OMB Decision Sets Precedent for Managing Costs and Interest Against Unreasonable Claimants

February 07, 2018

In *Shergar Developments v. Windsor*, the Ontario Municipal Board made an unprecedented award of costs to the expropriating authority and significantly reduced the claimant's entitlement to statutory interest.

The recent decision of the Ontario Municipal Board (the Board) in *Shergar* Developments v. Windsor (City) (*Shergar*) provides new support for expropriating authorities looking to control costs from claimants who delay their claims or advance unreasonable positions in land acquisition cases.1 In *Shergar*, the Board made an unprecedented award of costs to the expropriating authority, the City of Windsor, and significantly reduced the claimant's entitlement to statutory interest.

The decision is timely in an era when land acquisition is an increasingly expensive and complex proposition. Changes to land use planning in Ontario will increasingly necessitate that public infrastructure such as schools, rights-of-ways, and transit stations will need to be built within existing urban boundaries rather than on greenfield sites. In addition to skyrocketing land costs, long construction timelines in urban areas will also increase claims for disturbance damages, business losses, and injurious affection.

Increasing Costs in Land Compensation Cases

The increased complexity of expropriation litigation will also drive up legal costs and entitlements to statutory interest. The Expropriations Act (the "Act") requires an expropriating authority to pay 6 per cent interest on outstanding awards for market value and injurious affection. In the current era of low interest rates, an outstanding claim becomes a good investment unless procedural controls can be exercised. The authority must also pay a claimant's reasonable costs if the claimant is awarded 85 per cent of the authority's statutory offer of compensation.2 Traditionally, a claimant was almost always guaranteed to beat the 85 per cent rule because the expropriating authority is obliged to make an offer in full compensation for the registered owner's interest in the land. Only in rare instances would an expropriating authority take a position at hearing on market value that was below the Section 25 offer.

In civil litigation, Rule 49 of the *Rules of Civil Procedure* incentivizes litigants to make reasonable offers to settle before proceeding to trial. For example, if a defendant makes an offer to settle and the plaintiff does not beat the offer at trial, the plaintiff will generally have to pay the defendant's costs from the date of the offer.3 While the Board incorporates the *Rules of Civil Procedure* by reference,4 Board jurisprudence has not always been clear as to whether a subsequent, more generous offer made by the expropriating authority would count under the meaning of "offer" pursuant to costs provisions of Section 32 of the Act.

There are only a few instances when the Board has awarded costs against a claimant; almost all of which were limited to claims for injurious affection with no land taken.5 When a claim is limited to injurious affection, the expropriating authority does not have to make a Section 25 offer for an interest in land. The expropriating authority will often make a nominal offer to protect its costs position if it believes there is no merit to the claim. However, in land taken cases, the Board has been very reticent to deny the owner costs much less order an expropriated owner to pay the costs of the expropriating authority.6

Facts of the Case

The underlying facts in Shergar highlight the need for a different approach to costs and interest. The City of Windsor expropriated lands fronting the Detroit River to complete the City's river front park. Shergar declined the Section 25 offer and challenged the legality of the expropriation in the civil courts for almost nine years. The civil claims were all dismissed and the matter proceeded back to the Board for a determination of compensation.7

The claimant sought $5,100,000 for the market value of the expropriated lands. The City advanced a market value position of $710,000. The Section 25 offer was $500,000. Therefore, Shergar took the position that it was automatically guaranteed its reasonable costs.8

In June 2015, the City made a subsequent offer that included set-off for legal fees incurred in parallel civil claims. The quantum of the offer was significantly more generous than the Section 25 offer and the City's position advanced at the hearing.

In its decision of May 2016, the Board agreed with the estimate of the City's appraiser, finding that the market value of the expropriated lands was $710,000. The City requested the opportunity to unseal the offer and make submissions on costs based on its subsequent offer. The Board denied the request, reasoning that the award of $710,000 was greater than the Section 25 Offer.

The City also requested that the Board reduce Shergar's entitlement to interest for its protracted litigation and for delaying its claim once the civil claims had been dismissed. The Board ordered a small variation in interest for the period of Shergar's delay following the dismissal of the civil claims, but ordered the City to pay the full 6 per cent interest for the entire period of the previous litigation.

The City sought a review of the Board's award of costs and interest pursuant to Section 43 of the *Ontario Municipal Board Act*.9 The Board determined that those portions of the

Board's 2016 decision were unreasonable and ordered a new mini-hearing on the issue of interest and costs. The Board's finding on market value was not reviewed.

