

SHERGAR: REDEFINING EXPROPRIATION COSTS

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Introduction:

Expropriation is one of the ultimate exercises of government authority and the *Expropriations Act*, RSO 1990, c. E-26 (the “*Expropriations Act*”) is a remedial statute designed to make landowners whole when their property is taken without their consent.¹ Outside of its provisions guiding the determination of compensation for market value, injurious affection and disturbance damages, the *Expropriations Act* contains a unique costs regime that generally provides for a landowner to recover its reasonable legal and appraisal costs following expropriation proceedings. Section 32 of the *Expropriations Act* provides:

32 (1) 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). [emphasis added].

Section 32(2) of the *Expropriations Act* provides discretion for the Tribunal to make a costs award in the event the owner does not achieve 85 per cent or more of the amount offered by the statutory authority.

Section 32 of the *Act* distinguishes expropriation proceedings from their counterparts in civil court or before other administrative tribunals and generally provides for the recovery of full

¹ *Toronto Area Transit Operating Authority v Dell Holdings Ltd*, [1997] 1 SCR 32, 1997 CanLII 400 at paras 20-23 (SCC) [*Dell Holdings*].

indemnity costs by an expropriated landowner.² Until recently, there was some conflicting jurisprudence respecting the rights of a landowner pursuing the determination of its right to compensation before the Local Planning Appeal Tribunal (“LPAT”) to full indemnification for its reasonable legal and appraisal and other costs pursuant to section 32(1) of the *Expropriations Act*. The conflict in the jurisprudence surrounded the threshold amount that an owner had to achieve before engaging the section 32(1) cost regime. Some decisions held that an owner could recover full indemnity legal and appraisal costs in accordance with section 32(1) as long as it achieved 85 per cent or more of the expropriating authority’s offer made pursuant to section 25 of the *Act* (“Section 25 Offer”).³ Other decisions held that an owner was required to achieve 85 per cent of subsequent higher offers made by the expropriating authority, including those made pursuant to Rule 49 of the *Rules of Civil Procedure*, RRO 1990, Reg 194 (“Rule 49 Offer”).⁴

² See *Rules to be Applied for the Purposes of Subsection 32(1) of the Act*, RRO 1990, Reg 364 (subject to assessment for reasonableness of the costs incurred).

³ *Expropriations Act*, RSO 1990, c. E-26 [*Expropriations Act*], s. 25:

25 (1) Where no agreement as to compensation has been made with the owner, the expropriating authority shall, within three months after the registration of a plan under section 9 and before taking possession of the land,

(a) serve upon the registered owner,

(i) an offer of an amount in full compensation for the registered owner’s interest, and

(ii) where the registered owner is not a tenant, a statement of the total compensation being offered for all interests in the land,

excepting compensation for business loss for which the determination is postponed under subsection 19 (1); and

(b) offer the registered owner immediate payment of 100 per cent of the amount of the market value of the owner’s land as estimated by the expropriating authority, and the payment and receipt of that sum is without prejudice to the rights conferred by this Act in respect of the determination of compensation and is subject to adjustment in accordance with any compensation that may subsequently be determined in accordance with this Act or agreed upon.

⁴ *Rules of Civil Procedure*, RRO 1990, Reg 194, r. 49.10(2)-(3).

Recent decisions of the LPAT and the Divisional Court in *Shergar Developments Inc v The City of Windsor* (“*Shergar*”)⁵ have addressed this question. The Divisional Court in *Shergar* upheld the LPAT’s interpretation of the meaning of the word “offer” in section 32(1) of the *Expropriations Act* to include Rule 49 Offers and, more generally, offers made subsequent to the Section 25 Offer.⁶ The clarity of this interpretation from the Divisional Court may have unintended implications for the unique costs regime under the *Expropriations Act* by opening the door for authorities to make offers that lack the transparency of a Section 25 Offer, but which can put an owner’s entitlement to the recovery of all of its reasonable legal, appraisal and other costs in jeopardy. This effectively superimposes elements of the costs regime in civil proceedings set out in the *Rules of Civil Procedure* on proceedings under the *Expropriations Act*, despite the unique nature of expropriation proceedings and the policy basis for cost recovery underlying the *Act*.

