

ISSUE DATE:

**March 27, 2012**



LC110027

Ontario  
Ontario Municipal Board  
Commission des affaires municipales de l'Ontario

Shell Lake Developments Ltd., Stanley Square Construction Ltd., and Promotion Potentials Holdings Ltd., (operating as Barron's Lake Development) (Claimants) have made an application to the Ontario Municipal Board under section 26 of the *Expropriations Act*, R.S.O. 1990, c. E.26, as amended, for determination by this Board of the compensation to be paid by the Minister of Transportation (Respondent) for land known as Part of Lot 29, Concession 4, Geographic Township of Baxter, Township of Georgian Bay, District Municipality of Muskoka  
OMB File No.: LC110027

**APPEARANCES:**

**Parties**

Shell Lake Developments Limited,  
Stanley Square Construction Limited,  
and Promotion Potentials Holdings Limited,  
operating as Barron's Lake Development  
(Collectively the "Claimants")

Her Majesty the Queen in Right of Ontario  
as Represented by the Minister of  
Transportation  
(the "Respondent")

**Counsel**

Shane Rayman and Greg Bowley

Dona Salmon and Ananthan Sinnaduri

**DECISION DELIVERED BY HAROLD S. GOLDKIND AND ORDER OF THE BOARD**

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**Overview**

[1] The Respondent has brought a motion to strike parts of the Claimants' Notice of Arbitration and Statement of Claim (the "Claim") that relate to its claim for damages for injurious affection arising from an expropriation by the Respondent of part of the Claimants' Lands in 1991. In effect, the motion is to strike the Claimants' claim with respect to the expropriation that took place in 1991.

[2] By registration of Expropriation Plan 167161, the Respondent expropriated 4.14 hectares of the Claimants' Land on December 23, 1991 (the "Expropriated

Parcel”), and took possession of it on April 13, 1992, for part of the right of way necessary for the upgrading and development of Highway 69/400.

[3] Notwithstanding paragraph 2 of the Notice of Motion, the Respondent abandoned its request to strike portions of the Claim for injurious affection arising from the Respondent’s closure of access to the Claimants’ property in 2009.

[4] The basis of the Respondent’s motion is that:

- a) The claim for injurious affection based on the 1991 expropriation is barred by Subsection 22(1) of the *Expropriation Act*, which places a one-year limit on making a claim “after the damage was sustained or after it became known to the person” who would otherwise be entitled to make a claim.
- b) The claim is barred by the terms of the April 13, 1992 agreement wherein the Respondent and Claimants fixed the consideration and other terms of the expropriation including the issue of injurious affection.

## **Background**

[5] The Claimants own about 390 acres of land (the “Claimants’ Land”) in the Township of Georgian Bay in the District of Muskoka, to the west of Highway 69/400 and about one kilometre north of the Town of Port Severn. The Claimants’ Land contains a lake and is close to Georgian Bay.

[6] Part of the Claimants’ Land is adjacent to Highway 69/400 and had a field entrance onto the Highway. The Respondent’s taking of the Expropriated Parcel in 1991 and the following 1992 agreement resulted in the Claimants’ Land retaining its field entrance onto Highway 69/400.

[7] On November 1, 2009, the Respondent closed this field entrance by proceedings under the *Expropriation Act* and the *Public Transportation and Highway Improvement Act*. The Claimants allege the loss of the benefit of three accesses to Highway 69/400 and the resulting land-locking of the Claimants’ Land.

[8] The Claimants allege in their Statement of Claim that, but for the Respondent’s scheme of constructing a controlled access highway with resulting

planning, preparation and associated development restrictions commenced in the 1970s, the Claimants' Land would have been developed with cottage subdivisions in the 1980s with vehicular access off Highway 69. The Claimants maintain that the cottage use would have been the highest and best use of the Claimants' Land. The Claimants claim compensation for injurious affection to the remaining portion of the Claimants' Land following the expropriation of the Expropriated Parcel on December 23, 1991, and closure of access in 2009. The Respondent seeks to strike the claim with respect to the 1991 expropriation.

[9] The Claimants also allege that as a result of the closure of access to the Claimants' Land on November 1, 2009, the land is landlocked and its highest and best use is for a natural site, accessible only by foot.

[10] The Respondent does not deny the Claimants' right to claim compensation for injurious affection caused by the Respondent's closure of access to the Claimants' Land from Highway 69/400 on November 1, 2009.

[11] The Claimants maintain that by virtue of the April 13, 1992, agreement, the existing field entrance was reconstructed by the Respondent. The Claimants allege also that in 1979, the Respondent undertook to provide a replacement access in the event that the existing field entrance was closed by the Respondent. The Claimants maintain that such access and the Respondent's undertaking for its replacement were essential to their entering into the above agreement.

