ISSUE DATE:

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LC120032

Ontario Municipal Board
Commission des affaires municipales de l'Ontario

Margaret Marsdin (Claimant) has 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 City of Hamilton (Respondent) for land municipally known as 12 Tiffany Street in the City of Hamilton
OMB File No.: LC120030

IN THE MATTER OF subsection 37 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O. 28, as amended

Motion By:	City of Hamilton
Purpose of Motion:	Request for an Order Dismissing the Claim
Claimant:	Margaret Marsdin
Respondent:	City of Hamilton
Subject:	Expropriation
Property Address/Description:	12 Tiffany Street
Municipality:	City of Hamilton
OMB Case No.:	LC120030
OMB File No.:	LC120030

Mark Marsdin (Claimant) has 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 City of Hamilton (Respondent) for land municipally known as 14 Tiffany Street in the City of Hamilton
OMB File No.: LC120031

IN THE MATTER OF subsection 37 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O. 28, as amended

Motion By:	City of Hamilton
Purpose of Motion:	Request for an Order Dismissing the Claim
Claimant:	Mark Marsdin
Respondent:	City of Hamilton
Subject:	Expropriation
Property Address/Description:	14 Tiffany Street
Municipality:	City of Hamilton
OMB Case No.:	LC120031
OMB File No.:	LC120031

Joao Milagaia and Maria Milagaia (Claimant) has 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 City of Hamilton (Respondent) for land municipally known as 8 Tiffany Street in the City of Hamilton
OMB File No.: LC120032

IN THE MATTER OF subsection 37 of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O. 28, as amended

Motion By:	City of Hamilton
Purpose of Motion:	Request for an Order Dismissing the Claim
Claimant:	Joao Milagaia and Maria Milagaia
Respondent:	City of Hamilton
Subject:	Expropriation
Property Address/Description:	12 Tiffany Street
Municipality:	City of Hamilton
OMB Case No.:	LC120032
OMB File No.:	LC120032

APPEARANCES:

Parties	Counsel
City of Hamilton	J. S. Doherty R. D. Arbuto
Margaret Marsdin, Mark Marsdin, Joao & Maria Milagaia	G. Lavictoire N. Roushan

DECISION DELIVERED BY R.G.M. MAKUCH AND ORDER OF THE BOARD

[1] The City of Hamilton ("City") brings these motions to dismiss the Notices of Arbitration and Statements of Claim of the Claimants in these matters on the grounds that the Ontario Municipal Board ("Board") does not have jurisdiction to hear these claims because an expropriation has not taken place in each of these matters.

[2] The materials before the Board on these matters are as follows:

1. City of Hamilton Motion Record dated December 20, 2012

2. City of Hamilton Factum dated January 14, 2013
3. City of Hamilton Reply Factum dated January 22, 2013
4. City of Hamilton Brief of Authorities dated January 14, 2013
5. City of Hamilton Supplemental Brief of Authorities dated January 22, 2013
6. Claimants' Responding Records dated January 3, 2013
7. Claimants' Factums dated January 21, 2013
8. Claimants' Brief of Authorities dated January 22, 2013

THE FACTS

[3] The parties generally agree as to the relevant facts in these matters. In summary, Hamilton City Council, in February 2010, approved the West Harbour Precinct location containing the Claimants' properties as the site for the new stadium, warm-up track and velodrome for the 2015 Pan American Games. It also gave City staff the approval to proceed with the necessary steps to expropriate the Claimants' lands in the event negotiations were unsuccessful. There was no application for approval to expropriate before Council for its consideration at that time.

[4] Having knowledge that the City planned to expropriate their lands, the Claimants retained legal counsel to advise them with respect to the acquisition process.

[5] The City and the Claimants with the assistance of their counsel then entered into negotiations beginning in February 2010 for the sale of the Claimants' lands in anticipation of the expropriation. In the spring of 2010, the City made offers of full and final compensation for the purchase of property based on appraisal reports commissioned by the City. These offers were refused by the Claimants.

[6] On June 16, 2010 the City served a Notice of Application for Approval to Expropriate Land on the Claimants and published this notice in the *Hamilton Spectator* for three consecutive weeks on June 16, 23 and 30, 2010, as required by s. 6 of the *Expropriations Act* ("Act").