Since the LPAT’s decision in *Shergar*, expropriating authorities have at times liberally interpreted this decision and have advanced offers that may have the effect of impeding an owner’s right to pursue full and fair compensation. Such offers are not made with the support of an appraisal report required in offers under section 25 of the *Expropriations Act* and therefore lack independent or objective analysis in support of the offer.⁷

The authors have observed expropriating authorities relying on the Court’s decision in *Shergar* and its interpretation of section 32 of the *Expropriations Act* to increase the economic

⁵ *Shergar Developments Inc v The City of Windsor*, 2018 CanLII 3074 (ON LPAT) [*Shergar* LPAT], aff’d 2019 ONSC 2623 (ON SCDC) [*Shergar* Div Ct]. Leave to appeal the *Shergar* Div Ct decision was granted by motion heard September 23, 2019. Counsel for the Appellant includes John S. Doherty, Anne Tardif, Roberto Aburto and Michelle Cicchino of Gowling WLG (Canada) LLP. Counsel for the Respondent includes Stephen F. Waqué, Gabrielle K. Kramer, Andrew Baker and Julie Lesage of Borden Ladner Gervais LLP.

⁶ See *Shergar* Div Ct at paras 91-93.

⁷ See *Expropriations Act*, *supra*, s. 25(2), which requires an expropriating authority to base its offer for compensation under section 25(1) upon an appraisal report and serve that appraisal report at the time the offer is made.

risk that expropriated owners face when pursuing their rights to compensation under the *Expropriations Act*. Such use of the *Shergar* decision may be contrary to the underlying purpose of the *Expropriations Act*, which is to make owners whole following an expropriation and to recognize that property owners are unwittingly forced into acquisition proceedings without their consent.

The *Shergar* Decision:

Shergar's underlying facts span more than 20 years and involve numerous proceedings before the Ontario Municipal Board ("OMB"), the Canadian Transportation Agency, and various levels of Court.⁸ The extensive procedural history is only tangentially relevant to the issue of the costs regime in section 32 of the *Expropriations Act*, but it is noteworthy that there were numerous findings by the Courts and the OMB that were sharply critical of *Shergar Developments*' conduct. *Shergar*'s conduct was characterized as unreasonable and unnecessarily increased the costs of the proceeding.⁹

In *Shergar*, both the Tribunal and the Divisional Court made three key findings: (1) that the interpretation of the word "offer" in section 32(1) of the *Expropriations Act* includes an offer to settle pursuant to Rule 49 of the *Rules of Civil Procedure*; (2) that the expropriating authority (the City of Windsor) "beat" its offer of settlement made subsequent to its Section 25 Offer and pursuant to Rule 49; and (3) that the expropriated owner was not entitled to its full indemnity costs in accordance with section 32(1) as a result of the fact that the authority "beat" its offer and, in fact, was required to pay costs to the authority pursuant to section 32(2).¹⁰ The Tribunal

⁸ See *Shergar* Div Ct, *supra* at paras 2-32 (summarizing the procedural history and factual background of the case).

⁹ See e.g. *Shergar* Div Ct at para 26; *Shergar* LPAT, *supra* at paras 62-69. See also *Shergar*'s civil action disputing the City's expropriation, the dismissal of which was upheld on appeal: *Shergar Developments v Windsor (City)*, 2005 CanLII 3947, aff'd 2007 ONCA 666.

¹⁰ *Shergar* Div Ct at paras 97-107.

and the Court noted in awarding costs against Shergar that its conduct delayed the determination of compensation inappropriately and that it took unreasonable positions throughout the expropriation proceedings.¹¹

Interpreting the term “offer” in section 32(1), the Divisional Court in *Shergar* resolved an apparent inconsistency in the jurisprudence on the issue. Although the majority of cases favour and interpretation of the term “offer” to be a Section 25 Offer,¹² the Divisional Court relied on the outlier decision of *Bellwood v Clearview (Town)* in deciding an “offer” also includes Rule 49 Offers.¹³

Both the Tribunal and the Divisional Court in *Shergar* considered the policy implications before arriving at this conclusion. A Section 25 Offer and a Rule 49 Offer are distinct and made for clearly different purposes. A Section 25 Offer requires the support of an appraisal report that must be served on the expropriated owner.¹⁴ A Section 25 Offer is not subject to settlement privilege and is made known to the Tribunal determining compensation. A landowner can accept an authority’s Section 25 Offer respecting market value without prejudice to its right to advance further claims.¹⁵ On the other hand, a Rule 49 Offer is intended to engage adverse cost consequences and does not require the transparency of a supporting appraisal report. There is no

¹¹ *Shergar* Div Ct at para 101 (citing the *Shergar* LPAT decision which states “the *Act* should not be interpreted so as to permit the funding of unreasonable claims with no costs risk”).

