Memorandum

Date: October 4, 2017

To:	The Ontario Expropriation Association ("OEA") Membership
From:	The OEA Legislative Reform Committee
Subject:	Proposed Amendments to the *Expropriations Act*, R.S.O. 1990, c. E. 26 (the "Act")

The OEA first established the Legislative Reform Committee on November 20, 1998. As a result of a discussion paper which was issued to the OEA membership at the Fall Conference in 1999, the membership endorsed the proposed amendments by a majority vote. Those amendments dealt with non-controversial items and the 1999 memorandum outlining the proposed amendments is attached hereto for reference. We propose to carry forward some of these revisions in the current exercise.

In 2016, the OEA Legislative Reform Committee was tasked to consider amendments to the *Act* to address more substantive issues. In particular, the OEA Legislative Reform Committee has considered the following 8 issues:

1. Amendments to Sections 41 and 42 of the *Act*;
2. Inquiry Hearing costs;
3. The Publication of Inquiry Officer Reports;
4. Interim Costs under Section 32 of the *Act*;
5. The Interest Rate as prescribed by the *Act*;
6. Interest on Disturbance Damages;
7. Optional Summary Resolution for Small Claims at the Board of Negotiation*;*
8. Simplified Procedure for Small Claims in the Ontario Municipal Board Rules of Practice and Procedure (the "Board Rules");

Each of these issues will be addressed in the sequence of the above list, and amendments have been recommended for each issue.

Next Steps

a) The OEA Legislative Reform Committee request comments/suggestions from the OEA membership on the below issues and recommendations, sent to reformcommittee@oea.on.ca by **October 20, 2017.**

b) After we receive your comments, we will make a presentation at the 2017 OEA Fall Conference.

c) After the 2017 Fall Conference, the Legislative Reform Committee will post a survey on the OEA website. You will be asked to vote on each of the recommendations or alternatively provide further comments. You will be required to enter your OEA Website password in order to vote. Voting will be open until **December 1, 2017.**

1. Amendments to Sections 41 and 42 of the *Act* to Address Ambiguity

Current Legislative Provisions

Abandonment of expropriated land

41 *(1) Where, at any time before the compensation upon an expropriation is paid in full, the land or any part thereof is found to be unnecessary for the purposes of the expropriating authority or if it is found that a more limited estate or interest therein only is required, the expropriating authority shall so notify each owner of the abandoned land, or estate or interest, who is served or entitled to be served with the notice of expropriation, who may, by election in writing,*

(a) take the land, estate or interest back, in which case the owner has the right to compensation for consequential damages; or

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

Revesting

(2) Where all the owners elect to take the land, estate or interest back under clause (1) (a), the expropriating authority may, by an instrument signed by it and registered in the proper land registry office and served on each owner, declare that the land or part thereof is not required and is abandoned by the expropriating authority or that it is intended to retain only such limited estate or interest as is mentioned in the instrument, and thereupon,

(a) the land declared to be abandoned revests in the owner from whom it was expropriated and those entitled to claim under the owner; or

(b) in the event of a limited estate or interest only being retained by the expropriating authority, the land so revests subject to such limited estate or interest.

Disposal of expropriated lands

42 *Where lands that have been expropriated and are in the possession of the expropriating authority are found by the expropriating authority to be no longer required for its purposes, the expropriating authority shall not, without the approval of the approving authority, dispose of the lands without giving the owners from whom the land was taken the first*

chance to repurchase the lands on the terms of the best offer received by the expropriating authority.

Issues

There has long been uncertainty regarding the scope of certain terms utilized in sections 41 and 42. This includes the term "purpose" as used in both sections; "each owner" as used in section 41; and "dispose of the lands" as used in section 42:

- The proposed amendments would add a definition of "purpose" into subsection 1(1) of the *Expropriations Act*, with explicit reference to applicable constituting documents underlying an expropriation and taking guidance from the Ontario Court of Appeal's decision in *1739061 Ontario Inv. v. Hamilton-Wentworth District School Board*. This includes amendments to section 6 of the *Expropriations Act* to include a requirement that the expropriating authority's notice of intention include a description of the works for which land is being expropriated, among other amendments.
- The amendments also clarify that "owner", for the purposes of the election and revesting provisions of section 41, is the fee simple owner of the land expropriated. This avoids possible problems related to receiving the consent of any possible owner as defined elsewhere in the *Act*, and the amendments maintain the rights of other owners to continue claims for damages they may have suffered that arise as a result of the discontinued expropriation.
- The amendments also specify that any transfer of an interest in the expropriated lands, whether for value or not, is sufficient to engage that section's protection. This accords with the protective intent of the section and ensures less ability for expropriating authorities to find creative workarounds to the potential applicability of section 42.

