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

Dale McKean and Mary McKean (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 costs associated with solicitor accounts.
O.M.B. File No.: L050037

APPEARANCES:

Parties

Dale and Mary McLean

Ministry of Transportation

Counsel

M. Valee

E. Finn,
R. McLachlan, Student-at-law

DECISION OF THE BOARD DELIVERED BY K. J. HUSSEY AND ORDER OF THE BOARD

This is an application by Dale and Mary McKean (“Claimants”) to determine compensation under Section 32 of the *Expropriations Act*. The Claimants’ farmland was expropriated by the Ministry of Transportation of Ontario (“MTO”) following (1) the registration of the Plan of Expropriation as part of a land assembly required by the MTO for realignment of a portion of Highway 26; and (2) Superior Court of Ontario proceedings that, among other things, determined what land was available for expropriation by the MTO (the “Court Proceedings”). Through the Court Proceedings, the MTO sought and obtained a declaration that portions of what the McKeanes had believed was their land were actually public roads that had never been opened.

In these proceedings, the McKeanes seek recompense from the MTO for costs incurred in determining compensation for the expropriation of their land.

FACTS:

The Board heard evidence from Mark Baker, a partner at Baker and Company, who represented the McKeens in the Court Proceedings. Mr. Baker was cross-examined by the MTO. No witness appeared for the MTO.

The evidence is that in December 2002, the MTO registered a Plan of Expropriation for the taking of part of the McKeens' farm. The purpose was to re-align a portion of Highway 26 for which a strip of the McKean's farm was necessary.

Mr. McKean's farm had been in his family since 1884. All of the lands had been fenced and farmed since that time. In 1978, Mr. McKean acquired what he believed was the full 70 acres of the land, on which he carried on a beef and cattle operation. The farm was part of an historic plan of subdivision, recorded by the Barry Registry Office Plan Index in 1866 as Plan 110.

Plan 110 divided the property into a number of blocks separated by municipal road allowances. The plan had, since 1866, never been developed and the roads were never opened. The effect of the plan of subdivision was to vest the road allowances in the municipality and rather than the McKean family.

For more than 25 years, Mr. McKean farmed the entire 70-acre parcel he believed he had purchased. He paid municipal taxes on the entire property. He was granted a mortgage on the entire property.

Having previously registered a Plan of Expropriation to take part of the McKeens' land, in 2003, the MTO brought the Court Proceedings. The Court Proceedings were to determine whether the MTO would assume the farmlands in question under section 8 of the *Public Transportation and Highway Improvement Act, R.S.O. 1990 Chapter P.50* or whether the MTO was instead required to expropriate or otherwise acquire certain lands from the McKeens. The McKeens opposed the application.

Mr. Baker testified that the McKeens, a family of ordinary means, had tried unsuccessfully to have the MTO withdraw its application. The MTO was reluctant to settle because it would benefit from the precedential value of a Court Order approving its application. According to Mr. Baker, MTO had three legal counsel assigned to these

complex legal issues of the Court Proceedings, which involved plans and documents dating back to the 19th Century.

Based on these documents and the case the MTO presented, the Superior Court held that the McKears' property was subject to an historic registered Plan of Subdivision with the effect that the undeveloped road allowances on the McKears' entire property were deemed to be common and public highways vested in the corporations of the Township of Clearview and the Town of Collingwood.

As a result, the MTO was no longer required to expropriate the entire strip of the McKears' farm land in order to realign highway 26. Nor was the MTO required to compensate the McKears for the entire strip. Instead, that strip was legally (although not physically) divided up by a grid of highways that had never been developed, but were deemed common and public highways. These portions of the land could simply be assumed by the public authority. The McKears had requested that the MTO restrict its application to the narrow strip of land required for the highway realignment. The MTO refused. As a result, the undeveloped common and public highways did not just fragment the strip of the McKears' farm necessary for the highway, but also fragmented the remainder of the farm.