[7] On or about the week of July 12, 2010, Mr. Shane Rayman (counsel for the Claimants) was advised by the City's legal counsel during a telephone conversation that

the City would not be proceeding with the expropriation because the City was considering other sites for the stadium; the West Harbour Precinct was no longer the desired location for the stadium. This was later confirmed on March 14, 2011 in an e-mail from the City's Senior Solicitor.

[8] On or about July 22, 2010, Mr. Rayman was advised by telephone that the City's staff would, however, recommend the purchase of the Claimants' properties to City Council if the Claimants accepted an offer previously made to them, as a result of the City not moving forward with the expropriation of the properties. The Claimants did not accept this re-stating of the offers by the City and did not consent to the acquisition of their lands by it.

[9] On February 25, 2011 the City received a request for an inquiry hearing from Mr. Rayman. This request was not forwarded to the inquiry officer as the City was not proceeding with this site for the Pan American Games stadium nor expropriating any property.

[10] The application for approval to expropriate was not forwarded to Council as the approving authority, pursuant to the Act, and the expropriation was never approved. It must be noted that the City never held a proprietary or legal interest in the Claimants' lands as an expropriation plan was never registered on the title to these lands and agreements were never reached with any of the Claimants for the purchase of their lands.

[11] On March 16, 2011, counsel for the Claimants submitted a Bill of Costs to the City setting out a summary of their legal costs associated with the determination of compensation payable under the Act in relation to the negotiations between them and the City respecting the possible taking of their lands.

[12] On September 12, 2012, the City was served with the Claimants' Notices of Arbitration and Statements of Claim claiming compensation pursuant to s. 41(1)(a) of the Act for the consequential damages arising from the City abandoning the expropriation of the subject lands owned by the Claimants.

SUBMISSIONS OF THE CITY OF HAMILTON

[13] Counsel for the City argues that the Board's Rules of Practice and Procedure, the *Ontario Municipal Board Act* ("OMB Act") and the Rules of Civil Procedure, all give the Board the power to grant the relief sought. More specifically:

- Section 56 of the Board's Rules of Practice and Procedure permits a Board member to dismiss a proceeding without holding a hearing if he or she is satisfied that the Board is without jurisdiction to hear the application.
- Section 38 of the *Ontario Municipal Board Act* confers upon the Board the power to exercise the general procedural rights available to the Ontario Superior Court of Justice, such as the Rules of Civil Procedure, on all necessary or proper matters.
- Rule 21.01(3)(a) of the Rules of Civil Procedure provides for the dismissal of a proceeding before a trial on the basis that the court has no jurisdiction over the subject matter of the action.

[14] The Board has jurisdiction to determine questions of law in preliminary motions before the commencement of a hearing.

[15] The Claimants base their claims on s. 41(1)(a) of the Act for consequential damages arising from the City abandoning the expropriation of the subject lands owned by them. Mr. Doherty, on behalf of the City, argues that the Board is without jurisdiction because there was no expropriation of any lands. Section 41(1)(a) of the Act stipulates that upon an expropriation, where land is found to be unnecessary for the expropriating authority and is subsequently abandoned, before compensation is paid in full, the landowner may be entitled to consequential damages if they request to take back their interest in the land in writing.

[16] The Claimants did not request that the interest in their lands be taken back because the City never held a proprietary or legal interest in the lands. The lands never vested in the City as the application to expropriate was never forwarded to Council.

[17] Mr. Doherty argues that the expropriation of land is a condition precedent to the application of s. 41 and that you cannot have an abandonment without such

expropriation. In other words, there must be an expropriation in order for there to be an abandonment.

[18] The jurisdiction of the Board under s. 41 is with regards to lands that have been expropriated. Contemplated or intended expropriations are not caught by s. 41. If the legislature, in its construction of the *Expropriations Act*, intended to capture intended or considered expropriations, clear and express language providing for compensation in such cases would have been employed. Any additional jurisdiction or powers of the Board would have been explicitly stated in clear language.

[19] Mr. Doherty, to bolster this argument, refers to the abandonment provision of the Federal Expropriation statute, s. 12(2), which uses explicit language to capture intended expropriations. It stipulates that damages are payable resulting from the intention to expropriate. If the Ontario legislature intended to compensate landowners for the intention to expropriate, it would have employed similar express language as found in the federal act.

[20] In order to trigger damages under s. 41(1), consequential damages must flow from an expropriation in fact and there must be a subsequent abandonment of an expropriation in fact.

