Costs Update Under Section 32 of the *Expropriations Act*

The Application of the *Shergar* decision in *1353837 Ontario Inc. v City of Stratford,* 2024 CarswellOnt 3439

Friday, April 12, 2024

The information and comments herein are for the general information of the viewer and are not intended as advice or opinion to be relied upon in relation to any circumstances. For application of the law to specific situations, the participants should seek professional advice. The information was updated on May 9, 2022.

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Introduction

- *1353837 Ontario Incorporated v. Stratford (City)*, 2024 CarswellOnt 3439
- Recently released Ontario Land Tribunal decision
- The most significant application of the *Shergar* decision since it was decided with respect to the payment of costs under the *Expropriations Act*

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- Section 32
- Full indemnity principle & efficiency principle
- Threshold – 85% of “amount offered”

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- *Shergar Development Inc. v. Windsor (City)*, 2020 ONCA 490
  - 2019 ONSC 2623 (Superior Court)
  - 2018 CarswellOnt 1614 (Ontario Municipal Board)

- 22-year history following the 1998 expropriation
- Unnecessarily delayed pursuing its claim while pursuing other collateral litigation, including a negligence claim against its lawyers
- Shergar refused to grant the City access to the Expropriated Lands
- Shergar challenged the expropriation until the issue was finally resolved by the Ontario Court of Appeal nine-and-one-half years after the expropriation

- Shergar refused to resolve the matter of compensation before the Board of Negotiation
- Shergar delayed the preparation of an appraisal for 14 years
- Shergar delayed its claim for compensation for 15 years
- Shergar delayed the determination of compensation for 18 years

- During compensation arbitration City increased its offer to Shergar – offer rejected
- City beat offer

Decision

- After rehearing, Board preferred City's appraisal advice
- Compensation awarded was less than City's latest offer of compensation
- Shergar ordered to pay some of City's costs from the date of that offer
- Board's decision upheld by Ontario Divisional Court and Court of Appeal

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Reasoning

- *Expropriations Act,* s. 32: provides for costs incurred for determination of compensation to be paid by expropriating authority to owner
- 85% Threshold – for entitlement to costs as of right, compensation must amount to at least 85% of the “amount offered” by the “statutory authority”
- Full indemnity cost recovery

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Expropriation Costs

Reasoning

- Before *Shergar*, common, perhaps preferred, approach was that the “amount offered” was the statutory offer under s. 25 of the Act, aka the “Section 25 offer”
- *Shergar:* “amount offered” is not restricted to the Section 25 offer. It can refer to subsequent offers made by statutory authority
- Also, principles of Rule 49 offers to settle in court proceedings can apply to offers made by statutory authority

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Overview of Rule 49.10

- Cost consequences of offer to settle
- If result is less than amount of offer to settle, then Plaintiff/Claimant may not be entitled to costs from date of offer
- Plaintiff/Claimant may have to pay some of Defendant's/ Respondent's costs from date of offer
- Tribunal has discretion – conduct matters

Key Takeaways

- 85% threshold not restricted to Section 25 offer
- Authorities can increase offers of compensation as they learn more
- Subsequent offers may carry cost consequences

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Expropriation Costs

Key Takeaways

- Consistent with what Court of Appeal described as a balance between the Act’s objectives of (i) full compensation to the owner; and (ii) just determination of compensation in expeditious and cost-effective manner
- Where 85% threshold not met, the Tribunal retains a discretion on the award of costs – s. 32(1)

- *1353837 Ontario Inc. v City of Stratford*, 2024 CarswellOnt 3439 (Ontario Land Tribunal)
- Two costs motions following the merits decision
- A significant application of the *Shergar* decision(s)

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- Subject Property: 11.4-acre site in downtown Stratford with a large industrial building
- Historically used as railway lands
- In 2001, purchased by the Claimant with the aim of a large mixed-use redevelopment

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Stratford - Facts

- On June 15, 2009, the City expropriated the entire property for a University of Waterloo Campus
- A section 25 Offer of $500,000 was made jointly to the Claimant and others
- In 2010, the City paid compensation under Minutes of Settlement of **$566,935** to the Claimant

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- Highly contentious proceedings
- Prior to the Arbitration:
  - the Claimant brought an injunction to **prevent** the expropriation
  - the Claimant brought a motion to **expedite** the expropriation
  - The Claimant brought an application to **extend** the possession date indefinitely

Stratford – Legal Proceedings

- From the Arbitration commencement:
  - In 2012, the Claimant commenced the arbitration
  - The Tribunal issued 18 decisions on procedural matters and motions
  - A temporary stay to attend the BoN
  - The Notice of Arbitration Struck for issues outside the Tribunal's jurisdiction
  - June 2013, the Claimant unsuccessfully claimed for the payment of interim costs
  - In 2016, the City brought a successful Summary Judgment Motion
  - The Claimant appealed the summary judgment motion – dismissed in 2018