The ability of an expropriating authority to exempt a disposition of previously expropriated lands from the protections of section 42 by applying to the approving authority to do so has been a source of concern for some time. As the approving authority is often the same as, or closely related to, the expropriating authority, this provision gives rise to perceptions of "self-dealing". To allay such concerns, exempting authority has been transferred to the Ontario Municipal Board [or Local Planning Appeal Tribunal, as it soon may be known].

Recommended Legislative Amendment

Addition to Interpretation/Definitions (subsection 1(1)):

"purpose", as included in sections 41 and 42 of this Act, are the purposes or objectives of the expropriating authority as set out in the application for approval pursuant to section 4, and the notice of intention to expropriate pursuant to section 6, of this Act and, where necessary, the grounds set out in the notice of grounds served pursuant to subsection 7(4) of this Act.

Addition/Revisions to section 6:

Notice of intention to expropriate

6 *(1) Upon applying for an approval under section 4, an expropriating authority shall serve a notice of its application for approval to expropriate upon each registered owner of the lands to be expropriated and shall publish the notice once a week for three consecutive weeks in a newspaper having general circulation in the locality in which the lands are situate.*

6(2) A notice of intention pursuant to subsection 6(1) shall contain:

> *(a) the name of the expropriating authority,*
> *(b) the description of the land,*
> *(c) the nature of the interest intended to be expropriated,*
> *(d) a description of the purpose for which the interest is required,*
> *(e) the name and address of the approving authority, and*
> *(g) a statement that a person affected by the proposed expropriation need not serve an objection to the expropriation in order to preserve the person's right to have the amount of compensation payable determined by the Board or the court, as the case may be.*

Revisions to Sections 41 and 42:

> ***Abandonment of expropriated land***
>
> *41 (1) Where, at any time before the compensation upon an expropriation is paid in full, the land or any part thereof is found to be unnecessary for the purposes of the expropriating authority or if it is found that a more limited estate or interest therein only is required, the expropriating authority shall so notify each fee simple owner of the abandoned land, or estate or interest, who may, by election in writing,*
>
> > *(a) take the land, estate or interest back, in which case the fee simple owner has the right to compensation for consequential damages; or*
> >
> > *(b) require the expropriating authority to retain the land, estate or interest, in which case the fee simple owner has the right to full compensation therefor.*
>
> ***Revesting***
>
> *(2) Where a fee simple owner elects to take the land, estate or interest back under clause (1) (a), the expropriating authority may, by an instrument signed by it and registered in the proper land registry office and served on each fee simple owner, declare that the land or part thereof is not required and is abandoned by the expropriating authority or that it is intended to retain only such limited estate or interest as is mentioned in the instrument, and thereupon,*
>
> > *(a) the land declared to be abandoned revests in the fee simple owner from whom it was expropriated, and those other owners entitled to claim compensation under*

this Act may proceed with their claims as if the land had been retained by the expropriating authority; or

(b) in the event of a limited estate or interest only being retained by the expropriating authority, the land so revests subject to such limited estate or interest.

Disposal of expropriated lands

42 Where lands that have been expropriated and are in the possession of the expropriating authority are found by the expropriating authority to be no longer required for its purposes, the expropriating authority shall not, without the approval of the Ontario Municipal Board [or Local Planning Appeal Tribunal], transfer ownership of or an interest in the lands, whether for value or not, without giving the fee simple owner, from whom the land was taken, the first chance to repurchase the lands on the terms of the best offer received by the expropriating authority.

2. Inquiry Hearing Costs

Current Legislative Provision

Costs
(10) The inquiry officer may recommend to the approving authority that a party to the inquiry be paid a fixed amount for the party's costs of the inquiry not to exceed $200 and the approving authority may in its discretion order the expropriating authority to pay such costs forthwith.

Issues

An Inquiry Hearing represents the land owner's only opportunity to resist a significant interference with their private property rights and an expropriation, which may not be fair, sound or reasonably necessary in light of the authority's objectives. The costs associated with making legal submissions and presenting expert evidence at a Hearing can quickly escalate beyond the $200 in fixed costs, prescribed by section 7(10) of the *Expropriations Act*.

The $200 cap bears no relation to modern billing rates for experts and lawyers, and it is a paltry sum when compared to the requirement that a statutory authority pay "the reasonable legal, appraisal and other costs actually incurred by the owner for the purposes of determining the compensation payable", pursuant to section 32(1) of the *Expropriations Act*. Historical commentaries on the Act dating back to the 1960s suggest that the $200 cap was too low then, particularly where the services of an expert consultant is required. Costs have only increased since the 1960s, and the expropriation process has become more complex, thus necessitating the input of more experts.