[21] Only an expropriation in fact triggers consequential damages under the abandonment provision of the Act. Preliminary steps toward an expropriation, such as the designation of a parcel of land to be expropriated or directing City staff to proceed to acquire certain lands, does not trigger consequential damages under s. 41.

[22] Consequential damages are only damages flowing from the fact of expropriation and the subsequent abandonment of that expropriation.

[23] Section 41(1)(a) provides that consequential damages are only awarded if the expropriated landowner takes the land, interest or estate back. If the lands never vest in the expropriating authority, it is impossible for the landowner to take back his/her interest since it was never lost. The Claimants in these cases were never without an interest in their lands and the City never had a legal interest in their lands.

[24] The designation of land as being necessary for a future expropriation is not compensable; there is no compensation until the land is actually expropriated.

[25] The purpose of the Act is to provide full and fair compensation to the person whose land is expropriated. As the Supreme Court of Canada stated in *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.* [1997] 1 S.C.R. 32 (*Dell Holdings*) at paragraph 33:

> The whole purpose of the Expropriations Act is to provide full and fair compensation to the person whose land is expropriated. It is the taking of the land which triggers and gives rise to the right to compensation. An owner whose land is caught up in a zoning or planning process but not expropriated must simply accept in the public interest any loss that accrues from delay. There is neither a statutory requirement nor a policy reason for employing a similar approach to compensation for losses accruing from delay when land is expropriated and for losses accruing from delay in the planning approval process when land is not taken.

[26] A Claimant is only entitled to costs under s. 32 of the Act if there is an expropriation of land or a claim for injurious affection that has been determined by the Board. Costs, as being claimed in the alternative by the Claimants, are not owing because (a) there was no expropriation of the land; and (b) there is no valid claim for injurious affection.

[27] The Board does not participate in safeguards designed to exercise control over an expropriating authority contemplating expropriation.

SUBMISSIONS OF THE CLAIMANTS

[28] Mr. Lavictoire, on behalf of the Claimants, argues that there is only one issue before the Board to determine in this matter:

> Does the Board have jurisdiction to award consequential damages and/or legal costs incurred by the Claimants as the result of expropriation proceedings initiated by the City, despite there having been no formal registration of a plan of expropriation?

[29] He argues that the majority of the Supreme Court of Canada in *Dell Holdings,* at paragraphs 20-21, began its interpretation of the *Expropriations Act* with the following words of caution:

> The expropriation of property is one of the ultimate exercises of governmental authority. To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the power of an

> expropriating authority should be strictly construed in favour of those whose rights have been affected…
>
> …Further, since the Expropriations Act is a remedial statute, it must be given a broad and liberal interpretation consistent with its purpose. Substance, not form, is the governing factor.

[30] It is agreed that no land was ultimately expropriated by the City. Counsel argues that the City, throughout the majority of the proceedings, led the Claimants to believe that it would be exercising its power of expropriation. Mr. Lavictoire maintains that the Claimants were under the reasonable impression that a compulsory acquisition of their properties would occur from February 2010, and that the Claimants experienced very significant interference with their private property rights when they were advised of the impending expropriation.

[31] The provisions of the *Expropriations Act* are remedial in nature, requiring the Board to interpret these provisions in a broad, liberal and purposive manner. Substance, not form, should govern the Board's decision. The overriding theme of the *Expropriations Act* is that property owners impacted by expropriation proceedings have the right to be made whole. Consequently, the Claimants should not be deprived of their damages and/or legal costs incurred for the purposes of obtaining fair compensation on the technical ground that an expropriation plan was not registered.

[32] Section 41(1) of the *Expropriations Act* reads:

> **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.

[33] The wording in s. 41 of the *Expropriations Act* therefore grants the Board jurisdiction to hear a claim for consequential damages where:

- There has been an expropriation.
- The expropriation was found to be unnecessary by the expropriating authority prior to the payment of compensation in full.
- The expropriated owner was served or entitled to be served with the Notice of Expropriation.
- The owner elected to keep the property subject to the authority's expropriation.

[34] It is argued that each of the above-noted conditions was fulfilled and accordingly, the Board has jurisdiction to hear the Owners' claims for consequential damages.