¹² See e.g. *Jansen v Ontario (Minister of Transportation & Communications)*, 30 LCR 31, 1983 CarswellOnt 832; *Loblaws Ltd v Ontario (Minister of Transportation & Communications)*, 53 OR (2d) 50, 1985 CarswellOnt 1105; *Genman Holding Ltd v New Mount Sinai Hospital (No 2)*, 6 LCR 186, 1974 CarswellOnt 1304.

¹³ *Shergar* Div Ct at paras 90 and 94, citing *Bellwood v Clearview (Town)*, 53 LCR 277, 1994 CarswellOnt 5353 (ON OMB). For a discussion of the *Bellwood* tribunal’s decision’s inconsistency with the *Expropriations Act* see John Coates and Stephen Waqué, *New Law of Expropriation*, loose-leaf (consulted 2019), (Toronto: Carswell, 2016 – Release 2) at p. 10-215.

¹⁴ *Expropriations Act*, *supra*, s. 25(2).

¹⁵ *Expropriations Act*, *supra*, s. 25(2) (“and the payment and receipt of that sum is without prejudice to the rights conferred by this Act in respect of the determination of compensation”)

obligation to advance funds when a Rule 49 offer is made, even if the funds are presumably considered to be owing to an owner by the party who already took property without consent.

The distinction between the two reflects the obligation of an expropriating authority to provide a transparent offer that can educate a property owner on the merits of appropriate compensation before the owner decides how to proceed. These policy considerations reflect the understanding that the expropriations process is not strictly adversarial (like civil litigation) and a property owner ought not to fall victim to economic loss simply because his or her land is required for public purposes.¹⁶

The policy underlying Section 25 Offers also recognizes that an owner should receive at least what the expropriating authority believes to be fair compensation for the market value of land taken without delay, prejudice or conditions (i.e., the full and final release of future claims). Rule 49 Offers by their nature invite risk and impose prejudicial conditions on the party who chooses not to accept them. Exposing an owner to risk in claiming fair compensation can lead—perhaps unfairly—to the very loss the Section 25 Offer and its underlying policy seeks to avoid.

Modern expropriation legislation in Ontario has gone to great lengths to ensure that when land is taken from owners without consent and for public purposes, those owners are given full and fair compensation to be made whole.¹⁷

The basis of expropriation legislation was stated by the Ontario Law Reform Commission in 1967 as follows:

From its examination of the development of Canadian law, the Commission has formed the opinion that some of the difficulties with assessing compensation flow from a failure to appreciate

¹⁶ See *Diggon-Hibben Ltd v The King*, [1949] SCR 712, 1949 CarswellNat 82 at para 8.

¹⁷ See *Dell Holdings*, *supra* at paras 20-23.

that the true basis for it is not to be found in imaginary haggling over the price to be paid for land in a deal between two private individuals, not the negotiation of a normal bargain in the market place, but in the fulfilment by the state of its obligation to repair the injury cause to particular individuals for the public good, and to minimize the loss, inconvenience, and disturbance to the life of its citizens to as great an extent as is possible. The fiction that the state is merely buying the private individual's land, clearly seen in the English phrase "compulsory purchase", pervades the law of compensation and obscures many of the policy decisions which have to be made. Compensation should consist not of this illusory agreed price but the indemnification to which the owner would be entitled were his land taken unlawfully by a private individual.¹⁸

This basis of compensation has been endorsed by the Supreme Court of Canada on several occasions and has been respected by the courts in Ontario to ensure that owners are treated fairly. In the expropriation process, an expropriating authority does not "win" by achieving the lowest possible compensation and saving taxpayer dollars. The legislated objective of expropriating authorities is to ensure that owners are made whole through a fair process that recognizes the reality that expropriation is one of the ultimate exercises of governmental authority.¹⁹

The Ontario Law Reform Commission applied this understanding to the issue of costs as follows:

Approaching the costs problem from the indemnity aspect, there is no reason why the claimant should not be fully compensated for his legal and appraisal expenses. It is not the same situation that exists where two private litigants are engaging in a contest before the courts and where costs, in all likelihood, will be paid by the loser to the winner. Here, the state has intervened and injured one of its subjects in the enjoyment of property. Since the purpose of compensation is to make the expropriate economically whole, he should be fully reimbursed for the legal and appraisal costs incurred.

