Managing Costs and Interest in Expropriations:

The Shergar Story

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Costs and Interests in Expropriation

Expropriation cases are unique litigation cases in that a claimant who "loses" its case does not need to fully "win" to be entitled to their costs. Section 32 of the *Expropriations Act* (the "Act")[2] states that so long as an owner recovers 85 per cent of the amount offered by the authority, the Tribunal must make an order directing that the reasonable costs actually incurred by the owner be compensated by the authority.[3]

As a claimant, not only are you entitled to costs, you are also entitled to a statutory six per cent rate of interest from the date you cease to make productive use of the expropriated lands.[4] The Tribunal has the discretion to vary this rate of interest. It is highly unusual for the Tribunal to do so, despite the wording of the Act that clearly

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[2] R.S.O. 1990, c. E.26.
[3] Section 32(1) of the Act states "Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Tribunal and the amount awarded by the Tribunal is 85 per cent, or more, of the amount offered by the statutory authority, the Tribunal 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)."
[4] Section 33(1) of the Act.

permits interest to be varied if the Tribunal is of the opinion that any delay in determining compensation is attributable "in whole or in part" to the owner.[5]

This is not surprising given the context of expropriation cases and the sophistication of the parties involved. Typically, the authority is well experienced in expropriation matters, while the owner is unfamiliar with the legal process and is forced to hire legal counsel to defend their interests at a hearing for the first time. As often cited in claimant cases, the Supreme Court of Canada has held that expropriation 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.[6]

For public policy reasons, expropriating authorities who seek to avoid paying costs to owners or reduce the statutory interest rate payable often face an uphill battle, despite the wording of the Act. This may be the case even when the expropriated owner fails to respect the expropriation process, meet timelines set by the Tribunal, or mitigate their damages. The award of costs against the owner, even if the 85 per cent threshold test is not met, is at the discretion of the Tribunal. As noted by some commentators, the

[5] Section 33(2) of the Act.
[6] *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 SCR 32 at para 20.

Tribunal is very reticent to deny the owner costs, much less order that an expropriated owner to pay the costs of the expropriating authority.[7]

This is contrary to the principles of costs in the civil litigation context, where a Rule 49 offer is often used to facilitate settlement by shifting some of the risk of continuing to litigate on the party who fails to accept a reasonable offer.[8] Although a Section 25 offer from an expropriating authority represents an offer to settle, in the absence of a tangible threat of costs, a hardened claimant may continue to subject an authority to repeated delays and rounds of litigation with little risk that costs will be forfeited, so long as the market value of the expropriated lands is found to meet the 85 per cent threshold requirement.

However, the Ontario Municipal Board (now continued as the Local Planning Appeal Tribunal)[9] recently awarded costs in favour of the expropriating authority and significantly reduced the claimant's entitlement to interest, even though the market value of the lands was held to be higher than the Section 25 offer. This provides both authorities and claimants with much needed guidance as to what constitutes reasonable conduct in an era where land acquisition costs are increasing due to Provincial policy on intensification and government investment in public infrastructure.

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[7] Andrew Baker, *OMB Decision Sets Precedent For Managing Costs And Interest Against Unreasonable Claimants*, online: Borden Ladner Gervais LLP News & Publications, <http://www.http://blg.com/en/News-And-Publications/Publication_5200>

[8] Rule 49 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[9] For the purpose of this paper, the terms Tribunal and Board will be used interchangeably.

The facts in *Shergar Development Inc. v. Windsor (City)* ("*Shergar*") are compelling.[10] They provide the ideal backdrop to demonstrate the challenges faced by authorities in seeking costs or a reduction of statutory interest from an expropriated owner, even when the owner is sophisticated and is found to have significantly contributed to the delay of determining compensation.

The Unanticipated Costs of an Uninterrupted Waterfront

For almost 50 years, the City of Windsor sought to finish its stretch of uninterrupted riverfront parkway across from the Detroit skyline. By the 1960s, the City had established a policy to eventually purchase all of the lands north of Riverside Drive to create a continuous public park between the Hiram Walker & Sons distillery to the east and the Ambassador Bridge to the west.