[12] The Claimants maintain that the Respondent's closure of the field entrance on November 1, 2009, was a repudiation of an essential element upon which the above agreement was based, entitling the Claimants at that point to claim for injurious affection from the commencement of the Respondent's highway scheme, prior to 1980. The Respondent views the Claimants' claim as a "collateral attack" on an expropriation that has been contractually determined and is now barred by statute. However, the Claimants maintain that the Respondent had originally planned to close direct access to the Claimants' Land with the 1991 taking, but changed its position in order to avoid a claim for injurious affection for land-locking this parcel. The Claimants submit that the Respondent has received this financial benefit but has arbitrarily closed the access in 2009. The Claimants maintain that the Respondent seeks to deny the Claimants the

right to injurious affection it would have otherwise been able to claim in 1991 if the access was then closed.

[13] The Claimants allege also that the 2009 closure of access is part of the Respondent's continuing highway development process to restrict development in proximity to the planned route for Highway 69/400, extending back to the 1970s and culminating in the 2009 closure. The Claimants maintain that the Respondent's highway development process has influenced municipal planning decisions from the 1970s with the result that the development of the Claimants' Land has been blocked in an effort to protect the highway route.

[14] The Claimants allege that, but for the Respondent's highway development and the various facets of this process, the Claimant's land would have received development and sub-division approval for cottages in the 1970s and early 1980s, and would have been developed as such shortly following such approvals; whereas now this land is landlocked and has no development potential without the Respondent installing alternative highway access, which it is alleged the Respondent refuses to do.

## **Analysis**

[15] Subsection 22(1) of the *Expropriations Act* provides a one-year cut-off date from the date the damage was sustained or after it became known, for making a claim for injurious affection.

[16] The denial of a claim based on the expiry of a limitation period is final and deprives the claimant of any right to compensation. Such a determination is not made lightly and should only be used when the circumstances present no other alternative. The Board must be extremely cautious in entertaining such a motion to strike, especially at such an early stage in the proceedings when the Claimants may not as yet have had an opportunity to fully explore or develop all of the details of their case. For example, in this case, it became necessary for the Claimants to amend their claim based on information recently obtained from the Respondent. Also, the long time period over which events evolved and the large number of events and participants presented the Respondent with challenges in investigating its records and resulted in a long delay in bringing this motion. These facts also create similar challenges for the Claimants. Accordingly, the Claimants must be given a generous opportunity to develop their case.

[17] The Claimants maintain that the Respondent's closure of their field entrance in 2009 is a repudiation of the April 13, 1992 written agreement, setting out of terms of the expropriation of the right of way in 1991. They maintain that such repudiation removes the application of Subsection 22(1) of the *Expropriations Act* and the finality provision of the 1992 written agreement (the 1992 Agreement"). This is further complicated by the alleged undertaking of the Respondent to construct a new access road and the failure to carry this out.

[18] The Claimants rely on the decision of the Supreme Court of Canada in the case of *Hill v. Nova Scotia (Attorney General)* [1997], S.C.J. No. 7. That case involved the expropriation by the Province of Nova Scotia of a strip of land through the Hill farm for a controlled access highway, thereby bisecting the farm. The province authorized Hill to cross the highway and built ramps, fences and gates to facilitate the crossing of the highway by farm animals and equipment. After 27 years, the province denied access across the highway. Hill had signed a release of the province as part of the original expropriation agreement and the province maintained that there was no written permission given to cross the highway.

[19] The court held that the province gave Hill an "equitable permission" to cross the highway and this is an interest in land. It found that monetary consideration for the land acquisition would have been greater, but for this permission to cross, and that the permission formed an "integral and essential part of the compensation paid for this land." The court held that in these circumstances, the release signed by Hill did not constitute a bar to a claim for compensation.

[20] The Claimants maintain that the decision in the Hill case supports its position that the Respondent's withdrawal of access to Highway 69/400 is a repudiation of the 1992 expropriation agreement, entitling the Claimants to treat the Respondent's contractual undertaking as to finality as void and to now maintain its claim for injurious affection.

[21] The Claimants also submit that the limitation period in subsection 22(1) of the *Expropriations Act* did not commence with the 1991 taking of the land, but rather when the defining part of the injury took place in 2009 with the closure of access. They maintain that the closure of access in 2009 landlocked the Claimants' Land and is a part

of the continuous process that has been ongoing since the commencement of the implementation of the Respondent's scheme in the 1970s. In summary, for the Claimants, the closure is the defining element of injury in a continuous series of interrelated acts in relationship to the expropriation of part of the Claimants' Land and its value. For the Claimants, the limitation period commences in 2009 when the totality of the injury crystalized and it becomes possible to measure the effect of the continuum of the expropriation process.

[22] The Board finds that the Claimants have raised arguments in relation to its claim based on the 1991 and 2009 expropriation events that are worthy of adjudication. The Board is not satisfied that the one year limitation period conclusively began to run in 1991 and, based on Hill, supra, the failure by the Respondent to fulfill its access undertaking may prevent the finality provision in the 1992 Agreement from being a bar to the injurious affection claim being advanced at this time. A full hearing on the merits is required to properly assess the positions of the Parties.

[23] For the above reasons, the Respondent's motion is dismissed.

[24] So Orders the Board.

"Harold S. Goldkind"

HAROLD S. GOLDKIND  
MEMBER