[...]

¹⁸ The Ontario Law Reform Commission, Report on the Basis for Compensation in Expropriation (Toronto: Department of the Attorney General, 1967) at 11 [Commission Report].

¹⁹ *Dell Holdings*, *supra* at paras 20-23.

Certainly, in expropriation cases, claimants should not be placed in a position where they are afraid to consult the legal profession because they are apprehensive about the cost. The same applies to seeking the advice of an appraiser. People should be placed in a position which gives them freedom of action in seeking advice. In this way, they will be more likely to feel fairly treated and that the expropriating authority has not taken advantage of them.²⁰

Despite this underlying policy, the *Shergar* decision lays the foundation for a landscape of expropriation proceedings more akin to adversarial civil litigation when it comes to the risk of litigation than a process intended to compensate private citizens for injury caused by their government.

Residual Discretion of Courts and Tribunals Following *Shergar*

The practical implication of the *Shergar* decision is to engage section 32(2) of the *Expropriations Act* when the determination of compensation is lower than 85 per cent of the expropriating authority's highest offer, including those made subsequent to the Section 25 Offer. However, this does not *prima facie* disentitle landowners to their costs, nor does it *prima facie* entitle expropriating authorities to their costs.

The language of section 32(2) of the *Act* is permissive, not mandatory, and gives wide discretion to the Tribunal in making a costs award:

²⁰ Commission Report, *supra* at 39-40. For a recent application of the principles outlined in the Law Reform Commission Report, see *Spragg v Middlesex (County)*, 2019 CanLII 10211 (ON LPAT) at paras 20-21, 58-78. In particular the Tribunal commented at para 78:

“[w]ere this not an expropriation, but rather litigation arising out of an agreement of purchase and sale between a willing seller and a willing buyer, the Tribunal may have reached a different conclusion. However, it is an expropriation. It is the ultimate exercise of public authority and its timing is totally controlled by the expropriating authority. In this case the County controlled the date of the Taking and controlled the date of the assumption of the Taking as a public highway. This Tribunal finds that the delay in the timing with regard to the dedication as a public highway was part of the course of action by the County to leverage negotiations for a settlement.”

The tribunal awarded the Claimant its costs pursuant to section 32 of the *Expropriations Act*.

32(2) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection 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** [...]

This discretion is also built into the language of section 32(1) which provides for the recovery of “reasonable” costs actually incurred by the landowner. This reasonableness threshold has in the past been relied upon to deny a Claimant some or all of its costs even if it achieves 85 per cent of the expropriating authority’s offer but acts in an unreasonable manner. Such findings have been made both by the Tribunal hearing the underlying decisions on compensation,²¹ or by Assessment Officers who determine costs after the fact.²²

The Divisional Court in *Shergar* also explicitly introduced reasonableness as a consideration in a more discretionary costs award pursuant to section 32(2) of the *Act*, commenting as follows:

In particular, I do not accept that the application of the “full compensation” principle excludes consideration of the reasonability of a claimant’s actions in the face of an offer that satisfies the standard of full compensation, as *Shergar* suggests [...] The Rehearing Board reasonably noted that “the *Act* should not be interpreted so as to permit the funding of unreasonable claims with no costs risk”.²³

The Court went on to uphold the Board’s award of costs against *Shergar* pursuant to section 32(2), in part based on the reasonableness (or rather lack thereof) of *Shergar*’s conduct.

In respect of section 32(2), the *Shergar* decision affirms that the reasonableness of the Claimant’s conduct, litigation position and consequent costs incurred is a factor the adjudicator may consider in exercising its discretion to make a costs award. Expropriating authorities may

²¹ See e.g. *Windsor (City) v 789881 Ontario Inc*, 2002 CarswellOnt 5374 at para 151 (OMB); *Cf Henery v London (City)*, 2012 CarswellOnt 17509 at paras 43-44 (OMB).

²² See e.g. *Billman Investments Ltd v Toronto (City)*, 2005 CarswellOnt 3204 at paras 54-55 (Ont SCJ).