[35] The term "expropriation" is not defined in the *Expropriations Act*. In *Dell Holdings*, counsel argues that the majority of the Supreme Court of Canada explicitly rejected the City's current argument that expropriation refers to the transfer of title. Rather, the majority favoured a more inclusive view wherein an expropriation is viewed as "part of a continuing process" and can be defined as "the process of taking the property for the purpose for which it is required."

[36] In providing its analysis in deciding that damages for pre-expropriation delay should be compensated where a taking of land has occurred, the majority in *Dell Holdings* reasoned that:

> the approach to damages flowing from expropriation should not be a temporal one; rather it should be based upon causation. It is not uncommon that damages which occurred before the expropriation can in fact be caused by that very expropriation.

[37] Counsel argues that the Claimants' interpretation of the definition of "expropriation" is supported by the City's own treatment of the term as evidenced by the City's senior solicitor's March 14, 2011 e-mail confirming the City's abandonment of the expropriation. It confirmed that the City would not be proceeding with "this expropriation". In the City's view, an expropriation was already underway. The case law, as well as the City's own interpretation of the word "expropriation", makes clear that expropriation is not merely a matter of title vesting in the authority at a particular point in time. Rather, it is a process which typically begins once an authority identifies to an owner the need to acquire privately owned lands on a compulsory basis. The City,

therefore, found the expropriation to be unnecessary prior to the payment of full compensation.

[38] Expropriation is a process and before a Notice of Expropriation is served, it is incumbent on an expropriating authority to serve a Notice of Application. Thus, but for the abandonment, the expropriated owners would have been entitled to be served with a Notice of Expropriation.

[39] Counsel for the Claimants does not dispute that the Claimants elected to keep their properties.

[40] Section 32 of the *Expropriations Act* states:

> **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.

[41] The Board has the jurisdiction to determine an Owner's entitlement to legal costs upon an expropriation. Again, expropriation is a process, not the transfer of land. The entitlement of Owners to their reasonable costs does not hinge on whether a plan of expropriation is registered. Further, courts have in a number of instances awarded owners "pre-expropriation costs" incurred in the determination of compensation.

[42] In *Moto-Match Centres Ltd. v. Metropolitan Toronto (Municipality) (No. 2)*, (1985), 32 L.C. R. 289, at 296, the Board ordered the expropriating authority to pay the

Claimant its reasonable legal, appraisal and other costs incurred for purposes of determining compensation. The Assessment Officer tasked with determining those costs opined that such costs included those expended in the determination of compensation prior to a formal registration of a plan of expropriation.

[43] In *Ravvin Holdings Ltd. v. Calgary (City) (Alta. C.A.)*, [1992] A.J. No. 998, 48 L. C. R. 81, the Alberta Court of Appeal made particularly poignant remarks in support of providing Owners with pre-expropriation costs. In that decision, the Claimant was *inter alia* appealing the Alberta Land Compensation Board's refusal to award the Owner with costs incurred in the preparation of "appraisals or analogous reports" conducted prior to the delivery of the formal notice of intention to expropriate. In reversing the Alberta Land Compensation Board's decision, the Court of Appeal stated as follows:

> The board rejected the expenses claimed for a number of appraisal or analogous reports on the grounds that they had been ordered before any formal notice of intention to expropriate was served. We can find nothing in the Act which so restricts the obligation to pay costs. When an authority with power to expropriate tells a landowner that it wants to buy his land, he cannot close his eyes to the fact that that authority may decide to expropriate. In some circumstances, it would be reasonable for him to get an appraisal and some legal advice at once without waiting for a formal notice. What is more, the policy of the law is to favour compromise and consensual sales. To tell the owner that he will not be paid for appraisals or legal advice before a notice is simply to frustrate the negotiation process. No sensible owner would sell land without good advice about its value. Once the expropriation notice was served, the owner would have to go through the charade of having the appraiser duplicate his earlier work and report, if he wanted to get reimbursement for it. Therefore, we must allow this aspect of the appeal.

[44] In *Marshall v. Ontario (Ministry of Transportation)* (2005), O.M.B.D. No. 530 at Para 6, the issue was whether the Board could refer the matter of costs to an Assessment Officer where the parties had entered into an agreement as to compensation, an agreement which also specified that costs would be paid pursuant to s. 32 of the *Expropriations Act.* The expropriating authority, the Ministry of Transportation, claimed that the Board did not have jurisdiction to refer the matter to an Assessment Officer because, *inter alia*, the parties had agreed to the settlement amount, as opposed to compensation having been determined by the Board. The Board rejected the Ministry of Transportation's submission, criticizing the arbitrary distinction between instances where the Board has determined the compensation payable and instances where the parties have arrived at a mutual agreement as to compensation.

