WeirFoulds LLP

The Application of Rule 49 Cost Consequences in Expropriation Cases: *Shergar v Windsor*

May 29, 2019

By Sean Foran

When land is expropriated, the owner whose land is taken is entitled to be compensated for the fair market value of the land taken, the damage to the remainder of the land if only part of the land was taken, as well as other "disturbance" damages that result from the expropriation and the project or works for which the land was taken. The governing legislation, the *Expropriations Act*, helps to ensure that an expropriated owner can claim compensation without being at a disadvantage. For example, s. 25 of the Act requires the expropriating authority to make an offer of compensation before taking possession of the land (the "Section 25 Offer"); that offer can be accepted by the owner without prejudice to the right to claim more compensation.

Another way that the Act tilts in favour of the expropriated owner in the claims compensation process is through its costs provisions. Section 32 of the Act provides that if the owner is awarded at least 85% of the "amount offered by the statutory authority", then the owner is entitled to reimbursement of reasonable legal, appraisal and other consulting costs actually incurred for the purpose of determining compensation. Until recently, many assumed that the "amount offered" by the expropriating authority referred only to the Section 25 Offer. An authority could make subsequent offers to try to settle the claim; however, those offers would not impact the right of recovery of costs under s. 32.

However, in *Shergar Development Inc. v The City of Windsor*, the Ontario Divisional Court recently affirmed a decision of the Ontario Municipal Board ("OMB") denying the owner costs – in fact, awarding costs against the owner – as a result of the application of Rule 49 of the *Ontario Rules of Civil Procedure*. This has the potential of significantly changing the litigation costs calculus in the determination of claims for compensation. No longer can owners reject the offers of expropriating authority during the arbitration process without running the risk of being denied costs or having to pay costs to the authority.

Facts

This case has a somewhat tortuous history, proceeding at the same time in the courts and before the OMB. The City of Windsor expropriated lands from Shergar in 1998. The lengthy proceedings culminated in the decision of the OMB to award costs against the owner in January, 2018, almost 20 years after the land was expropriated.

Shergar acquired two parcels of land from CP Rail ("CPR") in 1995, one along the Detroit River (the "Subject Lands") and the second a former rail corridor. The CPR took back a mortgage as part of the sale transaction.

The Subject Lands were expropriated by Windsor in April, 1998 for completion of a waterfront park. It served a joint Section 25 Offer on Shergar and CPR as mortgagee (as required by the Act) in the amount of $500,000. Shergar accepted the offer and said that it would arrange for the CPR to also accept. The City asked Shergar for information as to the quantum of CPR's security interest but Shergar would not provide this information. The City took steps to determine the compensation owed to Shergar; however, Shergar chose instead to challenge the validity of the expropriation in the Ontario Superior Court, leading to a 20-day trial in 2004. Its action

was dismissed in February, 2005. Shergar's appeal of that decision was dismissed in September, 2007. The City was awarded costs of the action and the appeal.

Shergar then sued the lawyers who acted for it on the purchase of the CPR lands and indicated to the court that it was holding its expropriation compensation claim in abeyance pending determination of this action. That claim was settled in 2011.

Shergar then brought its claim for compensation under the Act in July, 2013. Under the Act, a claim for compensation proceeds by way of arbitration to the OMB (now the Local Planning and Appeal Tribunal). Prior to the hearing, the City made Shergar an offer to settle which was substantially higher than the compensation originally offered in the 1998 Section 25 Offer. The City also made an offer to settle to CPR, who also claimed compensation for its interest as mortgagee, which the CPR accepted. Pursuant to that settlement, CPR assigned all of its rights to compensation as determined by the OMB to Windsor. These offers were stated by the City to be made under Rule 49 of the *Rules of Civil Procedure*. Depending on the outcome of a civil proceeding, failure to accept such offers can result in adverse cost consequences pursuant to Rule 49.

The OMB found in favour of the City on the claims for compensation, preferring the City's expert appraisal evidence to Shergar's. The OMB also awarded costs to Shergar on the basis that the compensation awarded exceeded 85% of the Section 25 Offer. In effect, it ignored the subsequent offer to settle made by the City in its consideration of the award of costs.

The City sought review of the OMB decision by another panel of the OMB pursuant to s. 43 of the *Ontario Municipal Board Act*. The OMB agreed to review the decision and in subsequently rehearing the matter overturned the original decision on the issue of costs. The OMB, in its rehearing decision, held that the reference to the "amount offered by the authority" under s. 32 of the Act was not an exclusive reference to the Section 25 Offer. It decided that the "amount offered" can include a subsequent offer to settle. The OMB also held that Rule 141 of the OMB Rules allows for consideration of offers made subsequent to the Section 25 Offer and that, if an offer to settle is made and is not addressed in the Act, the *Rules of Civil Procedure* apply. Accordingly, the OMB held that it had the authority to apply the cost consequences of Rule 49 of the *Rules of Civil Procedure* and to deny costs to the claimant and award costs to the expropriating authority under s. 32(2) of the Act.

Costs and Offers to Settle

On appeal by Shergar, the Ontario Divisional Court affirmed the OMB rehearing decision. Shergar argued that the reference in s. 32 of the Act to "the amount offered by the statutory authority" could only be a reference to the Section 25 Offer. The Court held that the OMB's interpretation of the meaning of this phrase was reasonable and consistent with the OMB case law.

First, in interpreting s. 32 of the Act, the Court quite rightly recognized the availability of claims for compensation under the Act when lands are taken, or expropriated, and for claims for compensation for injurious affection in cases where no land is taken. The Court noted that s. 32 refers to offers made by a statutory, not expropriating, authority. In addition, s. 32 does not refer specifically to the Section 25 Offer. In this regard, the Court held that "given the different treatment of "no land taken" claims in s. 22 and "land taken" claims in s. 25, the omission of any reference in ss. 32(1) and 32(2) to the offer required to be made under s. 25 is significant."

Second, the Court noted that where no land is taken, there is no obligation in the Act for a statutory authority to make an offer of compensation, nor is there any restriction on the number of offers it may make; it therefore concluded that ss. 32(1) and 32(2) are triggered by the most recent offer, if any, made by a statutory authority. In the absence of language in those subsections distinguishing between offers made in lands taken and no lands taken cases, the Court concluded that there is no basis for restricting the phrase "the amount offered by the statutory authority" in cases where land is taken to the Section 25 Offer.

What's Next?

Expropriating authorities will almost certainly look with favour on the Divisional Court decision in *Shergar*. No longer will the owner's right to be reimbursed reasonable costs be a sure thing so long as the 85% threshold is met. Authorities now have the option of extending further offers as positions are refined during the course of litigation, with the knowledge that an owner's failure to accept the offer may result in adverse cost consequences. This may result in "rebalancing" the playing field and will almost certainly result in the avoidance of hearings that otherwise would have proceeded had the Divisional Court ruled in favour of Shergar.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

For more information or inquiries:

Sean Foran

Toronto
416.947.5019

Email:
sforan@weirfoulds.com

Sean Foran is a leading expropriation lawyer, with extensive experience as counsel in large-scale infrastructure projects. Sean also practises real-estate, employment, business and government litigation.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035