²³ *Shergar* Div Ct at para 101.

therefore leverage offers made (Section 25 Offers or Rule 49 Offers) to demonstrate that the Claimant was acting unreasonably by pursuing further compensation.²⁴ This sort of costs award in favour of an authority based on the reasonableness of a claimant's position is not unheard of in "no land taken" claims where no Section 25 Offer is required.²⁵ However, the application of *Shergar* in expropriation claims may give rise to further jurisprudence where expropriated landowners are ordered to pay costs to the statutory authority based at least in part on the reasonableness of the Claimant's conduct and position.

Offers by Authorities Post-*Shergar* and Potential Abuses

Since the LPAT released its decision in *Shergar*, the authors have observed offers or purported offers by expropriating authorities that have attempted to rely on the *Shergar* decision in a manner contrary to the policy considerations underlying the costs provisions of the *Expropriations Act*. Such "offers" have included:

1. Offers by expropriating authorities made before the formal arbitrations process was commenced in accordance with Section 29 of the *Expropriations Act*;
2. Offers conditional on cooperation or affirmative conduct by the owner to assist with restoration or permission to enter property that has not been expropriated;
3. Offers that are actually recommendations by staff that are subject to approval by Municipal Council (and therefore are not offers capable of acceptance);
4. Offers that are made at or before the Section 25 Offer is made, but are for a sum higher than the Section 25 Offer; and
5. Offers that are made without foundation or transparent basis.

²⁴ See *Henery*, *supra* at paras 10-13.

²⁵ See e.g. *Davoodian v Dufferin Wind Power Inc*, 2019 CanLII 75377 (ON LPAT) (a "no land taken" claim where the LPAT was critical of the Claimant's position and ultimately made a costs award in favour of the authority).

While it remains an open question whether the above offers constitute valid Rule 49 Offers that would engage adverse cost consequences pursuant to the *Rules of Civil Procedure*, expropriated owners now have to endure the risk and uncertainty of jeopardizing their costs when considering an offer. This new risk seems contrary to the spirit of the *Expropriations Act* and its underlying policy framework.

Offers made in a manner set out above will likely have a chilling effect on the ability of expropriated owners to advance claims under the *Expropriations Act*. For owners with sufficient experience in the expropriation process, financial resources and time—which puts them on equal playing field with the government that has taken their property—Rule 49 Offers or other offers resembling the same would not likely hinder the pursuit of full and fair compensation. On the other hand, when a homeowner with limited resources and no experience in the expropriation process is confronted with offers from government that lack the transparency of a Section 25 Offer, he or she may be unwilling to incur adverse cost risks and therefore be forced to make unfavourable settlement decisions.

In cases resembling the latter scenario, expropriated owners will be denied access to justice if they do not have the protections afforded by Section 32 of the *Expropriations Act* that permit them to carry out reasonable investigations and understand compensation issues with the knowledge that they are entitled to full indemnification for the costs of that process. To hinder such rights not only denies owners access to justice, but it also creates a weapon for expropriating authorities to prevent claims or even the investigation of potential claims by expropriated owners. This is to contrary to the policy underlying the *Expropriations Act* and efforts by the Ontario Legislature to balance power between expropriated owners and expropriating authorities.

Potential abuses of the *Shergar* decision by expropriating authorities making offers of settlement, as noted above, could be prevented by a requirement that if an expropriating authority is to make a further offer that will influence the underlying basis for costs pursuant to Section 32 of the *Expropriations Act*, the offer has to comply with Section 25 of the *Expropriations Act*. This would require a clearly binding offer by expropriating authorities, an offer that has a transparent basis, and an offer that is capable of acceptance by the owner even if it wishes to pursue its rights to compensation. Authorities making such offers would still be able to challenge the reasonableness of a Claimant's conduct if an offer that has been made proves meritorious and can be shown to impact the reasonableness of the Claimant's conduct. In *Shergar*, for example, even without a finding that the Rule 49 offer is a valid "offer" for the purpose of section 32 costs, the City of Windsor would still have been within its rights to challenge the quantum of costs payable to *Shergar* based on the reasonableness of *Shergar*'s conduct throughout the process.

The *Shergar* decision should ultimately be read in light of the well-established jurisprudence protecting the rights of expropriated landowners in this province. Courts and Tribunals following *Shergar* should consider the ultimate purpose of the *Expropriations Act* and weigh whether or not a costs award would prevent or deter a landowner from pursuing or investigating meritorious claims due to the risk of adverse cost consequences.

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