[45] In the alternative, Claimants' counsel argues that if the Board determines that s. 41 and 32 of the *Expropriations Act* do not directly address the issue of pre-expropriations costs, the Doctrine of Jurisdiction by Necessary Implication requires the Board to make a determination of pre-expropriation costs regardless of the registration of an expropriation plan.

[46] In *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)* [1989] 1 S.C.R. 1722, (*Bell Canada*), Bell Canada successfully applied to the Canadian Radio-Television and Telecommunications Commission ("CRTC") for an interim rate increase with respect to its services. Eventually, the CRTC conducted a review of Bell Canada's revenues and concluded that the interim rate increase had resulted in excessive revenue for Bell Canada. The CRTC then ordered Bell Canada to provide a one-time credit to its customers. Bell Canada argued that under its enabling statutes, being the *Railway Act* and the *National Transportation Act*, the CRTC had no jurisdiction to conduct the review or to order this one-time credit. In its unanimous decision, the Supreme Court framed the issue in the following manner:

> The question before this Court is whether the appellant has the statutory authority to make a one-time credit order for the purpose of remedying a situation where, after a final hearing dealing with the reasonableness of telephone rates charged during the years under review, it finds that interim rates in force during that period were not just and reasonable. Since there is no clear provision on this subject in the Railway Act or in the National Transportation Act, it will be necessary to determine whether this power is derived by necessary implication from the regulatory schemes set out in these statutes.

[47] In deciding that the CRTC did have the relevant powers to engage in both of the impugned courses of conduct, the Supreme Court provided the following analysis:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making**,** they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes. I have found that, within the statutory scheme established by the Railway Act and the National Transportation Act, the power to make interim orders necessarily implies the power to revisit the period during which interim rates were in force. The fact that this power is provided explicitly in other statutes cannot modify this conclusion based as it is on the interpretation of these two statutes as a whole**.**

[48] Generally, the Board has wide powers in the exercise of its jurisdiction, as per s. 38 of the *Ontario Municipal Board Act* which states as follows:

> for the due exercise of its jurisdiction and powers and otherwise for carrying into effect the provisions of this or any other general or special Act, has all such powers, rights and privileges as are vested in the Superior Court of Justice with respect to the amendment of proceedings, addition or substitution of parties, attendance and examination of witnesses, production and inspection of documents, entry on and inspection of property, enforcement of its orders and all other matters necessary or proper therefor

[49] In addition to s. 38, the Board "has all the powers of a court of record", may "hear and determine all questions of law or of fact", and "has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other general or special Act." Some of the specified powers and jurisdiction of the Board are set out in s. 37 of the *Ontario Municipal Board Act*, including the power:

> to hear and determine all applications made, proceedings instituted and matters brought before it under this Act or any other general or special Act and for such purpose to make such orders, rules and regulations, give such directions, issue such certificates and otherwise do and perform all such acts, matters, deeds and things, as may be necessary or incidental to the exercise of the powers conferred upon the Board under such Act.

[50] Counsel for the Claimants argues that it is therefore clear that the legislature did not limit the powers of the Board to a literal, four-corners reading of its enabling statutes. The legislature has confirmed within numerous provisions of the *Ontario Municipal Board Act* that the Board has powers necessarily or incidentally required for the exercise of its jurisdiction.

[51] An Owner who is to be subject to the deprivation of property would necessarily hire legal counsel in order to navigate expropriations proceedings and to obtain full and fair compensation. An Owner engaged in months of negotiations but who has not been able to consent to the acquisition of land because of various circumstances, and who has been unfortunate enough to have the expropriating authority subsequently declare the expropriation to be unnecessary, should not be deprived of the reasonable costs associated with an expropriation proceeding.

[52] Finally, Mr. Lavictoire argues that s. 32 and 41 of the *Expropriations Act* permit the Board to make orders as to costs, even when a plan of expropriation has not been registered and the Board has not made a determination as to compensation. Even if the current proceedings do not squarely fall within the specified provisions, the remedial nature of the *Expropriations Act* and the Doctrine of Jurisdiction by Necessary Implication require that the Board be able to provide Owners with costs where they have

been led to believe that their property will be expropriated. It is only by providing pre-expropriations costs, that Owners can be made whole.