One of the last parcels that remained privately-owned was located on the south shore of the Detroit River between the Ambassador Bridge and the Detroit-Windsor Tunnel. The lands were almost 2,000 feet in length but irregularly-shaped, narrow and had poor vehicular access due to an easement along Riverside Drive West. There was evidence of environmental contamination and grading challenges on the site. Although the City attempted to buy the property from Canadian Pacific Railway Company ("CPR") in the early 1990s, the six-acre parcel was eventually sold to Shergar Developments Inc.

[10] For the purpose of this paper, *Shergar* will refer to both the decisions of the Ontario Municipal Board issued on May 25, 2016 (*Canadian Pacific Railway Company v. Windsor (City)*, 2016 CarswellOnt 8507, 1 L.C.R. (2d) 280) and January 24, 2018 (*Canadian Pacific Railway Company v. Windsor (City)*, 2018 CarswellOnt 1614) for OMB Case Nos. LC130023 and LC130034.

("Shergar") in 1995 for $750,000. The sale price included lands south of Riverside Drive West described as the "railcut lands".

a) 1998 Expropriation and Subsequent Proceedings

The City expropriated the subject lands on April 29, 1998. It did not expropriate the railcut lands. A figure showing the approximate location of the subject lands and the railcut lands is below:

From the onset, Shergar contested the validity of the expropriation. It requested a hearing of necessity and refused the City's request for access to its property until the City sought to bring a motion to the Board seeking access. It did not participate in

proceedings scheduled before the Board of Negotiation. Instead, in January 2001, Shergar filed a Statement of Claim to the Superior Court of Justice alleging that the City had, *inter alia*, pursued the expropriation in bad faith and sought an order to quash the expropriation.

After a 20-day trial, the Court found that there was no bad faith in the expropriation and that the expropriation was validly done.[11] Shergar then appealed the ruling to the Court of Appeal, which dismissed the appeal in 2007.[12] Despite the Court of Appeal's ruling, Shergar did not file its Notice of Arbitration and Statement of Claim until 2013, shortly after CPR (as mortgagee of the subject lands) filed its Notice. Shergar then delayed the issuance of a Procedural Order and forced the City to bring a motion for directions seeking the settlement of the draft Order in November 2015. As a result of these actions, the hearing on the merits was not held until March 2016.

b) Shergar's Evidence at the Hearing

Shergar assessed the market value of the subject lands at $5,000,000. The City's assessment was $710,000. After a lengthy hearing, the Board agreed with the City and found that the market value of the subject lands was $710,000. In doing so, the Board also made the following observations and findings:

a) There was almost an eighteen year period between the date of expropriation to when the matter was brought before the Board.

[11] *Shergar Developments Inc. v. Windsor (City)*, 2005 CarswellOnt 615 (ON SC) at para 31.
[12] *Shergar Developments Inc. v. Windsor (City)*, 2007 ONCA 666.

b) As early as 1999, Shergar advised the City that it was not acknowledging or attorning to the jurisdiction of the Board since it did not accept the legality of the expropriation and would be commencing legal action.

c) There were legal proceedings in 2004 and 2007 brought by Shergar and resolved in favour of the City.

d) The Board had granted the City's motion for directions for a revised Procedural Order in November 2015 to guide the hearing process.

e) One of the appraisers called by Shergar prepared an appraisal report that included analysis that was "inadequate, inappropriate and unreasonable and as a result, the conclusion is unreliable."[13]

f) The Board was concerned that neither of the appraisers called by Shergar fulfilled their duty to provide the Board with opinion evidence that is "fair, objective and non-partisan."[14]

g) The litigation against Shergar's solicitors involved in the purchase of the subject lands and railcut lands "had no bearing on the value of the land."[15]

However, the Board appeared to afford little weight to such findings in its decision at the first instance relating to costs and interest, as further discussed below.

