CONTROLLING "REASONABLE" COSTS IN EXPROPRIATION PROCEEDINGS

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Introduction

The entitlement of expropriated owners to recover their reasonable legal costs is a vital component of the compensatory scheme under the *Expropriations Act (*the *"Act")*.[2] This entitlement permits parties subject to expropriation to have access to professional expertise to ensure that they receive fair compensation arising from the expropriation and gives those who seek additional compensation the means to access justice with the support of professional advice and assistance.

The discussion below will address the policy behind the costs rule, its application under the *Act* and practical considerations for both respondents and claimants to ensure the fair recovery of costs.

Policy Considerations for the Recovery of Costs

The often used phrase "no one ever asked to be expropriated" is a logical starting point for approaching a scheme for fair compensation following the expropriation of privately held property. This statement is logically supported by the reality that if one wishes to part with property he or she is free to do so voluntarily and, most likely, would have already done so before a public authority acquires land or other interests under the compulsion of statute. The interference with private property rights is, however, justified

[1] "Recovery of Costs in Expropriations: Policy and Reality", was written by Shane Rayman in 2005. Portions of that paper were liberally used herein, with updates to reflect recent developments.
[2] *Expropriations Act*, R.S.O. 1990, c. E. 26, as amended ["*Expropriations Act*"].

by the fact that a public authority expropriates property when it is required for the public interest.

In order to balance the public interest with the rights of private landowners, the law of expropriation has evolved to provide the dispossessed owner with compensation similar to the consideration a private landowner would objectively require to voluntarily part with his or her property.[3] An owner of property should not be prejudiced by an expropriation or placed in a worse position than the owner would have been in but for the expropriation. In support of this principle, Mr. Justice Rand, writing for the majority of the Supreme Court of Canada in *Diggon-Hibben Ltd. v. R.,*[4] wrote:

> A compensation statute should not be approached with the attitude that Parliament intended an individual to be victimized in loss because of the accident that his land rather than his neighbour's should be required for public purposes;…. [5]

Section 32 of the *Act*, which will be discussed in greater detail below, directs the authority to pay "the reasonable legal, appraisal and other costs"[6] instead of "all legal, appraisal and other costs"[7] However, the approach to compensation articulated by Mr. Justice Rand has been applied to modern expropriation statutes by courts and tribunals broad and liberal interpretation, which is to be strictly construed in favour of those whose rights have been affected.[8]

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[3] Eric C. E. Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed. (Toronto: Carswell, 1992) at pg 2.
[4] *Diggon–Hibben Ltd. v. R.*, [1949] 4 D.L.R. 785 (S.C.C.).
[5] *Ibid.* at para 8.
[6] *Expropriations Act*, *supra* note 2, Section 32.
[7] *National Energy Board Act*, R.S.C., 1985, c. N-7, Section 99.
[8] *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority* [1997] 142 D.L.R. (4th) 206 at para 20 and 21 (S.C.C.) ["*Dell Holdings*"].

The Supreme Court of Canada (the "Supreme Court") held that the "whole purpose"[9] of the *Act* is to provide the private land owner, who has been subject to the expropriation of property, with "full and fair compensation".[10]

The Supreme Court later re-affirmed that the only limitation to an expropriated owners' entitlement to full indemnity for the costs required to exercise their statutory rights is that the costs be reasonable.[11] It held that "[o]nly this type of award"[12] can indemnify a claimant, "as best one can". [13]

Origins of Costs Legislations in the *Act*

The interests of the owner to full compensation must be balanced with the interests of the public in the achievement of its goals. This balancing requires rational limits to an owner's entitlement to compensation and was articulated in the *Report of the Ontario Law Reform Commission on the Basis of Expropriation*,[14] as follows:

> While we urge that the owner should receive full indemnity for his loss, however, we are in no case suggesting that he should receive more than that amount. He should not reap a windfall, nor should he recover for losses which are highly speculative or uncertain. The public purse is also to be protected, and we are convinced that if excessive compensation were paid the cost of public works might well increase to such an extent that further projects would be curtailed because of insufficient funds.[15]

An expropriated owner must have access to a judicial mechanism for the determination of compensation in order to facilitate the achievement of full and fair compensation. As the

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[9] *Ibid.* at para 33.
[10] *Ibid.* at para 33.
[11] *Alliance Pipeline Ltd. v. Smith*, [2011] 2011 SCC 7 at para 66 (S.C.C.) ["*Alliance Pipeline*"].
[12] *Ibid.* at para 76.
[13] *Ibid.* at para 76.
[14] *Report of the Ontario Law Reform Commission on the Basis for Compensation on Expropriation* (Toronto: Queen's Printer, 1967) ["*Law Reform Commission Report*"].
[15] *Ibid.* at pg 10.

determination of full and fair compensation under the *Act* is usually an intricate and complicated process that requires the support of expert evidence and analysis, owners often require the assistance and services of legal counsel, appraisers, business loss experts, planners and numerous other professionals with expertise in areas relevant to their claim for compensation. The *Law Reform Commission Report* recognized the importance of an expropriated owner having an entitlement to the recovery of costs in the process of determining compensation under the *Act* 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 engaged in a contest before the courts and where costs, in all likelihood, will be paid by the loser or the winner. Here, the state has intervened and injured one of its subjects in the enjoyment of his property. Since the purpose of compensation is to make the expropriated owner economically whole, he should be fully reimbursed for the legal and appraisal costs incurred. …
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> 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 of the cost. The same applies to seeking the advice of an appraiser. People should be placed in a position which gives them the 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.[16]

The indemnification of the expropriated owner's legal costs by the expropriating authority not only increases the likelihood of the expropriated owner having access to justice, but also ensures that the owner is fully compensated for the expropriation and does not have to go out of pocket for the costs of the compensation process. Adopting this rationale, the *Act* entitles expropriated owners to their reasonable legal, appraisal and other costs for the determination of compensation.[17]

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[16] *Ibid.*at pg 39 and 40.