FINDINGS

[53] Firstly, the Board does not accept the Claimants' argument that *Dell Holdings* provides the authority for the proposition that the Claimants are entitled to costs as consequential damages, where there has not been an actual taking of lands. *Dell Holdings* does not address s. 41 of the *Expropriations Act* and whether s. 41 ought to compensate an owner for an intended or contemplated expropriation. The reference to *Dell Holdings* in *Mikalda Farms* is clearly distinguishable on the basis that there was an eventual taking in that case which entitled the land owner to disturbance damages under s. 13(2)(b).

[54] The same applies to *Moto-Match* and *Ravvin Holdings* as both are distinguishable on their facts as pre-expropriation losses were compensated for because of the eventual expropriations. It is quite clear from the cases cited, that pre-expropriation costs are compensable when there is an expropriation. In the cases at hand, the process of expropriation was not completed to a point where the lands were vested in the municipality either by agreement or following the registration of a plan of expropriation.

[55] The four point test set out in s. 41 as set out by Mr. Lavictoire grants the Board jurisdiction to hear a claim for consequential damages, where the tests are met.

[56] It is clear that *Dell Holdings* justifies compensation for pre-expropriation delay, however, the Supreme Court of Canada held that delay damages are "disturbance damage within the meaning of the Act."

[57] Disturbance damages are compensable under s. 13(2)(b) of the *Expropriations Act*, which includes the requirement of compensation "when land is expropriated".

[58] Further in *Dell Holdings*, (Paragraph 41) the Supreme Court of Canada stated:

> … there is neither a statutory requirement nor a policy reason for employing a similar approach to compensation for losses accruing from delay… in the planning approval process when land is not taken.

[59] Regardless, the Claimants' Notices of Arbitration and Statements of Claim make no claim for disturbance damages as a result of delay, these simply claim costs as "consequential damages".

[60] Counsel for the Claimants asserts that "before a Notice of Expropriation is served, it is incumbent on an expropriating authority to serve a Notice of Application." While a Notice of Application is a condition precedent to a Notice of Expropriation, the proposition that a Notice of Expropriation need follow every Notice of Application is not supportable by a simple reading of the relevant sections of the Act or on the basis of any jurisprudence.

[61] The Board does not accept Counsel for the Claimants' proposition that "but for the abandonment, the expropriated owners would have been entitled to be served with a Notice of Expropriation", as an abandonment cannot occur without an expropriation. It is noted that the wording of Forms 10 to 12 under Reg. 315 expressly refer to existing and registered expropriations.

[62] The language of s. 41, which provides that when "the expropriated owners would have been entitled to be served with a Notice of Expropriation" involves consideration of s. 10 (1), which reads as follows:

> **Notice of Expropriation**
>
> 10. (1) Where a plan has been registered under section 9 and no agreement as to compensation has been made with the owner, the expropriating authority may serve the owner, and shall serve the registered owner, within thirty days after the date of registration of the plan, with a notice of expropriation of the owner's land, in the prescribed form, but failure to serve the notice does not invalidate the expropriation.

[63] This means that a Notice of Expropriation is required (or that expropriated owners would have been entitled to be served with a Notice of Expropriation) when a plan has been registered under s. 9.

[64] The Claimants assert that the fourth prong of the test determining abandonment requires that "the owner elected to keep the property subject to the authority's expropriation."

[65] This statement is also not entirely accurate, as the wording of s. 41 specifically requires not only that there be such an election by the Claimants, but also that it be in writing.

[66] The Claimants' Factum states that "the Claimants elected to retain their land", citing paragraph 10 of the Affidavit of Shane Rayman. The Board notes that Mr. Rayman's affidavit does not refer to an election, but rather states that "the Claimants opted, once again, not to accept the Respondent's offer of compensation for the Subject Lands."

[67] There is no dispute that the Board has the jurisdiction to award costs when there is an expropriation. However, as the claimants point out, the term expropriation is not defined in the Act. The Claimants urge the Board to apply its discretion or to invoke the principle of incidental authority, to find that the term expropriation in s 41 applies to the process for the taking of land. The Board accepts that it has and can apply these discretionary powers in certain instances, in order to exercise its authority under this Act. This is not one such instance. The language in s 41 is clear that for there to be a right to claim for consequential damages, there must be a taking of land or an interest in land. The term expropriation in this section, requires that there be a taking. This is clear by the terms "take the land" or "retain the land" set out in s 41. These terms are specific and do not include the notion of a process for the taking of land, as suggested by the Claimants, who have brought this claim under s 41. However, as stated previously, the Board concludes on the facts before it that there was no expropriation in these cases.