The Act could be amended to provide expropriated owners with their reasonable legal, appraisal and other costs actually incurred by the owner in connection with the Inquiry Hearing, but there are concerns that this approach might encourage land owners to unduly file requests for such hearings, and this approach would increase the already substantial cost of expropriations for authorities.

A more balanced approach would be to make these costs discretionary, and award them on the basis of reasonableness, as they are pursuant to section 15(10) of the Alberta *Expropriation Act*. This approach serves as a safeguard against frivolous requests for hearings. Leading decisions on the provision of costs for Inquiry Hearings in Alberta suggests that costs should reflect reasonable, economical and straightforward preparation and presentation necessary to properly present the owner's case to the board, but the owner should not be allowed costs incurred through overcaution or overpreparation, or costs which are a result of misconduct, omission or neglect on the part of the owner.

Recommended Legislative Amendment

Section 7(10) should be replaced with the wording similar to section 15(10) of the *Alberta Expropriation* Act as follows,

> *7(10) The expropriating authority shall pay the reasonable costs in connection with the inquiry*
>
> > *(a) of the inquiry officer, and*
> >
> > *(b) of the owner unless the inquiry officer determines that circumstances exist to justify the reduction or denial of costs.*

3. The Timing and Publication of Inquiry Officer Reports

Current Legislative Provisions

> ***Hearing by means of inquiry***
> *(5) The hearing shall be by means of an inquiry conducted by the inquiry officer who shall inquire into whether the taking of the lands or any part of the lands of an owner or of more than one owner of the same lands is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority.*
>
> ***Report***
> *(6) The inquiry officer shall give the approving authority and the parties to the hearing a report containing,*
>
> > *(a) a summary of the evidence and arguments advanced by the parties;*
> >
> > *(b) the inquiry officer's findings of fact; and*
> >
> > *(c) the inquiry officer's opinion on the merits of the application for approval, and the reasons for the opinion.*

Issues

An Inquiry Officer's Report contains a summary of the evidence advanced by the parties, as well as the inquiry officer's findings of fact and their opinion on the merits of the authority's proposed application to expropriate. Although the Approving Authority is not bound by the Report, it provides an opinion as to whether the expropriating authority should proceed with one of the

ultimate exercises of governmental authority. As a result of the state of the Expropriation Legislation in Ontario, the decision to expropriate is an administrative decision, and the Supreme Court has opined that an Approving Authority is neither a judicial nor a quasi-judicial body, but is invested with the widest discretionary power to determine, subject only to considering the Inquiry Officer's Report, whether an expropriation should proceed.

As a result, the Inquiry Hearing may not be considered to be a "public" hearing, and these reports do not form part of the public record. They are only made available to the parties to the hearing, and third parties do not have a right to obtain copies of the reports. Availability of these reports to the public is ad hoc at present. Further to this, there have even been instances in which Inquiry Officers refuse requests to disclose copies of their reports. This represents an access to justice issue, as certain parties, including large municipalities, will have access to a large number of reports, compared to the few available to expropriated owners.

Refusing to disclose these reports because the decision to approve an expropriation may be viewed as administrative in nature is an unduly technical approach, given that the authority must consider these reports and copies are already "public" to the extent that they are disseminated to the parties. These reports also include many of the same indicia as decisions from other courts and tribunals and are generated as the result of an evidentiary hearing in a publicly funded process. Moreover, expropriation legislation in Alberta, Manitoba and British Columbia includes provisions making these hearings public, and legislation in Alberta explicitly allows third parties to access the respective reports Moreover, Alberta Act also requires that the inquiry officer complete their report within 30 days of their appointment. We recommend that this period be extended to 60 days from the conclusion of the hearing, to allow more flexibility, while ensuring that this process proceeds expeditiously.

This approach eliminates the overly technical approach of withholding reports on the ground that inquiry hearings are not public, and it provides equal access to all parties, including the tax payers, who funded this process. A reasonable solution to this problem would be to adopt similar language contained in the Alberta *Expropriation Act*.