Stratford – Legal Proceedings

- In November 2018, the hearing resumed
- The Tribunal's involvement was required in numerous CMCs to resolve procedural matters
- Motions regarding refusals and undertakings
- The Claimant didn't have its witness statements and expert reports ready by the due date in the Procedural Order and had to be directed to serve same

Stratford – Merit Decision

- The Claimant claimed:
  - $22.7 million for market value compensation; and
  - $1.07 million for disturbance damages and business losses
- The City's Position:
  - $290,000 market value compensation
  - At most $51,683 for wasted development costs
- The Tribunal held in favour of the City
- (The Claimant unsuccessfully appealed to the Divisional Court)

Two Costs Motions

- Claimant:
  - Costs of $6,102,513
    - Full indemnity up to the City’s last offer (April 13, 2021)
    - Partial Indemnity after the City’s last offer
- City:
  - Costs of about $4.1 million for the entire proceeding on a full indemnity basis, or alternatively, on a substantial, or partial indemnity basis

The Law on Costs

- Section 32(2) of the *Expropriations Act*: when the award is less than 85 percent of the authority's offer, costs discretionary:
  - the Tribunal may make such order, if any, for the payment of costs that it considers appropriate
- Rule 26.29: If an offer to settle is made and it is not dealt with in the *Expropriations Act*, the Rules of Civil Procedure apply

The Law on Costs

- Rule 49.10(2), Authority's Offer:
    - Offer made at least 7 days before the hearing
    - Is not withdrawn
    - Is not accepted by the Claimant
    - If the Tribunal's award is less than 85 percent of the City's Offer, the Claimants costs may be payable on a full indemnity basis up to the date of the offer, and after the date of the offer, the costs may be payable by the Claimant to the Authority, or no costs may be paid to the Claimant, or something else. The Tribunal has discretion

- The City has the burden of showing Rule 49.10 applies
- “The award of Costs to either the Claimant or to the City is a matter of discretion for the Tribunal to be made along a broad spectrum of possible outcomes, including awarding no costs”

- Guidance from Shergar

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The Eight Issues

- The Tribunal considered eight issues in ordering costs

- Whether, subject to exceptional circumstances, the Claimant is entitled to its costs
- Whether the authority is entitled to its costs as of the date of a Rule 49 Offer

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Issue 1: Costs presumptively payable?

- The Tribunal stated that there are two principles to consider in awarding costs (from Shergar):
  - **The Indemnity Principle**: The Act must be given broad and liberal interpretation consistent with its purpose to adequately compensate those whose lands are taken to serve a public interest
  - **The Efficiency Principle**: The encouragement of early settlement of claims on an equitable basis

Issue 1: Costs presumptively payable?

- Tribunal Principles:
  - The “general approach” is to award the Claimant its costs
  - No presumption under Rule 49 that the Authority will have its costs paid from the date a successful Rule 49 offer is delivered
  - A responsible expropriating authority should be afforded some measure of costs protection where it makes a fair offer, and a claimant unreasonably refuses to accept it
  - The “measure” of protect may be awarding a claimant less of its costs, without necessarily awarding the expropriating authority anything

Issue 1: Costs presumptively payable?

– Tribunal may consider the following factual circumstances in exercising its discretion against the “general” approach:

(1) the existence of a “proper” offer to settle made by the expropriating authority;

(2) the unreasonable refusal or non-acceptance of a “proper” offer;

(3) If the expert evidence advanced by a claimant is not fair, objective and non-partisan;

(4) the conduct of a claimant who may have unduly delayed the expropriation proceeding, including frustrating or obfuscating the determination of the claim on its merits; and

(5) other relevant factors that go to the reasonableness or unreasonableness of the conduct of Parties.

Issue 2: Proper Rule 49 Offer?

- Test for a proper Rule 49 Offer (from *Shergar*):
  - easily discernable
  - sufficiently certain to engage costs consequences
  - understandable and open at the commencement of the hearing
  - presents no difficulty in interpreting the quantum
  - actionable upon its acceptance by a Claimant

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Issue 2: Proper Rule 49 Offer?

- The City made five offers to the Claimant
- The Tribunal found that the first three would not have a direct impact on the Claimant’s entitlement to costs, but the last two would
- The problems with the first three offers included: Offer was made jointly without allocation, offer was not final, offer was withdrawn, offer was related to other matters or proceedings

Issue 2: Proper Rule 49 Offer?

– Final two Offers were proper and unreasonably refused by the Claimant
  - Offer 4: June 2018
    - $6,000,000 in total compensation offered, plus costs, plus interest
  - Offer 5: April 13, 2021:
    - $9.9 million in compensation, plus costs, plus interest

Issue 3: Claimant’s Reliance on Experts?

– Can a Claimant reasonably refuse settlement offers in reliance on the advice of its experts?

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Issue 3: Claimant’s Reliance on Experts?

