

Local Planning Appeal Tribunal
Tribunal d'appel de l'aménagement
local



ISSUE DATE: April 16, 2020

CASE NO(S): LC180022

The Ontario Municipal Board (the “OMB”) is continued under the name Local Planning Appeal Tribunal (the “Tribunal”), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

PROCEEDING COMMENCED UNDER subsection 26(b) of the *Expropriations Act*, R.S.O. 1990, c. E.26, as amended

Claimant:	1658024 Ontario Inc (o/a Two Goblets Restaurant)
Respondent:	Regional Municipality of Waterloo
Subject:	Directions
Property Address/Description:	85 Weber St W
Municipality:	Regional Municipality of Waterloo
LPAT Case No.:	LC180022
LPAT File No.:	LC180022
LPAT Case Name:	1658024 Ontario Inc. v. Waterloo (Region)

PROCEEDING COMMENCED UNDER subsection 12(1) of the *Local Planning Appeal Tribunal Act, 2017*, S.O. 2017, c. 23, Sched. 1, and the Tribunal’s Rules of Practice and Procedure

Request by:	Regional Municipality of Waterloo
Request for:	Motion for Directions

Heard: March 20, 2020 by telephone conference call

APPEARANCES:

Parties

Regional Municipality of Waterloo

Counsel

Richard Brooks

1658024 Ontario Inc. (o/a Two Goblets Conner Harris Restaurant)

DECISION DELIVERED BY M. ARPINO AND ORDER OF THE TRIBUNAL

INTRODUCTION AND BACKGROUND

[1] This is the hearing of a motion in the aforementioned proceedings, being a claim by 1658024 Ontario Inc. (“Two Goblets”). Two Goblets seeks compensation from the Regional Municipality of Waterloo (“Region”) for loss/interference with its leasehold interest, and compensation for executive time, pursuant to the *Expropriations Act*.

[2] 404251 Ontario Limited owns a parcel of land which consists of two buildings known municipally as 79 Weber Street West, 85 Weber Street West, and a shared parking area in the City of Kitchener (“Subject Land”). In 2012 the Region expropriated a portion of the Subject Land to facilitate road improvements.

[3] Two Goblets was a tenant in the building at 85 Weber Street West. The leasehold interest included access to the shared parking area and exclusive use of 11 parking spaces (“Two Goblets Property”).

[4] This motion is brought by the Region for:

- 1) An Order to compel Two Goblets to answer its refusal from an Examination for Discovery held on June 4, 2019, specifically to produce Two Goblets’ financial statements, including its monthly income statements for the period of 2010 to 2016;
- 2) In the alternative, an Order to compel Two Goblets to serve a further and better affidavit of documents containing Two Goblets’ financial statements, including its monthly income statements, for the period of 2010 to 2016;

- 3) In the alternative, an Order striking out Part V of Two Goblets' Notice of Arbitration and Statement of Claim which includes paragraphs 24 and 25, on the basis that the pleadings are prejudicial, vexatious and an abuse of process;
- 4) An Order, if necessary, abridging the time for the service and filing of its Notice of Motion, or alternatively, an Order validating or dispensing with the service of the Notice of Motion;
- 5) An Order for costs of this motion; and
- 6) Such further and other relief as counsel may advise and this Tribunal may deem just.

[5] For the motion the Tribunal had before it:

- 1) Region's Motion Record;
- 2) Responding Motion Record of Two Goblets;
- 3) Region's Factum;
- 4) Two Goblets' Factum;
- 5) Two Goblets Book of Authorities; and
- 6) The transcript of the examination for discovery of Maria Savu.

GROUNDS FOR THE MOTION

[6] Two Goblets plead in paragraph 24 of its Notice of Arbitration and Statement of Claim:

Two Goblets experienced significant disruption to its business and associated losses as a result of the Region's expropriation and construction works. Though significant to Two Goblets, the quantum of such losses would not justify the complexity associated with a business loss claim in this proceeding. Two Goblets has elected to forego a claim for compensation for the business losses that it has experienced as a result.

[7] Two Goblets refused to produce its financial statements including monthly income statements, based on relevance notwithstanding that it referred to a business disruption and business loss in its Notice of Arbitration and Statement of Claim ("Claim").

[8] The Region makes this motion on the grounds that the assertion of business loss has cast the expropriation and construction works, and thus the Region in a negative manner to gain the sympathy of the Tribunal.

[9] The Region asserts that Two Goblets should be required to produce its financial statements including its monthly income statements, so the Region may defend against the assertion of a business loss or Part V should be struck as prejudicial, vexatious and an abuse of process.

TWO GOBLETS' RESPONSE

[10] Two Goblets refused to produce its financial statements based on relevance to any matter at issue, a claim for business loss is not being pursued.

[11] Financial statements are typically confidential; Two Goblets is under no obligation to produce them.

[12] Two Goblets would incur unnecessary cost to produce the documents.

[13] Production of the documents would add time and unduly complicate the proceedings.

[14] Two Goblets is not making a claim for business losses, a dispute over whether a business loss occurred is moot.

[15] The cost and time which would be expended to satisfy the request for production of the documents is disproportionate.

[16] The Region denied that Two Goblets suffered a business loss. While it is entitled to do so, that denial does not render the financial statements relevant.

[17] Part V of the Claim does not cast the Region in a negative manner. The paragraphs at issue were only intended to provide an explanation of the compensation being sought.