Mr. Baker stated that the result of the Court Proceedings was that the McKears would effectively lose not only the land that was originally the subject of the registered Plan of Expropriation, but also all of the remaining property. The remaining farmlands would become a series of notional islands to which the McKears would no longer have physical access. In other words, much of the land the McKears owned, previously farmed and had paid taxes on would become useless.

Based on the MTO's success, the Court awarded costs of the Court Proceedings in the amount of \$800 to the MTO and \$750 to each Municipality.

Following the Court Proceedings, the parties to the present proceedings reached a settlement on compensation for the expropriated lands and for injurious affection. Under the *Expropriations Act*, the party from whom land is expropriated is, under certain conditions, entitled to its costs actually incurred for the purposes of determining compensation. The parties did not reach a settlement on costs, which the MTO refused

to pay. In attempting to preserve their farm, the McKeans had incurred over \$55,000 in legal expenses.

Arguments

The McKeans' position is that the *Expropriations Act* gives claimants a specific right in recognition of the extraordinary and oppressive effect of an expropriation. The MTO's purpose in applying to the Superior Court was to determine compensation payable for the expropriation. The approximately \$55,000 in legal costs that were actually incurred were as a consequence of the expropriation and for the purpose of resolving claims for compensation as a result of land taking and therefore should be reimbursed as provided by s. 32(1) of the *Expropriations Act*.

The McKeans also take the position that the nominal costs awarded by the Courts were with respect to the civil proceedings, which are distinct from and had a different purpose than s. 32 of the *Expropriations Act*.

Counsel for the McKeans directed the Board to *Dell Holdings Limited v Toronto Area Transit Operating Authority* [1997] S.C.J. No.6 in which the Supreme Court of Canada required that the *Expropriations Act* be accorded a liberal interpretation:

[S]ince the *Expropriations Act* is a remedial statute, it must be given a broad and liberal interpretation consistent with its purpose. Substance, not form, is the governing factor.

Dell Holdings at para. 22.

The Supreme Court went on to state that “[i]t follows that the *Expropriations Act* should be read in a broad and purposive manner in order to comply with the aim of the Act to fully compensate a land owner whose property has been taken”. *Id.* at para. 23.

The MTO's Position

The MTO argued that the McKeans are not entitled to compensation and that commencing the present proceedings is tantamount to seeking a remedy on a matter

that the Courts have already decided, *i.e.*, costs of the Court Proceedings. Counsel argued that it would be an abuse of the decision-making process to raise this issue again: (1) The same question had already been determined by the Courts; (2) the judicial decision was not appealed and was a final decision; and (3) the parties at these proceedings are the same. Accordingly, the three conditions for the application of issue estoppel were met.

The MTO further argued that, in any event, compensation is not available under Section 32 of the *Expropriations Act* as compensable costs must be incurred for the purposes of determining the compensation payable for the expropriated property or for a claim for injurious affection. Those claims were settled, not the subject of the Court Proceedings. Thus, the legal costs for which the McKeans are seeking compensation did not fall within the scope of s. 32(1). For example there were no appraisal fees or fees associated with land use evidence.

The Board's Findings:

This matter is directed solely to determining whether the MTO is required to pay reasonable legal, appraisal and other costs incurred by the McKeans for purposes of determining the compensation payable to them for the taking of their lands and injurious affection thereto. Section 32(1) of the *Expropriations Act* provides:

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). R.S.O. 1990, c. E.26, s. 32 (1).

The MTO argued the Claimants did not meet the conditions of s. 32(1) because the costs the McKeans sought were not for the purposes of determining the compensation payable for the expropriation or injurious affection.

The Board finds binding and persuasive the Supreme Court's holding in *Dell Holdings* that the *Expropriations Act* must receive a broad interpretation to accord with its purpose of compensating a land owner whose property has been taken (at para. 22 and 23).

The Board finds that if s. 32(1) is given its proper interpretation, the McKeans are entitled to compensation by the MTO for costs associated with the Court Proceedings. The Board finds that the McKeans actually incurred costs in association with the Court Proceedings and that these proceedings were for the purposes of determining compensation payable for the expropriation and injurious affection. But for the proceedings before the Court, the MTO could not have determined what lands would be expropriated or to what extent, and therefore what compensation would be payable to the McKeans.