Findings on Costs

At the Section 43 rehearing, the City conducted an analysis of the applicable procedural rules and legislation and advanced the argument that the "offer" referred to in Section 32 of the Act could indeed refer to a subsequent offer of compensation made in addition to the statutory offer required by Section 25. The City argued that the quantum of the offer warranted the application of the costs consequences of Rule 49. Shergar argued that the costs consequences of the Act only contemplate the Section 25 offer. Shergar also argued that the City's offer was not sufficiently clear to engage costs consequences. The Board agreed with the City and exercised its discretion to order Shergar to pay the City's costs from the date of the offer:

[91] The Board finds based on the principles underlying s. 32 of the Act and Rule 49 of Rules of Civil Procedure, and taking into account Shergar's conduct in these proceedings that it should exercise its discretion to deny Shergar its reasonable legal, expert, and appraisal fees following service of the Offer and award costs to the City.

[92] The costs consequences in s. 32(1) are not triggered by the Board's overall determination that market value was $710,000. Rather, these depend on an analysis of whether the compensation actually awarded to Shergar beats 85% of the City's Offer.10

Findings on Statutory Interest

The Board also found that Shergar's legal challenge constituted an unreasonable delay that warranted a variation of interest pursuant to Section 33 of the Act. The Board reduced Shergar's entitlement to interest to 3% for the entire nine-year period of the previous civil proceedings:

[68] The key consideration under s. 33 of the Act is whether the conduct of the claimant caused delay in a determination of compensation and it is quite clear from the record that the City made all attempts possible to make an early payment of compensation to Shergar but that Shergar persistently resisted those efforts by pursuing groundless litigation.11

Implications

The holding in *Shergar* finally provides expropriating authorities with a clear precedent for penalizing a claimant's delay and unreasonable litigation position. The rehearing decision will result in substantial savings to the City compared to the Board's 2016 decision.

It is important to note that while the Board can take into account the consequences of a Rule 49 offer, the decision to award costs under Section 32(2) of the Act is still discretionary. A detailed record evidencing the claimant's conduct is therefore crucial when seeking relief under these provisions. It is also important to properly document a Rule 49 offer in a manner that is easily understood and calculated to meet the percentage threshold under the Act.

The Board's decision was based in part on Rules 4 and 141 of the *OMB Rules of Practice and Procedure*. It remains to be seen if the new rules adopted under the Local Planning Appeal Tribunal, set to replace the Board under Bill 139, will contain the same provisions with respect to costs in expropriation proceedings. For more information on Bill 139, read BLG bulletins Province Releases Bill 139 Regulations for Transition From the OMB to the New Local Planning Appeal Tribunal and Bill 139 – The Proposed End of the Ontario Municipal Board.

1 2016 Hearing Decision: *Shergar Developments v. Windsor (City)*, 2016 CarswellOnt 2613 [*Shergar 2016*]; the Section 43 Review Decision is yet to be reported on WestlawNext, but can be found at www.omb.gov.on.ca [*Shergar 2018*]. The Board's reasons for granting the Section 43 review are not reported (please contact the author).

2 Section 25, Expropriations Act, R.S.O. 1990, c. E.26.

3 R.R.O. 1990, Reg. 194: Rules of Civil Procedure under the *Courts of Justice* Act, R.S.O. 1990, c. C.43.

4 Rules 4 & 141, *OMB Rules of Practice and Procedure*.

5 See for example: *Paciorka Leaseholds Ltd. v. Windsor (City)*, 2008 CarswellOnt 1531.

6 For example, in Bellwood v. Clearview (Town), 1994 CarswellOnt 5353, the Board concluded that it had authority to consider subsequent offers made after the Section 25 Offer in the determination of costs. In the same proceeding under, 1994 CarswellOnt 5474, partial costs were denied to a claimant on the basis of the subsequent offer.

7*Shergar Developments Inc. v. Windsor (City)*, 2007 ONCA 666 affirming *Shergar Developments Inc. v. Windsor (City)*, 2005 CarswellOnt 615.

8Shergar 2016, supra note 1 at para. 9. This calculation was complicated by the fact that a mortgage on the property in favour of CP Rail had not been discharged. The mortgagee advanced a claim pursuant to Section 17 of the Act, but it was settled prior to the hearing. CP Rail's entitlement to compensation was assigned to the City.

9*Ontario Municipal Board Act*, R.S.O. 1990, c. O.28.

10Shergar 2018, supra note 1 at paras. 91-92.

11Shergar 2018, supra note 1 at para 68.

Expertise

Expropriation, Land Use Planning, Government & Public Sector

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 725 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749