[13] *Shergar* (2016) at para 42.
[14] *Shergar* (2016) at para 44.
[15] *Shergar* (2016) at para 55.

c) Shergar's Position on Costs and Interest

The City served a Section 25 offer for $500,000 in December 1998. It then made a Rule 49 offer for approximately $1.2 million on June 2, 2015 in an attempt to settle the expropriation proceedings.[16] Since the City's Section 25 offer was less than its position on market value at the hearing, Shergar claimed that the 85 per cent rule in the Act was met and thus its costs must be compensated by the City. From Shergar's perspective, the Board had no discretion as to costs while there was some discretion as to interest.[17]

Shergar also argued that the full statutory six per cent rate of interest was applicable on the $710,000, despite the fact that a substantial part of the interest in land was mortgaged back to CPR. The City took the position that interest was only applicable on the value of the land after the mortgage costs to CPR were netted out, and that the interest should not begin to run until the date Shergar filed its Notice of Arbitration and Statement of Claim (July 5, 2013) to the date of the Board's decision.

The Board found that Shergar was entitled to its costs. The Board also found that statutory interest would run from the date of possession to the date of the Board's decision, except for the period of time between January 2008 and July 4, 2013, when a reduced interest rate of three per cent would apply as Shergar ought to have filed the Notice of Arbitration and Statement of Claim earlier.

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[16] The Offer to Settle as of the date of the hearing was equivalent to $1,208,155.98. This amount was calculated based on forgiveness of unpaid cost awards owed to the City in the civil proceedings and discharge of mortgage monies owed to CPR, which mortgage interest was assigned to the City following its settlement with CPR.

[17] *Shergar* (2018) at para 13.

d) Board's Section 43 Decision and Rehearing

The City sought a Section 43 review of the Board's decision on the issues of costs and interest. In a decision dated December 8, 2016, former Associate Chair S. Wilson Lee and Executive Chair Bruce Krushelnicki (as he then was) ordered that the Board's decision as it relates to these issues be rescinded, and that a rehearing be convened to determine three issues:

1. What is the quantum of the award upon which interest is payable to Shergar?

2. How is the amount of interest on the compensation awarded to be calculated?

3. How are costs to be disposed of?[18]

The rehearing was held in March 2017. The Board's decision was released on January 24, 2018. In this Decision, the Vice-Chair Makuch carefully parsed out each component of the parties' arguments on costs and interest. It was clear to the Vice-Chair that the quantum of the award upon which interest is payable was determined by application of Section 33(1) of the Act, which states that the statutory interest is only to be applied to an owner's proportionate interest in the compensation for market value.[19]

Reduction of Interest

On the issue of the amount of interest, the Vice-Chair noted that Board jurisprudence supports the practice of denying interest for periods during which expropriations are

[18] Letter dated December 8, 2016 from the Ontario Municipal Board re Section 43 Request for Review of the Decision of J.E. Sniezek and M. Carter-Whitney, Issued May 25, 2016.
[19] *Shergar* (2018) at para 59.

being challenged with no good reason instead of advancing a claim for compensation.[20] In this case, the Board held that it was quite clear from the record that the City made all attempts to make an early payment of compensation but Shergar "persistently resisted those efforts by pursuing groundless litigation."[21] On this basis, the Board reduced Shergar's entitlement to interest down to three percent from the date of possession to July 5, 2013. The typical six per cent rate applied thereafter.

Costs Awarded to City following Rule 49 Offer

On the issue of costs, the Board appeared disturbed that Shergar refused to accept the City's $1.2 million offer to settle and instead decided to force the parties to attend a two week hearing, where it unreasonably maintained a claim based on evidence that was entirely rejected by the Board. Importantly, the Board made the following statements regarding the interpretation of Section 32 of the Act:

> The Board agrees with the City's argument that the Act should not be interpreted so as to permit the funding of unreasonable claims with no costs risk. While it is important to ensure that an owner has been fairly compensated, it is also important that there be a just determination of compensation in an expeditious and cost effective manner and that

[20] *Shergar* (2018) at para 64, citing *Coltman v. Metropolitan Separate School Board (No. 2)*, 1975 CarswellOnt 1315 and *Re/Max Sudbury Inc. v. Sudbury (City)*, 2004 CarswellOnt 7496.
[21] *Shergar* (2018) at para 68.