The Board rejects the MTO's argument that issue estoppel has attached. No violence has been done to the principle of finality of litigation by virtue of these proceedings. The MTO has not been twice vexed for the same cause. This is because no Court has previously determined what costs were actually incurred by the owner of lands for the purposes of determining the compensation payable as remediation for land expropriation, as required by s. 32(1) of the *Expropriations Act*. In fact, no Court has determined what costs were incurred by the McKeans at all. The matter determined by the Superior Court, rather, was what quantum of legal costs would be payable to the MTO, following the cause in its successful application. This is, in the Board's view, an entirely different issue.

Notably, this case does not affect costs payable by the McKeans or to the two Municipalities (neither of whom were parties here) or the MTO, by order of the Superior Court. The costs order of the Court stands unaffected. Thus, these proceedings cannot be said to be a collateral attack that would vary, reverse, nullify or even impugn the order or judgment of the Court in awarding costs to the MTO and municipalities in the Court Proceedings.

The McKeans have properly sought the remedy offered by s. 32 of the *Expropriations Act*. In so doing, they do not abuse the process of the Ontario Municipal Board. The MTO has pointed the Board to no binding or persuasive authority that a

costs award to the expropriating party in proceedings that determine what lands will be expropriated would void remediation under the s. 32(1) *Expropriations Act* to the injured party.

The MTO argues, in the alternative, that the \$55,180.97 (inclusive of G.S.T.) claimed by the McKeens does not constitute “reasonable legal costs” because no Court would award this amount in the context of Court Proceedings.

The Board notes that s. 32 of the *Expropriations Act* is concerned with costs “actually incurred” by the party losing its land to serve the public. Section 32 does not suggest that these costs are restricted to litigation costs; to the contrary, “other costs” are expressly compensable. Giving s. 32 of the *Expropriations Act* the liberal interpretation the Supreme Court mandates, the Board sees no reason why costs awarded to the party suffering the expropriation need be limited to those a Court would likely award in the context of legal proceedings.

Regardless, the Board has not been persuaded by the MTO that 164.45 lawyers’ hours (131.45 of which were spent on the application) is unreasonable, in light of the duration of this matter in and out of Court, the nature of proceedings, the magnitude of the case mounted by the MTO and the importance of the subject matter. Based on the proceedings to determine what lands would be expropriated and therefore what compensation would be payable, the McKeens stood to lose – and ultimately did lose – the use of their farm.

That said, the Board agrees that certain line items of the McKeens’ accounts do not appear to be directed specifically to the determination of compensation for expropriation. In particular, the Board finds that docket entries and disbursements that pre-dated the filing of the Plan Expropriation are not directed to this purpose. In addition, as counsel for the MTO urged, a turnover meeting dated November 7, 2003, and a review of law for a change of solicitors subject to a docket dated November 25, 2003, would not appear to fall within reasonable legal or other costs incurred for the purposes of determining the compensation payable.

Absent the line items noted above, the Board finds that whether on a strict or liberal interpretation of s. 32(1), the compensation the McKeens seek in this application

falls under the rubric of “reasonable legal...and other costs actually incurred by the owner for the purposes of determining the compensation payable”.

Accordingly, the Board will grant the application by the McKeanes for costs under section 32 of the Act in a lump sum consisting of \$55,180.97 less the account line-items noted above and any G.S.T. on those items. Because the precise quantum cannot be determined from the documents supplied by the parties, the Board directs the Claimants to submit to the Board (with a copy to the MTO) this figure and a description of how it was calculated. This document shall be submitted to the Board within 30 days of this decision, The MTO shall then have 15 days to submit in writing any objections to this calculation, with a copy to the Claimants, or, if there is no objection, provide payment to the Claimants within 45 days from the issuance of the final Order.

“K. J. Hussey”

K. J. HUSSEY
MEMBER