Proposed Revisions to the OLT Rules

Submitted to: The Ontario Land Tribunal

Submitted by: Ontario Bar Association

Date: September 25, 2024

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

Table of Contents

Executive Summary

The Ontario Bar Association ("**OBA**") welcomes the opportunity to provide feedback to the Ontario Land Tribunal ("**OLT**") regarding proposed revisions to its Rules of Practice and Procedure. We support the intention to streamline and clarify the practices and procedures for OLT proceedings and provide comments to support that goal.

Ontario Bar Association

Established in 1907, the OBA is the largest and most diverse volunteer lawyer association in Ontario, with close to 16,000 members, practicing in every area of law in every region of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public and we deliver over 325 in-person and online professional development programs to an audience of over 20,000 lawyers, judges, students, and professors.

This submission was prepared and reviewed by members of the OBA's Municipal Law, Environmental Law, and Real Property Law sections. Members of these sections include barristers and solicitors in public and private practice in large, medium, and small firms, and in-house counsel across every region in Ontario. These members have extensive experience with OLT proceedings, procedures, and legislation.

Comments & Recommendations

We have organized our comments sequentially, speaking to proposed revisions provided by the OLT where we have comments.

PART I

Rule 5 – Initiating Proceedings - General

There is currently a lack of consequences or directions for a party that fails to distribute the record within the statutory period. A mechanism to ensure timely receipt of municipal records would help ensure that the process proceeds in a timely manner. This is particularly important as appeals cannot commence until the Tribunal receives the record. A tie back to rule 1.3 could be helpful.

Rule 8 – Role and Obligations of a Party

This rule could be improved by providing further clarity on the meaning of the term "participate fully". This rule could also provide clarity on the use and meaning of a "watching brief", recognizing that watching briefs can be an effective and meaningful mechanism to support settlements, and how that is to be treated in the context of this proposed amendment. Without further clarity on watching briefs, changing the rule from "*may* participate fully…" to "*shall* participate fully" could be a source of confusion, especially for non-experts.

The proposed revisions further recommend removing the concluding sentence in rule 8.3, which previously read: "A non-appellant party has no independent status to continue an appeal should that appeal be withdrawn by an appellant party". While this may have been viewed as redundant, the remainder of the rule focuses on the issues that a non-party can engage with. The concluding sentence provided additional clarity as it relates to party status and the ability (or lack thereof) of a party to continue an appeal that is subsequently withdrawn by an appellant party. We think the removal of this content will result in legal disputes that could unnecessarily prolong the process. Additionally, the removal will likely confuse public participants who are unfamiliar with the process. We recommend maintaining this sentence in rule 8.3.

Rule 12 - Settlement

In our view, rule 12 could benefit from clarity on when the Tribunal will accept written settlement hearings and the handling of issues at the first Case Management Conference. We would support codifying this in rule 12, or in the alternative, providing this guidance through practice directions. This would help to avoid confusion, ensure fairness, and increase predictability. Clarity around these Rule 12 matters would be particularly helpful for unrepresented parties or parties unfamiliar with the Tribunal's process, decreasing the chances of delays in scheduling hearings and moving matters forward.

Rule 19 – Case Management Conferences

While there are no proposed revisions to rule 19, we have some recommendations on potential amendments. Rule 19 speaks to Case Management Conferences, referencing issues lists and narrowing the issues in dispute where possible. There is significant variation on how this rule is applied, with different Tribunal Members taking different approaches. Some Members take the approach that a hearing will not be scheduled until an issues list has been distributed. This sometimes leads to abuse by a party by delaying the distribution of the issues list to stop the other party from being able to schedule a hearing. We would welcome additional clarity as to when a hearing will be scheduled to provide consistency and clarity for parties. This could be implemented through an amendment to the Rules or a practice direction. Even without a formal change, having the Tribunal describe its ordinary practices would be beneficial. In the event there is a concern about the lack of ability for mediation or other discussions to inform the issues of a party, a mechanism could be added to permit for revised issues following a mediation process (which in our view would be helpful regardless). We invite further discussion with the Tribunal on what should be included in the event this is supported.

Rule 25 – Review of a Tribunal Decision or Order

We recommend expanding the proposed amendments from saying "on all other parties to the original hearing event" to say "on all other parties, including for greater clarity, any parties that have withdrawn from the proceedings". A party could settle their issue(s) and

not attend a hearing event, only for the review to upend the decision. We are concerned that the proposed revision could be interpreted by some to mean that a party in these circumstances would not receive notice as they did not attend the hearing event. It may also be advisable to remove the reference to "original hearing event" and replace it with a more general reference to "the event about which the written decision pertains". The term "original hearing event" is too ambiguous, and could be a source of confusion, particularly for self-represented parties and parties unfamiliar with the Tribunal's process.

PART II – Expropriation Proceedings

The timeframes in the proposed rule 26.19 would permit a claimant or respondent to request expropriation costs following either (a) the hearing of an Application by the Tribunal, or (b) the settlement of compensation and damages under the Act where the quantum of expropriation costs payable is yet to be determined. In our view, subsection (a) should be replaced with a reference to the final written order, to account for scenarios when the decision is reserved following the hearing. We also think it could be beneficial to explicitly add a caveat to 26.19 saying "in the event the parties don't agree", to make it clear that the parties are expected to attempt to resolve costs directly and making it clear that this provision is not a requirement to resolve costs.

The proposed rule 26.20 would require expropriation costs to be considered in writing unless a party satisfies the Tribunal by written objection that a written format is likely to cause the party significant prejudice. We think that the decision about proceeding in writing or orally should be the claimant's choice. At the very least, there should be more flexibility provided than the presumably high burden of showing significant prejudice, such as when the Tribunal member directs it or where the parties consent.

Clarity on the intended application of the proposed rules to section 32(1) and 32(2) of the *Expropriations Act* would be welcomed, particularly as it relates to proposed rule 26.27, and the discretionary factors the Tribunal can consider when evaluating costs.

We also think the proposed amendments could benefit from additional direction on timelines. Rule 26.21 permits a claimant to initiate the request for expropriation costs, and section 26.22 allows a respondent to do the same when a claimant has not acted under 26.21. There should be clear timelines provided for a claimant to act under 26.21, and if no action is taken by the claimant during that period, the respondent then has the right to move under 26.22. Without timelines for the claimant to act under 26.21, a respondent could act under 26.22 at any time (after the hearing with the initial proposed language, or after the final written order if our recommendation is accepted).

We assume providing staggered timelines was intended, and the reason for proposing separate rules for claimants and respondents to initiate the process, rather than a single rule permitting any party to file a request for expropriation costs with the Registrar. If this recommendation is accepted, we recommend providing a generous timeframe for the claimant to act, appreciating that in many cases the preparation of the bill of costs, dockets, and all other relevant documents can take considerable time. We would recommend something along the lines of 60 days for the claimant to act under 26.21, and if no action is taken, providing 15 days for the respondent to act under 26.22. For clarity, we are not suggesting that a claimant should not be able to act after the proposed 60 days elapses; we are simply suggesting to provide a buffer for the claimant to decide before the respondent can initiate the process. We further recommend increasing the time period under 26.23, when a respondent initiates the request under 26.22, to provide the claimant with more than 15 days to serve and file their supporting documents.

***

The OBA would be pleased to discuss this further and answer any questions that you may have.