[68] The Claimants' argument that the Doctrine of Jurisdiction by Necessary Implication applies in the alternative is premised on a finding by the Board that s. 41 does not apply, while its own test as to s. 41 is premised on there being an actual expropriation. An analysis of whether this doctrine applies begins with a finding that there is no justification for jurisdiction of the Board under the wording of the *Expropriations Act*. Awarding costs where there has been no expropriation would be contrary to the Supreme Court of Canada's statement in *Bell Canada* that "… courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making…"(Paragraph 50).

[69] The Claimants rely on *Dell Holdings* to propose a broad and liberal interpretation of the *Expropriations Act* consistent with its purpose. The Supreme Court of Canada was adamant that the broad purpose of the *Expropriations Act* is to fully compensate a land owner whose property has been taken.

[70] Further, based on Elmer Driedger's modern principles of statutory interpretation as noted in *Construction of Statutes*, cited with approval by the Supreme Court of Canada in *Rizzo v. Rizzo Shoes Ltd*. (Re), [1988] 1 SCR 27, the words of an Act are:

> to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[71] On a plain reading of s. 41 of the Act, it is clear that a requirement for compensation is the taking of land. The Board is however mindful that under a different section of the Act (s. 32), the Board may award an amount for costs in a claim for injurious affection, which is an instance where no land is taken.

[72] A plain reading of s. 41(2) also confirms a reading of s. 41(1) as requiring the taking of land. Land cannot re-vest as contemplated by s. 41(2) without first being vested in the expropriating authority.

[73] Section 32 of the Act explicitly states that:

> 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 percent, 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…

[74] The Board takes that wording to mean that there is no compensation payable if there is no expropriation.

[75] The use of the words "upon an expropriation" is intentional and ought to be read in their grammatical ordinary meanings. This phrase "upon an expropriation" is used in both s 32 and s 41. This cannot apply to the process of expropriation to attract an award of consequential damages, since the wording in s. 41 is specific to a taking. There can be no retention of an interest in land, or transfer back of land if the interest or title is not transferred in the first place. This Board recognizes how this provision places the

claimant in a difficult position when faced with the prospect of expropriation. The Board, however, must be mindful of its authority and the Board was reminded during the course of the hearing of the Motion of the care with which the Act must be read and applied.

[76] The overall purpose of the Act revolves around expropriations that are executed and determining the compensation thereof. The object of the Act is to ensure landowners are compensated fairly when their lands are expropriated.

[77] Mr. Doherty notes in his Factum that if the Ontario legislature had intended to capture intended or contemplated expropriations in awarding compensation for costs, it would have explicitly made provision for it, as the federal expropriation statute does.

[78] Mr. Doherty in his argument, referred to s. 30 of the Act as a form of protection for owners of land faced with a possible expropriation. This section provides that where an owner of lands consents to the acquisition of lands by a statutory authority, either party with the consent of the other may apply to the Board for the determination of the compensation to which the owner would be entitled by the Act if the lands were expropriated, including costs. There is no evidence before the Board however that the City would have consented to such an agreement.

[79] In the absence of a formal registered expropriation, an expropriating authority should not be bound to compensate for damages or costs in a case where there is a potential for an expropriation. Furthermore, in the absence of a taking of land, negotiations for the purchase of the lands does not, and should not, attract a claim for costs, merely because the potential buyer has the power, if fully exercised, to expropriate.

DISPOSITION

[80] In light of the above, the Board finds on the facts before it that an expropriation has not taken place within the meaning of the *Expropriations Act* and that consequently, it does not have jurisdiction over the subject matter of this action.

[81] Accordingly, the Board exercises its powers under s 38 of the Ontario Municipal Board Act to allow the motion and to dismiss the Notice of Arbitration and Statement of Claim of the Claimants in each of these matters on the grounds that the Ontario

Municipal Board does not have jurisdiction to hear these claims because on the facts of these cases, an expropriation has not taken place in each of these matters.

"R.G.M. Makuch"

R.G.M. MAKUCH
MEMBER