Determination of costs under the Expropriations Act: Case law update

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In *Hume v. MTO (Hume)*, the Local Planning Appeal Tribunal (LPAT) was tasked with assessing the reasonableness of costs claimed pursuant to section 32 of the *Expropriations Act* (Ontario) (the Act), and whether the costs awarded attracted interest in accordance with the Act. The LPAT's decision, released on December 6, 2019, provides much needed guidance about what constitutes "reasonable" costs. However, its decision to award interest on costs at the "prescribed rate" must be read with caution.

Background

In *Hume*, the Ministry of Transportation (MTO) expropriated a gas station with ancillary uses (including a residence). Once the claim was resolved, MTO took issue with the following:

A. The claimants' bill of costs;
B. Challenging whether the hourly rates charged by the claimants' counsel were reasonable;
C. Whether the hours spent by counsel were appropriate; and
D. Whether the subject matter of the services/advice provided were generally eligible for reimbursement under the Act.\

LPAT Decision

Two different lawyers practising in different cities had represented the claimants. Although the lawyers had an approximate 17-year difference in their years of call, they both charged similar hourly rates. The lawyer called to the bar in 1984 practises outside of Toronto and the lawyer called to the bar in 2001 practises in Toronto. The MTO challenged the rates of the lawyer called to the bar in 2001 as excessive. Significant evidence was led as to the appropriateness of the hourly rates. The LPAT concluded that the lawyer's rates were reasonable, noting:

A. The rates were established in a bona fide manner through a retainer agreement with the claimants;
B. The market supports higher hourly rates in Toronto compared to outside Toronto;

C. The claimants' lawyer does not alter his hourly rates as between files/clients;
D. The lawyer provided evidence of having significant experience in the field of expropriation; and
E. The lawyer's hourly rates had not been challenged by other expropriating authorities.

The LPAT was not persuaded by MTO's argument that the lawyer's escalation of hourly rates was excessive and rejected the suggestion that the rate of inflation is a relevant benchmark to hourly rate escalations.

In fixing costs, the LPAT also reviewed whether there had been excessive time spent by the claimants' counsel, particularly as a change of lawyers occurred leading to some overlap in tasks performed by the two different law firms. The LPAT found that time spent by counsel for the claimants was generally reasonable and subject to a 5 per cent overall reduction. Factors that the LPAT found relevant to assessing the number of hours spent as part of fixing costs are as follows:

A. The expropriation involved complex circumstances/facts;
B. The determination of compensation was also complex;
C. Legal counsel were involved in assisting with mitigation efforts, as well as lengthy negotiations, mediation and adjudication;
D. Legal counsel were required to respond to significant requests for disclosure from the MTO; and
E. There were significant delays in the determination of compensation outside of the control of the claimants.

The lawyers' dockets forming part of the costs claim included time spent in relation to various aspects of a proposed redevelopment of the expropriated property. The MTO argued that these costs are not compensable since they did not relate to the determination of compensation in the expropriation. The LPAT was not convinced of this argument. The claimants were successfully able to demonstrate that the dockets related to the claimants' redevelopment plans had some relevance to the expropriation and therefore, were allowed by the LPAT as being reasonable.

The authority conceded that interest would be payable on costs despite the clear language in section 33 of the *Expropriations Act* that interest be paid on "market value and injurious affection". The disagreement between the parties, which the Tribunal resolved in the claimants' favour, was whether the date for the commencement of interest was the date of the settlement or the date of the cost award. The Tribunal heard and accepted arguments about the policy objective of making claimants "whole" through interest on compensation payments. Although, the Tribunal's decision lacks any detailed discussion about the scope of section 33 of the *Expropriations Act* and whether it would be appropriate to include "costs" in the protection of interest.

The dispute between the parties was limited to whether the costs awarded ought to attract interest from the date of settlement or the date of the Tribunal's costs decision. Ultimately, the LPAT determined that interest should run from the date of settlement of the matter. The LPAT's order also specified that interest on the costs award would continue to run until the MTO made payment to the claimants. The "prescribed rate" was to be used to calculate the interest owing, referring to the statutory rate of 6 per cent per annum in section 33(1) of the *Expropriations Act*.

Comment

We anticipate this case being relied upon in support of the notion that costs attract interest at the “prescribed rate” in all cases. However, the jurisdiction to award interest on costs was not challenged in *Hume*, and the precedent value of the case must be considered in that context.

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