> negotiation is encouraged to promote early settlement. Costs incentives play a key role in the overall statutory scheme.[22]

The Board then disagreed that its discretion to award costs against the owner was somehow limited by the amount offered by the City in its Section 25 offer, as suggested by Shergar's counsel. The Board noted that Section 32(2) did not cross-reference Section 25 of the Act but did expressly refer to Section 44(d) regarding regulations applicable to costs. Section 32(2) states:

> **32(2)** Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Tribunal and the amount awarded by the Tribunal is less than 85 per cent **of the amount offered by the statutory authority**, the Tribunal 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. (Emphasis added)

The Board held that the legislature did not intend to limit the "amount offered" referred to in Section 32(2) to only mean a Section 25 offer. Instead, subsequent offers made outside of the expropriating authority's obligations (including Rule 49 offers) are

[22] *Shergar* (2018) at para 76.

appropriately considered. In making this determination, in addition to the wording of Section 32(2), the Board appeared to take direction from the following:

a) Rule 141 of the Board's *Rules of Practice and Procedure* provides for consideration of subsequent offers and states that if matters are not dealt with in the Act, the *Rules of Civil Procedure* apply;

b) Rule 49 explicitly sets out the entitlement for costs from the date of the service of the offer if certain criteria are met (and the Board found that such criteria were met in this case);

c) The Board and Divisional Court have awarded costs to expropriating authorities based on the principles of Rule 49 offers;[23] and

d) The Board is empowered to award costs after any hearing event, even outside of the expropriation context, and may award costs against a party whose conduct has been vexatious, frivolous or unreasonable.

Based on the above, the Board concluded that the City made a valid Rule 49 offer that was significantly greater than the quantum of compensation awarded to Shergar that did not meet the 85 per cent threshold under Section 32. In exercising its discretion, the Board held that Shergar is denied costs from the date the Rule 49 offer was made (June 2, 2015) and that the City would be entitled to its costs from this date. The City has calculated its partial indemnity legal costs of the Board proceedings from June 2, 2015

[23] *Shergar* (2018) at para 82, citing *Green-Life Proteins Ltd. v. Ontario (Ministry of Transport & Communications)*, 2002 CarswellOnt 4685 (OMB) and *Willies Car & Van Wash Limited v The Corporation of the County of Simcoe*, 2016 ONSC 5786 (Div Ct).

onwards to be $432,454.[24] Shergar has since appealed the Board's 2018 Decision to the Divisional Court.[25]

Subsequent Offers Matter … Maybe?

Shergar stands for the principle that claimants in expropriation proceedings may still be subject to cost awards, even when the Section 25 offer is less than what is determined to be market value of the lands. As noted by the Vice-Chair at the rehearing, the cost consequences of Section 32(1) are not triggered by the Board's overall determination of market value, but rather whether the compensation actually awarded to the claimant beats 85% of the authority's offer.[26] It gives further clarity and meaning to the reciprocal wording of Section 32 of the Act that puts an onus on both authorities and owners to avoid taking unreasonable positions on market value in the determination of compensation.[27]

At the same time, the impacts of *Shergar* on the Tribunal's willingness to consider Rule 49 offers as a civil court would remain to be seen. In the civil context, a party's conduct is generally irrelevant to judging success under Rule 49 as it is largely a straightforward numerical exercise. However, the impact of Rule 49 offers on whether cost awards will be made against claimants still remains at the discretion of the Tribunal by virtue of Section 32 of the Act. *Shergar* is unique in that (1) the claimant was a sophisticated developer, (2) it had initiated numerous collateral proceedings that effectively delayed

[24] Amount based on a Bill of Costs issued by the City's counsel as of March 22, 2018.
[25] As of the writing of this paper, Shergar's appeal is scheduled to be heard on October 2, 2018.
[26] *Shergar* (2018) at para 92.
[27] Compare Sections 32(1) and 32(2) of the Act.

the determination of compensation, (3) it took an aggressive position on market value that was not substantiated by the evidence, which was held to be not "fair, objective and non-partisan," and (4) the delay caused by such actions was substantial. These facts are not readily apparent in the majority of expropriation cases. Nonetheless, the ruling in *Shergar* suggests that expropriating authorities should consider using Rule 49 offers to deal with unreasonable litigants who may advance indefensible positions on the assumption that they are effectively shielded by the cost provisions of the Act, or mitigate the cost consequences of a "low-ball" Section 25 offer.