Recommended Legislative Amendment

Section 7(5) should be amended to include wording similar to section 15(7) of the Alberta *Expropriation Act*, as follows,

> ***Hearing by inquiry officer***
> *(5) The hearing shall be held in public by the inquiry officer who shall inquire into whether the taking of the lands or any part of the lands of an owner or of more than one owner of the same lands is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority.*
>
> A new section should be added following section 7(6), including wording found in 16(2) of the *Alberta Expropriation Act*, as follows,
>
> ***Report***
> *(6) The inquiry officer shall within 60 days from the conclusion of the inquiry hearing give the approving authority and the parties to the hearing a report containing,*

(a) a summary of the evidence and arguments advanced by the parties;

(b) the inquiry officer's findings of fact; and

(c) the inquiry officer's opinion on the merits of the application for approval, and the reasons for the opinion.

(6.1) The inquiry officer shall make a copy of their report available on request to any person at reasonable cost.

4. Interim Costs under Section 32 of the *Act*

Current Legislative Provisions

Offer

25 (1) 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,

(a) serve upon the registered owner,

(i) an offer of an amount in full compensation for the registered owner's interest, 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) 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 and is subject to adjustment in accordance with any compensation that may subsequently be determined in accordance with this Act or agreed upon…

Costs
32 (1) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Board and the amount awarded by the Board is 85 per cent, or more, of the amount offered by the statutory authority, the Board 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).

Idem
(2) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Board and the amount awarded by the Board is less than 85 per cent of the amount offered by the statutory authority, the Board 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.

Issues

The costs provision under section 32 of the *Expropriations Act* do not currently contemplate the provision of preliminary or interim costs, despite significant and increasing expert and legal costs associated with expropriation given a complex regulatory structure for land use and development. As a result, land owners are faced with a number of unsatisfactory options. They can self-finance, seek third party financing, ask for payment deferrals from experts and lawyers or, most frequently, rely on their section 25 payment to cover costs.

Section 25 payments, however, are not available to non-land owners that are expropriated, such as commercial tenants, including small businesses. Moreover, not all experts or lawyers will accept deferred fees, and even if they do, such payment terms may give rise to claims of impartiality or bias in their work. The recovery of this financing cost as a disturbance damage may be contentious and still not fully indemnify the owner. Self-financing or third party financing is also not an option for every party as financial means and credit issues vary with each owner's financial status.

Historical commentaries on the Act have suggested that since the purpose of compensation is to make the expropriated owner economically whole, they should be fully reimbursed for the legal and expert costs, and should not be placed in a position where they are afraid to seek this advice because they are apprehensive of the cost. These commentaries have also recommended that an owner be entitled to receive interim costs from the expropriating authority from time to time during the determination of the compensation.

Alberta and British Columbia have both developed an interim cost structure. Alberta has two separate costs provisions. One which provides the "reasonable costs" associated with obtaining an independent appraisal and respective legal costs for the purpose of determining whether to accept a proposed settlement by an authority. The second grants the reasonable legal, appraisal and other costs actually incurred by the owner for the purpose of determining the compensation payable, unless the Board determines that special circumstances exist to justify the reduction or denial of costs.

Alberta case law has interpreted these provisions to confer authority on the Land Compensation Board to award interim costs based on inherent principles of fairness, and this approach levels a playing field, that might otherwise put Claimants with limited resources at an unfair disadvantage during lengthy expropriation proceedings.

British Columbia has a specific statutory provision in section 48 of their *Expropriation Act* for "Advanced payment of costs", thereby allowing the owner to submit a written bill to the expropriating authority consisting of reasonable legal, appraisal and other costs from time to time, as well as providing a mechanism to have these bills reviewed by the court.

The key disadvantage associated with these extra-provincial approaches is the potential for increasing costs arising from preparation and negotiation of interim bills of costs or overpayments to the expropriating authority. Since the expropriating authority ultimately pays reasonable costs, this risk appears to be small. Moreover, in Alberta caselaw, the Board has awarded reduced costs depending on the risk of overpayment ranging from 50%-70% of the claimed interim costs. In British Columbia, the advanced payment of costs provision explicitly provides mechanisms to review a bill of costs and for a deduction of overpayments.

The specific statutory language for advance payments, assessment of these amounts and for the recovery of overpayments contained in the British Columbia *Expropriation Act*, provides a balanced approach to the issue of interim costs, but one that will require some adaption to the functionality of the Ontario Municipal Board.

