed the principle that cessation of productive use is a question of fact for determination by the Tribunal. The question is whether section 33(1) empowers the Tribunal to award no interest after registration of a plan of Expropriation on the basis that a landowner continued to make use of the expropriated lands. Here, of course, this occurred simply because Metrolinx deferred its project. However, the use that continued was essentially as described by the Claimant's counsel in final argument – although, based on the evidence before the Tribunal the Oaktown Plaza has clearly continued to operate.

[95] Neither counsel for Metrolinx nor for the Claimant has submitted any jurisprudence which clearly and unequivocally addresses the question posed in paragraph [85]. Essentially, the Claimant argues that it is beyond question that interest must be awarded at some appropriate date following the Expropriation, based on its general argument that to do otherwise would be 'contrary to the remedial nature of' the Act – a principle enunciated by the Supreme Court in Dell Holdings (assuming that the Tribunal determines that there is no basis upon which to disallow or vary interest pursuant to section 33(2)).

[96] As currently worded, section 33(1) is not a model of absolute clarity since it does not squarely prevent the argument made here by Metrolinx. On the other hand, it can be considered that sections 33(2) and 33(3), by necessary inference, define the only

circumstances when interest can be denied to a claimant, as expressly permitted by the Legislature. In other words, there must be some conduct on the part of the Claimant that would justify the exercise of discretion by the Tribunal to deny or vary the interest otherwise payable. No such allegation of conduct is made by Metrolinx beyond the contention that "everything continued as-is" for the Claimant due to the deferral of the project underlying the Expropriation.

[97] In the Tribunal's view, the key flaw in Metrolinx's contention that statutory interest ought not to be granted (in the absence of directly relevant jurisprudential support) is the fact that once the Expropriation plan was registered, it fundamentally and negatively impacted the Claimant's property rights in the Subject Property. Clearly, the Claimant could not freely deal with – let alone convey – the expropriated parcel after the plan was registered.

[98] The Tribunal notes that the Claimant proposes that interest run from either the date of registration of the Expropriation Plan – April 5, 2021 – or, in the alternative, October 16, 2021, the date Metrolinx acquired *legal* possession of the expropriated parcel. The latter date is the focal point of the arguments made by the Claimant above. In the Tribunal's view, the appropriate date from which to calculate interest is October 16, 2021, and the appropriate rate is 6%, there being no evidence or argument made to vary that rate.

E. Impact of the Unknown Shoppers Realty Claim & Settlement

[99] The question of what ought to be the outcome of Metrolinx's settlement of the claims made by Shoppers Realty has very loosely appeared in the final argument. The Tribunal finds it unclear what, if anything, the Parties seek from the Tribunal on this issue and notes that no evidence was led as to the terms of that settlement. In addition, in its closing submission, Metrolinx sought no Order on this matter.

[100] For its part, the Claimant seeks an award “without delay, set-off or deduction” and, in its final written argument, alleged that Metrolinx had created a ‘side-show issue’ as to “the alleged entitlement of Shoppers (no longer a party) to a portion of the Claimant’s market value for the subject lands.” In its final reply argument, counsel for the Claimant further stated (below emphasis added):

> The second side-show issue relates to the claim by Shoppers, who put forward a rather fanciful theory that because of their lease they were entitled to a portion of Oakville Developments’ market value compensation. Both Metrolinx and Oakville Developments vehemently opposed that claim and its entire legal underpinning. It was a claim that was unknown in law and was entirely destined to fail. Metrolinx and Shoppers settled the claim shortly before the hearing. We were not a part of those discussions and have no idea what the terms of such settlement are. When we asked for the details and raised concerns with Metrolinx about any implications for our client’s claim, we were assured that there would not be any. Therefore, any suggestion as was made in Metrolinx’s opening statement that there may be some further proceeding to determine some allocation to Shoppers of our client’s market value is beyond inappropriate.

[101] In the absence of any particular Order sought by either Party or useful evidence tendered in this proceeding, the Tribunal declines to make any ruling with respect to the impact or legal effect of the settlement reached by Metrolinx and Shoppers Realty on undisclosed terms.

F. Conclusions

[102] The Tribunal accepts the Claimant’s overall approach to the highest and best use of the Subject Property comprising a site-specific approach to the redevelopment of the Subject Property in the context of a comprehensive development plan demonstrating the potential full build-out of the surrounding lands in the block. The planning evidence at this hearing supports the conclusions that: the reasonably probable use of the Subject Property is redevelopment for higher order mixed-commercial residential development; there are a number of development scenarios that are reasonably probable; and that there was no requirement for a joint/consolidated application by all adjoining landowners.

[103] The temporary easement taken under the Expropriation shall be valued at $50,000 as opined by Mr. Parsons for the Claimant.

[104] The Tribunal determines that the market value of the fee simple taking under the Expropriation is $4,570,000.

[105] The Tribunal concludes that there is no basis in the circumstances of this case to apply the provisions of section 14(3) of the Act or to apply the before and after valuation methodology.

[106] The Tribunal determines that the Claimant's injurious affection claim should be valued at $1,321,061.

[107] The Tribunal concludes that there is no basis upon which the Claimant should be disentitled pursuant to section 33(1) of the Act to claim interest and in the Tribunal's view, the appropriate date from which to calculate interest is October 16, 2021, at the rate of 6%.

[108] The Tribunal declines to make any ruling with respect to the impact or legal effect of the settlement reached by Metrolinx and Shoppers Realty on undisclosed terms

ORDER

[109] **THE TRIBUNAL ORDERS THAT:**

(a) The amount of $4,570,000 shall be awarded to the Claimant as compensation for the market value of the fee simple lands taken under the Expropriation;

(b) The amount of $50,000 shall be awarded to the Claimant as compensation for the value of the temporary easement taken under the Expropriation;

(c) The amount of $1,321,061 shall be awarded to the Claimant as compensation for injurious affection arising from the Expropriation;

(d) Interest on the amounts described above in paragraph [109] (a), (b) and (c) at the rate of 6% per annum, calculated from October 16, 2021, shall be payable to the Claimant; and

(e) Costs to the Claimant will be payable in accordance with and subject to the provisions of section 32 of the *Expropriations Act* either as resolved by the Parties or as determined in a separate proceeding before the Tribunal scheduled in accordance with the Tribunal's Rules of Practice and Procedure, as directed by the Tribunal.

[110] In the event that the Parties have a dispute concerning (i) the amount of interest payable pursuant to the Order made in paragraph [109] (d) and/or the determination of costs pursuant to the Order made in paragraph [109] (e), they may contact the Tribunal to arrange for the adjudication of those matters. In that event, this Vice-Chair and Member shall remain seized of such adjudication.

"William R. Middleton"

WILLIAM R. MIDDLETON
VICE-CHAIR

"*Gwen Croser*"

GWEN CROSER
MEMBER