- Normally, a Claimant can rely on its experts
- However, the Tribunal found that:
  - The Claimant had expert reports in 2009 that did not address key issues and were “defensive rather than offensive”
  - The Claimant only had expert evidence on the key issues by 2020
  - The Claimant failed to reasonably assess and re-assess the strength of its case in a timely and ongoing manner
  - The Claimant failed to diligently seek financing for its compensation claim. A lack of financing is no excuse for not advancing a claim.
  - The Claimant had three expert reports that challenged its market value claim

Issue 4: Refusing higher and higher offers?

- Whether the Claimant's Refusal of the Offers was Reasonable because the City's Offers Kept Increasing or Evolving?
- The Claimant argued:
  - If the authority makes increasing offers, it is reasonable for the Claimant to reject them, because it means that the City's case has weaknesses
- The Tribunal rejected the Claimants argument because:
  - It would work against the Efficiency Principle because it would discourage settlement

Issue 5: Expert Evidence Impartial?

- Whether the Expert Appraisal Evidence of the Claimant at the Merit Hearing was fair, objective and non-partisan?
- The Tribunal declined to find that the appraiser was partisan because in the Merits Decision, no such finding was made, unlike in *Shergar*
- In the Merit Decision, the Claimant's appraiser's evidence was simply not preferred

Issue 6: Litigation funders?

- What Impact, if any, does the Presence of Litigation Funders have on the Exercise of the Tribunal's Discretion?
- Tribunal:
  - Costs are awarded to the Claimant, not litigation funders
  - the Claimant's source of financing is irrelevant to the exercise of its jurisdiction under section 32(2) of the Act
  - Whether or not the legal fees are paid or payable is irrelevant to a determination pursuant to section 32(2) of the Act if the fees charged are otherwise appropriate

Issue 7: Claim Reasonably Pursued?

- Whether, overall, the Claimant Reasonably Pursued its Claim without Undue Delay?
- Tribunal:
    - the Claimant did not reasonably pursue its claim without undue delay, particularly due to its inaction to prepare its case for significant periods of time

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Issue 7: Claim Reasonably Pursued?

- “Aggravating Factors in the assessment of the Claimant’s Costs”
- The Tribunal compared the Claimant’s conduct to that of Shergar:
  - The Claimant challenged the City’s possession of the Expropriated Lands
  - The Claim was filed after three (3) years; compared to 15 in Shergar
  - The Claimant delayed its appraisal for 11 years (14 years in Shergar)
  - The Claimant took over nine years to have full expert reports
  - The Claimant resisted mediation (as in Shergar)
  - The City successfully struck the Claimant’s pleadings regarding issues outside of the Tribunal’s jurisdiction
  - The determination of the expropriation took 12 years (18 in Shergar)

Issue 7: Claim Reasonably Pursued?

- The City brought a motion for partial summary judgment which was largely successful , and the Claimant launched two unsuccessful appeals, delaying the proceeding by two years
- The Claimant's proposed discovery plan was unreasonable
- The Claimant forced the Tribunal to hear various motions over multiple days
- The Claimant breached the Procedural Order by failing to deliver its expert reports
- The Claimant made no offers to settle its claim and sought no clarification of the City's offers

Issue 8: City’s Entitlement to Costs?

- Whether the City is Entitled, on an Exceptional basis, to its Costs as well?

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Issue 8: City's Entitlement to Costs?

- The Tribunal declined to award the City its costs on a substantial indemnity basis from the date of the 2018 Offer because the Claimant's conduct did not rise to the level of Shergar

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- The Tribunal awarded costs concurrently to both the Claimant and the City:
  - For the Claimant: full indemnity costs up to the date of the 2018 Offer, and then partial indemnity costs afterwards: $3,709,000
  - For the City: its partial indemnity costs throughout the proceeding: $2,901,380

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Reasons

- Costs consequences were required due to the Claimant’s conduct, including its inaction
- The conduct of the Claimant was unreasonable in some respects, but not to the degree present in the Shergar Decisions

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Reasons

- The City had made a proper offer on June 15, 2018, which was unreasonably refused or not accepted by the Claimant. As such, only partial indemnity costs should be payable thereafter
- The Claimant’s conduct throughout the proceeding was unreasonable, inappropriate and wasteful of both the Tribunal’s and the City’s time

Key Takeaways

1) A Rule 49 Offer does not automatically entitle an authority to their costs as of the date of the offer
2) Shergar may represent a threshold of “aggravating conduct”. A Claimant may have to act as bad as in Shergar for the full effect of Rule 49 to apply
3) Make proper Rule 49 Offers:
   - Easily discernable
   - Sufficiently certain to engage costs consequences
   - Understandable and open at the commencement of the hearing
   - Present no difficulty in interpreting the quantum
   - Actionable upon its acceptance by a claimant
   - Not made jointly
   - Not involving other lands
   - Not involving other proceedings
   - A final offer

Key Takeaways

4) Claimants must be active with experts and must reasonably assess and re-assess the strength of their case with expert reports that are up-to-date and not merely defensive
5) The Tribunal will be guided by the Indemnity Principle and the Efficiency Principle in assessing costs

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