Recommended Legislative Amendments

A new section should be added following section 32, including wording found in section 48 of the British Columbia *Expropriation Act*, as follows,

> ***Advance payment of costs***
> *32.1 (1) An owner may, from time to time after a notice of expropriation has been served on the owner but before the hearing has begun, submit a written bill to the statutory authority consisting of the reasonable legal, appraisal and other costs that have been incurred by the owner up to the time the bill is submitted.*
>
> *(2) On receiving a bill under subsection (1), the statutory authority must either promptly pay the bill or apply to have the bill reviewed by the Ontario Municipal Board.*
>
> *(3) If the statutory authority fails to comply with subsection (2), the owner who submitted the bill may apply to the Ontario Municipal Board to have the bill reviewed.*
>
> *(4) At a review under subsection (2) or (3), the Board must, after taking into account all relevant circumstances, assess the reasonableness of the bill and may make an order with respect to its payment, accordingly.*
>
> *(5) If the amount of costs paid under this section exceeds the amount of costs awarded under section 32, the statutory authority may*
>
> > *(a) deduct the amount of the difference from any amounts of compensation then outstanding, and*
> >
> > *(b) if all compensation has been paid, the statutory authority may seek an order from the Board directing the owner to pay the excess amount to the statutory authority.*

5. The Interest Rate as Prescribed by the *Act*

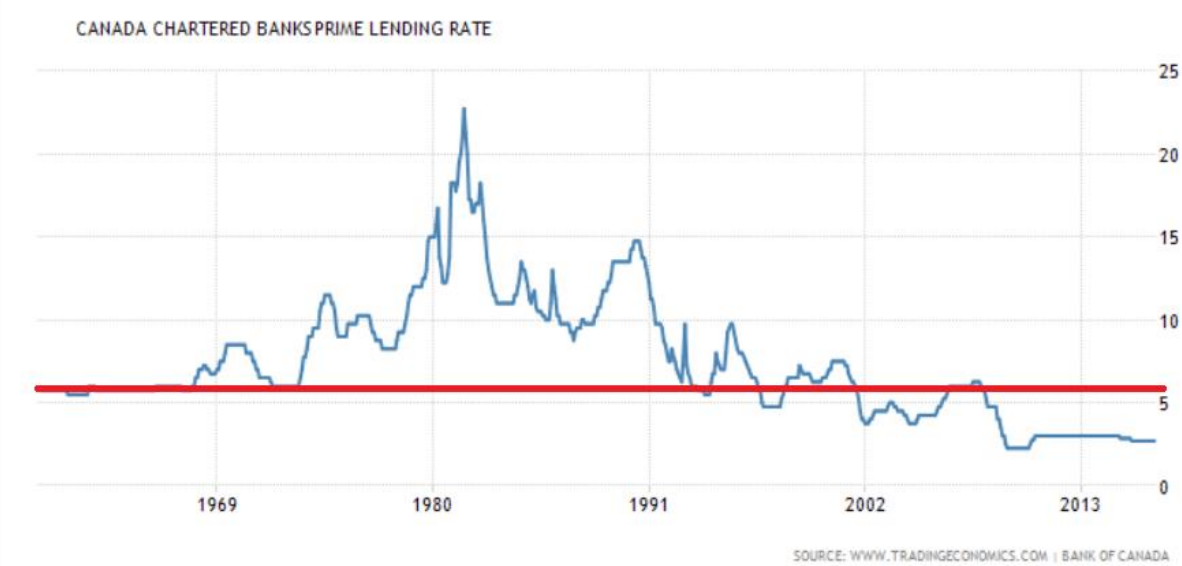
Current Legislative Provisions

> ***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.*
>
> *(2) Subject to subsection (3), where the Board 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.*
>
> *(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.*
>
> *(4) Where the Board is of the opinion that any delay in determining compensation is attributable in whole or in part to the expropriating authority, the Board 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.*

Issues

Section 33 of Ontario's *Expropriations Act* applies a 6% interest rate to the outstanding amount owed on the market value of the owner's interest in the land and any outstanding amount owed for injurious affection. The 6% interest runs from the date the owner ceases to reside on or make productive use of the lands to the date of payment.

The purpose of awarding interest, according to the 1967 Ontario Law Reform Commission Report and subsequent case law, is "compensation for the temporary loss of capital". A set interest rate of 6% only achieves that goal when the cost to borrow money is approximately 6%. Any fluctuations to interest rates inherently create an inequitable situation for either the authority or the claimant. The below graph illustrates this point from 1967 to present.



As stated by Eric Todd in the *Law of Expropriation and Compensation in Canada*, "such statutorily fixed rates are undesirable because of the unlikelihood that they will be amended with sufficient frequency, if at all, to keep them in line with current market rates". Indeed, this rate has not been revised since the Act was enacted.