[18] The statement in the Claim related to business loss is not framed in emotional or inflammatory language. It is nothing more than an attempt to clarify the compensation being sought.

[19] The impugned statements are not prejudicial, scandalous or vexatious, neither are they an abuse of process.

[20] The Region is not prejudiced by the impugned statements. It is fully able to respond to the claims for compensation by Two Goblets.

ISSUES

[21] There are two issues to be determined in this motion:

- a) Did Two Goblets properly refuse to produce its financial statements and the monthly income statements?
- b) Should Part V of the Claim be struck as prejudicial, scandalous, vexatious or an abuse of process?

[22] The Parties acknowledged that the Tribunal's *Rules of Practice and Procedure* 1.04 provides that the Tribunal may adopt the *Rules of Civil Procedure* if its own Rules do not provide for the matter of procedure. *The Rules of Civil Procedure* are herein referred to as the "Rules".

ANALYSIS AND FINDINGS

[23] During the hearing of this motion the Parties referred the Tribunal to many cases. In this decision the Tribunal notes a few cases the Tribunal considers to be most relevant and germane to these proceedings.

[24] When faced with a motion requesting production, the Tribunal must determine if the requested documents are relevant to any matter in issue in an action that is or has been in the possession or control or power of a party to the action. (Rule 30.02).

[25] The Region referred the Tribunal to the case of *Scaffidi-Argentina v. Tega Homes Developments Inc.*, 2019 ONSC 4170, 2019 CarswellOnt 11125 ("*Tega*"), paragraph [17]:

Relevance is defined by the pleadings. A party is not entitled to resist discovery because it believes it has a complete defence to a claim or because it believes that the claim has no merit.

[26] The Region points to the fact that Two Goblets specifically plead a disruption to its business and business loss in paragraph 24 of its Claim and, the Region referenced business loss in paragraph 20 of its Reply. The Region argues that the reference to the business losses in the pleadings made the issue relevant and consequently, the financial statements should be produced.

[27] Two Goblets replies that *Tega* holds that a party cannot refuse to answer a question on discovery on the basis that a claim is without merit or that they have a complete defense. Two Goblets asserts that it is not presenting a barrier to an argument being advanced, the case has no application to the matter before the Tribunal.

[28] The Tribunal notes that in one of the impugned statements of the Claim, Two Goblets confirms that it is not seeking compensation for business losses.

[29] The Region identified its need for the financial statements in the 3rd Ground for the Motion:

The Claimant should be required to produce its financial statements, including its monthly income statements so that the Region may defend against the assertion of business loss or Part V should be struck as prejudicial vexatious and an abuse of process.

[30] Having carefully considered all oral submissions and written materials, the Tribunal has determined that the financial statements and monthly income statements are not relevant to a matter in issue, as such they need not be produced.

[31] Two Goblets requested the Tribunal consider the application of Rule 29.2 Proportionality in Discovery. Having regard to the findings of the Tribunal, review of the application of Rule 29.2 is unnecessary.

[32] The Tribunal may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

- a. may prejudice or delay the fair trial of the action;
- b. is scandalous, or vexatious; or
- c. is an abuse of the process of the court. R.R.O. 1990, Reg. 194, [r. 25.11](#).

[33] Both Parties provided the Tribunal with a copy of *Noel v. Johnson et al*, 2019 ONSC 7366, 2019 CarswellOnt 21028 ("*Noel*") in support of their position. The case provides a fulsome review of the caselaw regarding Rule 25.11.

[24] The application of Rule 25.11 was considered by Epstein J. in *George v. Harris* [2000] O.J. No. 1762, 97 A.C.W.S. (3d) 225, 2000 CarswellOnt 1714. There her Honour stated as follows: the next step is to consider the meaning of “scandalous”, “frivolous” or “vexatious”. There have been a number of descriptions provided in the multitude of authorities decided under this or similar rules. It is clear that a document that demonstrates a complete absence of material facts will be declared to be frivolous or vexatious. Similarly, portions of a pleading that are irrelevant, argumentative or inserted for colour or that constitute bare allegations should be struck out as scandalous. The same applies to a document that contains only argument and includes unfounded and inflammatory attacks on the integrity of a party and speculative unsupported allegations of defamation. In such a case the offending statements will be struck out as being scandalous and vexatious. In addition, documents that are replete with conclusions, expressions of opinion, provide no indication whether information is based on personal knowledge or information and belief, and contain many irrelevant matters will be rejected in their entirety...”

[34] Part V Paragraph [25] of the Claim is a material fact regarding the damages sought in the Claim, as such it is not scandalous or vexatious. The Region is not prejudiced by this pleading.

[35] The statement that Two Goblets incurred business loss as a result of the expropriation and constructions works is neither inflammatory nor is it argumentative.

[36] The Tribunal considered the oral submissions and reviewed the cases and material provided to it. The Tribunal finds that the impugned paragraphs do not result in prejudice to either party or delay the fair hearing of the Claim. The Tribunal does not find the statements vexatious, frivolous or scandalous or an abuse of process. In this case, it is not appropriate to strike the challenged paragraphs.

[37] LPAT Rule 23.9 lists the circumstances in which a costs order may be made. The Tribunal may only order costs against a party if the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or if the party has acted in bad faith. The Tribunal does not find ground to order costs against either Party.

[38] The Tribunal Orders that:

- The motion is denied.
- The request for Costs by the Claimant is denied.
- This Member is not seized.

“M. Arpino”

M. ARPINO
MEMBER

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Local Planning Appeal Tribunal

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