It is interesting to note that the Tribunal's *Rules of Practice and Procedure* differ slightly from the Board's *Rules of Practice and Procedure*:

OMB Rules	**LPAT Rules**
4. Matters Not Dealt With in the Rules The Board may at any time in a proceeding make orders with respect to the procedure and practices that apply in the proceeding. If these Rules do not provide for a matter of procedure, the Board may do whatever is necessary and permitted by law to enable it to adjudicate effectively and completely on any matter before it. The Board may follow the Rules of Civil Procedure, where appropriate, or may exercise any of its powers under the Ontario Municipal Board Act or applicable legislation.	**1.04 Matters Not Dealt With in the Rules** The Tribunal may at any time in a proceeding make orders **and direct practices and procedures that offer the best opportunity for a fair, just and expeditious resolution of the merits of the proceeding and may exercise any of its powers under the SPPA, the LPATA, or other applicable legislation.** If these Rules do not provide for a matter of procedure, the Tribunal may **adopt or follow the procedures set out in the *Rules of Civil Procedure* where appropriate and** do whatever is necessary to adjudicate effectively and completely to resolve the merits of any dispute on any matter. **If the Tribunal does not provide for a particular form, then the Tribunal may adopt, or modify the applicable form in the *Rules of Civil Procedure* to apply to any proceeding**

	<u>before the Tribunal.</u>
141. Settlement Offer If an offer to settle is made and it is not dealt with in the Act, the *Rules of Civil Procedure* apply.	**28.22 Settlement Offer** If an offer to settle is made and it is not dealt with in the Act, the *Rules of Civil Procedure* apply.

The revisions to the Tribunal's *Rules of Practice and Procedure* suggest that the reasoning in *Shergar* will still apply to future expropriation cases. However, the wording of Rule 1.04 suggests that the application of the Rules of Civil Procedure, including Rule 49 offers, will still be assessed on a case-by-case basis and at the discretion of the Tribunal member.

<u>You Still Have an Interest in Interest</u>

Shergar reminds owners that the statutory six per cent rate of interest is not a "given". A reduction in the rate of interest is available to the Tribunal if it concludes that any delay in determination of compensation is attributable to the owner. However, even in the most egregious of causes, it appears that the Tribunal still seems reluctant to remove an owner's entitlement to interest in its entirety (as was requested by the City in *Shergar*).[28] Perhaps this is because the delay of determining compensation is not in and of itself as damaging to the hearing process as a litigant who takes an untenable position to a costly hearing at the price of the public interest.

[28] See *Shergar* (2018) at para 65, where the Board agrees that Shergar's conduct in delaying the determination of compensation until 18 years after the expropriation was significantly more egregious than the conduct in both the *Coltman* and *Re/Max cases* and that Shergar's conduct should not be rewarded with 18 years' worth of statutory interest when very little of that time was devoted to pursuing its claim. However, the Board still awarded Shergar a three per cent rate of interest from the date of possession to the date it filed the Notice of Arbitration and Statement of Claim.

Conclusion

While claimants and respondents instinctively focus on their respective interests in an expropriation, issues such as costs and interest are critical to the Tribunal to efficiently manage its own process. Otherwise, the Tribunal can be subject to being hijacked by individual interests and otherwise abused. The Tribunal must adjudicate objectively on the substantive matters brought before it, irrespective of party conduct. However, interest and costs represent key tools to discipline the conduct of parties who might be inclined to abuse the process.

Shergar represents an example of the kind of conduct most would identify as warranting a disciplinary response. Assuming that future participants take instruction from the exercise of the discretion ultimately undertaken by the Tribunal in *Shergar*, the case also demonstrates the utility of interest and costs as tools to control the process. From this perspective, presumably the Tribunal as well as the parties before it will read with interest the disposition on the outstanding appeal.