The prime interest rate is the interest rate charged to the most credit-worthy borrowers, i.e. the interest rate charged by chartered banks. This information is published on a monthly basis on the Bank of Canada Website.

http://www.bankofcanada.ca/wp-content/uploads/2010/09/selected_historical_v122495.pdf

Most claimants would not be able to qualify for a loan with an interest rate equivalent to the prime bank rate, since that rate does not factor in any risk of default. Therefore, in order to meet the goal of compensating for the temporary loss of capital, the interest rate would have to include a buffer that would reflect the average claimant.

The 1967 Report recommended that the rate should not be fixed but rather tied in with prevailing interest rates, such as 0.5% above the *National Housing Act* rate for ordinary home loans (i.e. the 1967 Report recommended that interest rates be tied with the bank rate with a small buffer). This recommendation was not adopted by the legislation.

It was also recognized by the Committee there are few incentives to induce claimants to accept Section 25 payments and to move through the expropriation process in a timely manner, particularly where prevailing interest rates are well below the fixed statutory rate. As such, we have also recommended that authorities be provided the opportunity to pay those funds into court to halt interest from running on the section 25 payment.

In British Columbia, interest is quantified as the prime lending rate of the banker to the government. An additional 5% interest is awarded if the amount of the offer is less than 90% of the compensation awarded, which incentivizes the authority to provide reasonable offers.

Recommended Legislative Amendments

Prime Lending Rate

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, payable at an average annual rate of 1% above the prime rate as published by the Bank of Canada (V122495)and calculated on a simple basis from the date the owner ceases to reside on or make productive use of the lands.

(2) Subject to subsection (3), where the Board 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 a rate less than the rate of interest as set out in subsection (1) as appears reasonable.

(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.

(4) Where the Board is of the opinion that any delay in determining compensation is attributable in whole or in part to the expropriating authority, the Board may order the expropriating authority to pay to the owner interest exceeding the rate of interest as set out in subsection (1) but not exceeding six percent above the rate of interest as set out in subsection (1).

*Note: there are also corresponding revisions required to subsections 20(a)(i) and 38.

A new section 38.1 which allows payment into court of section 25 funds that have not been accepted by the registered owner:

38.1 (1) Where the registered owner has been offered an amount of compensation under subsection 25(1), but has not accepted that offer within six months of the date of service of the offer, the statutory authority may, without an order, pay the amount of the offered compensation into the office of the Accountant of the Superior Court of Justice, together with interest in accordance with subsection 33(1) to the date of payment into court.

(2) Upon an application for payment out of court of compensation paid into court, a judge may direct that such notice of the application be given by publication or otherwise as the judge considers proper and may direct the trial of an issue or make such order with respect to the payment out of court of compensation and as to costs as the judge considers reasonable.

6. Interest on Disturbance Damages

Current Legislative Provisions

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.

Issues

It appears that interest cannot be applied to disturbance damages in Ontario. Currently, the wording of s. 33 of the *Expropriations Act* appears to allow the awarding of interest on market value and injurious affection only, excluding its application to disturbance damages.

However, like market value of an expropriated property, when an expropriated landowner is out-of-pocket for disturbance damages, that also constitutes loss of a capital asset that the landowner could earn interest on if it were otherwise invested. The payment of interest on disturbance damages from the date they are incurred would therefore support the legislative aim of making the landowner whole, and has been called "a more equitable and logical" approach.[1]

In *Pugliese v Hamilton,* (1972) 3 LCR 55 (ONLCB), the Board awarded payment of interest at 6% on the expropriated landowners' disturbance damages from dates up to a year prior to the hearing. The Board maintained that the *Expropriations Act* should be construed so as to provide a 6% interest on all facets of compensation, unless excluded by the *Act*. Further, the Board stated that "if a date can be ascertained from the evidence, interest on damages should run from the last date they were sustained".[2] Finally, the Board supported the view that the interest on damages should run from the date of the award where the damages are ascertained but have not yet been incurred.

Other jurisdictions allow interest to accrue on disturbance damages. For example, The Federal Expropriation Act allows interest on compensation payable in respect of an expropriated interest or right, which includes "the holder's disturbance" under subsection 26(3)(ii).

Similarly, the British Columbia *Expropriations Act* requires that interest is payable on "(a) on the market value portion of compensation, from the date that the owner gave up possession, and (b) <u>on any other amount, from (i) the date the loss or damages were incurred</u>, or (ii) any other date that the court considers reasonable."

Recommended Legislative Amendments

Carrying forward the revisions set out in above Section 5, section 33 should be revised as follows:

33 (1) Subject to subsection 25 (4), the owner of lands expropriated is entitled to be paid interest on:

(a) 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, <u>payable at an average annual rate of 1% above the prime rate as published by the Bank of Canada (V122495)</u> and calculated on a <u>simple</u> basis from the date the owner ceases to reside on or make productive use of the lands; and

[1] Eric Todd, *Law of Expropriation and Compensation in Canada* at 477.
[2] *Pugliese*, supra note 24 at para 62.

(b) damages for disturbance to which the owner is entitled, outstanding from time to time, payable at an average annual rate of 1% above the prime rate as published by the Bank of Canada (V122495) and calculated on a simple basis from the date any such damages were incurred.

7. Optional Dispute Summary Resolution of Small Claims at the Board of Negotiation

Current Legislative Provisions

Choice of proceedings, negotiation or arbitration

26. Where the statutory authority and the owner have not agreed upon the compensation payable under this Act and, in the case of injurious affection, section 22 has been complied with, or, in the case of expropriation, section 25 has been complied with, or the time for complying therewith has expired,

(a) the statutory authority or the owner may serve notice of negotiation upon the other of them and upon the board of negotiation stating that the authority or the owner, as the case may be, requires the compensation to be negotiated under section 27; or

(b) where the statutory authority and the owner have agreed to dispense with negotiation proceedings, the statutory authority or the owner may serve notice of arbitration upon the other of them and upon the Board to have the compensation determined by arbitration. R.S.O. 1990, c. E.26, s. 26.

…

Negotiation of amount of compensation

27.(4) In any case in which a notice of negotiation is served, the board of negotiation shall, upon reasonable notice to the statutory authority and the owner, meet with them and, without prejudice to any subsequent proceedings, proceed in a summary and informal manner to negotiate a settlement of the compensation.

…

Where no settlement reached

(6) If the negotiation proceedings do not result in a settlement of the compensation, the statutory authority or the owner may serve notice of arbitration upon the other of them, and upon the Board, stating that the authority or the owner, as the case may be, requires the compensation to be determined by arbitration as though the negotiation proceedings had not taken place.

Issues

There is a perception that the time and cost of resolving small matters is out of proportion to the amounts and matters in dispute. The question then arises: How should the legislation and/or rules be amended to make the resolution of small expropriation cases faster and less expensive? One

possible solution is to amend the *Expropriations Act* to allow the Board of Negotiation to summarily adjudicate small disputes.

Currently, section 26 of the *Expropriations Act* permits either the statutory authority or the owner to require that compensation be negotiated. Section 27 of the *Expropriations Act* sets out the parameters of the negotiation proceedings. The Board of Negotiation, sitting as two member panels, meets with the statutory authority and the owner and, without prejudice to any subsequent proceedings, proceeds in a summary and informal manner to negotiate a settlement of the compensation. If the negotiation proceedings do not result in a settlement of the compensation, the statutory authority or the owner may proceed through the arbitration process as though the negotiation proceedings had not taken place.

The proposed amendment would allow the Board of Negotiation to narrow issues and finally determine small disputes, hence giving land owners their "day in court" while bringing matters to a cost-effective conclusion for authorities. We propose that it be permissive of both the Board of Negotiation and the Parties, that the limit be set at $100,000, and given the nature of the summary determination, that there be restrictions on appeals. There is some precedent for this in Ontario. In Small Claims court, at a settlement conference, the judge may order final judgment where the matter in dispute is for an amount under the appealable limit and the parties file a consent indicating they wish to obtain a final determination of the matter at the settlement conference if a mediated settlement is not reached.

We are proposing to add a section that provides for the following:

IF:

(a) the amount offered by the statutory authority to the owner pursuant to section 25 of the Act is less than $100,000; and
(b) the negotiation proceedings do not result in a settlement of the compensation; and
(c) the statutory authority or the owner may file a consent signed by both the statutory authority and the owner indicating that they wish to obtain a final determination of all or part of the matter before the Board of Negotiation,

THEN

(a) the Board of Negotiation may (not must, as the Board may have insufficient material before it to make a determination) in a summary fashion determine any compensation and interest, and any other matter required to be determined. The Board may decline jurisdiction if they do not have sufficient information with which to make a determination;
(b) this determination cannot be appealed pursuant to section 31 of the Act;
(c) the Board of Negotiation 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 compensation payable, and may fix the costs in a lump sum or may order that the determination of the amount of such costs shall be referred to either the Ontario Municipal Board [or Local Planning Appeal Tribunal] and

assessment officer who shall assess and allow the costs in accordance with this subsection and the tariffs and rules prescribed under clause 44(d).

Recommended Legislative Amendments

Include a new subsection 27(6.1):

(6.1) The Board of Negotiation may, but is not required to, determine in a summary fashion any compensation and interest, and any other matter required to be determined, all of which may not be appealed except as to a matter of law pursuant to section 31 of the Act, provided that:

(a) the amount offered by the statutory authority to the owner pursuant to section 25 of the Act is less than $100,000;

(b) the negotiation proceedings do not result in a settlement of the compensation;

(c) the statutory authority or the owner may file a consent signed by both the statutory authority and the owner indicating that they wish to obtain a final determination of all or part of the matter before the Board of Negotiation;

and the Board of Negotiation 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 compensation payable, and may fix the costs in a lump sum or may order that the determination of the amount of such costs shall be referred to either the Ontario Municipal Board [or Local Planning Appeal Tribunal] or to an assessment officer or the Ontario Municipal Board or Local Planning Appeal Tribunal who shall assess and allow the costs in accordance with this subsection and the tariffs and rules prescribed under clause 44(d).

8. .Providing for Simplified Rules of Procedure in for Small Claims

Part II of the Ontario Municipal Board's Rules of Practice set out the procedural framework for the adjudication of expropriations cases before the Ontario Municipal Board.

Issue

There is a perception that the time and cost of resolving small matters is out of proportion to the amounts and matters in dispute. The question then arises: How should the legislation and/or rules be amended to make the resolution of small expropriation cases faster and less expensive? One possible solution is to amend rules of practice to allow for a simplified procedure to govern the adjudication of small disputes.

Arbitration occurs in proceedings before the Ontario Municipal Board. We acknowledge that Bill 139, the *Building Better Communities and Conserving Watersheds Act, 2017* proposes to replace the Ontario Municipal Board with the Local Planning Appeal Tribunal. Regardless of the name of the tribunal that adjudicates expropriation disputes, some form of rules of practice will be required. The starting point for these purposes remains the existing and in force Ontario Municipal Board

rules. Part II of these rules, sections 120 to 142, sets out a common set of procedural rules governing the adjudication of expropriation matters before the Municipal Board

In general, the rules of civil procedure in Ontario streams cases based on the monetary value of the claim, with cases of between $25,000 and $100,000 being heard in Superior Court under simplified rules of procedure, and cases beyond $100,000 being heard under the normal rules of practice. The Board rules could be modified to incorporate a simplified type of procedure, modeled in part after Ontario's Rules of Civil Procedure, Rule 76.

Proposed Amendments to the Board Rules

SIMPLIFIED PROCESS

143 Simplified Rules *A simplified process for the arbitration of matters is set out as rules 143.1 to 143.7, collectively referred to herein as "this Rule".*

143.1 Rules that Apply *The rules that apply to an arbitration apply to an arbitration that is proceeding under this Rule, unless the rules set out in this Rule provide otherwise.*

143.2 When Mandatory *The procedure set out in this Rule shall be used in an arbitration if the following conditions are satisfied:*

(1) The total of the amount claimed is $100,000 or less exclusive of interest and costs;

(2) If there are two or more claimants, the procedure set out in this Rule shall be used if each claimant's claim, considered separately, meets the requirements of subrule (1).

143.3 Affidavit of Documents *A party to an arbitration under this Rule shall, within 45 days after the service of a Reply, serve on every other party, an affidavit of documents disclosing to the full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party's possession, control or power, together with copies of the documents referred to in Schedule A of the affidavit of documents.*

143.4 Limitations on Oral Discovery *No party shall, in conducting oral examinations for discovery in relation to an arbitration proceeding under this Rule, exceed a total of two hours of examination.*

143.5 Settlement Discussion and Documentary Disclosure *Within 90 days after the filing of the first Reply, the parties shall, in a meeting or telephone call, consider whether, (a) all documents relevant to any matter in issue have been disclosed; and (b) settlement of any or all issues is possible.*

143.6 Notice of Readiness for Mediation Conference *The claimant shall, within 180 days after the first Reply is filed, set the matter down for a mediation conference*

by serving a notice of readiness for mediation on every other party to the Arbitration. If the claimant fails to do so, any other party or the Board may do so.

143.7 <u>Mediation Conference</u> *The Board shall serve notice of the mediation conference at least 60 days before the scheduled date. At least 14 days before the mediation conference, each party shall:*

(a) file,

(i) a copy of the party's affidavit of documents and copies of the documents relied on for the party's claim or defence,

(ii) a copy of any expert report, and

(iii) any other material necessary for the conference; and

(b) deliver a two-page statement setting out the issues and the party's position with respect to them.

143.8 <u>Arbitration Date</u> *At the conclusion of the mediation conference, the member shall fix a date for arbitration and may make any other order that the member could make at a Prehearing Conference.*

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