[17] *Expropriations Act, supra* note 2, Section 32(1).

The recovery of an expropriated owner's costs for the determination of compensation is itself considered part of an owner's compensation.[18] This principle was articulated by the Honourable J. C. McRuer in the *Royal Commission Inquiry Into Civil Rights Report,*[19] one of the foundations for the *Act*:

> The expenses incurred by an owner for solicitors' and valuators' fees are elements to be considered in determining a basis of compensation where land has been expropriated. This matter has been the subject of a reference to the Ontario Law Reform Commission [as set out above] and has been dealt with in its report. [Citations omitted].[20]

The Ontario Municipal Board (the "Board") and the courts have recognized that an owner's costs are an element of compensation.[21] At times, this recognition has taken the form of courts finding that the costs of a costs assessment are subject to the costs provisions of the *Act*, as the determination of costs is a determination of compensation. Implicit in the recognition of costs being an element of compensation is the fact that the recovery of costs by an owner is a critical element of the compensation process and ensuring that an expropriated owner is made whole.

Section 32 of the *Act*

The mechanism for the recovery of costs by claimants in expropriations is set forth in Section 32 of the *Act*, which reads as follows:

> 32. (1) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Board and the amount awarded by the Board is 85 per cent, or more, of the amount offered by the statutory authority,

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[18] *Marshall v. Ontario* (*Minister of Transportation)* [2005], 87 L.C.R. 177 (O.M.B.) ["*Marshall*"]; *The Law of Expropriation and Compensation in Canada*, *supra* note 3 at pg 393.
[19] The Honourable James Chamers McRuer, *Royal Commission (Ontario), Inquiry Into Civil Rights*, Report 1, Vol. 3 (Toronto, Queen's Printer: 1968) ["*Ontario Royal Commission Report"*].
[20] *Ibid.* at pg 1061.
[21] *Marshall*, *supra* note 18; *Eddie v. Outen (No. 3)* (1976), 10 L.C.R. 92 (Ont. S. C.), *Shriner v. Municipality of Metropolitan Toronto (No. 2)* (1972), 3 L.C.R. 101 (Ont. S. C.), *Madsen v. Municipality of Metropolitan Toronto* (1970), 1 L.C.R. 27 (Ont. C.A.).

> the Board 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).
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> (2) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Board and the amount awarded by the Board is less than 85 per cent of the amount offered by the statutory authority, the Board may make such order, if any, for the payment of costs as it considers appropriate, 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 the order and the tariffs and rules prescribed under clause 44 (d) in like manner to the assessment of costs awarded on a party and party basis.

The provisions of Section 32 of the *Act* incorporate regulations promulgated under Section 44 of the *Act,*[22] which read as follows:

> **1.** (1) The amount of legal, appraisal and other costs shall be in the discretion of the assessment officer to be determined *quantum meruit* and in assessing, the officer may reduce the amount of, or disallow, any item of cost upon the ground that the same was not reasonable in amount or was not reasonably incurred.
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> (2) Subject to subsection (1), legal costs shall be assessed, *quantum meruit*, by the assessment officer as on an assessment of costs as between a solicitor and his or her own client.

Under Section 32 of the *Act*, the owner's entitlement to recover costs that are "actually incurred"[23] from the expropriating authority is mandatory, subject to various considerations, as set out below.

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[22] R.R.O. 1990, reg. 364, as amended by O.Reg 332/92, Section 1.

[23] The phase "actually incurred" is given a broad meaning to include accounts that have been rendered even if they are not paid. See *Corporation of the City of Windsor v. Teshuba*, unreported decision of Nolan J., September 7, 2005, Court File No.: 04/CV/3750.

The "85% Rule"

This Rule provides that an owner's recovery of costs will be ordered so long as the compensation awarded by the Board for all heads of damages under the *Act* is at least 85% of the initial offer of compensation provided without prejudice to the owner by the expropriating authority.[24] For example, if an owner is provided $100.00 as an initial payment for the market value of the lands taken and ultimately recovers a total award of $86.00 for all damages including market value, the owner's entitlement to costs is triggered.

At times, expropriating authorities make the economic administrative and/or political decision to provide owners with increased compensation exceeding market value. This is done for several purposes, one of which is to avoid the expense of disputing compensation that is incurred by both the expropriating authority and the owner. This bonus to compensation has been provided by authorities in cases where the claim at issue is modest in comparison to the potential costs of taking the claim to adjudication and/or where an expropriating authority has limited concern about a precedent being set by the payment of compensation. It does not appear to be the intention of the legislation to provide a premium to the compensation paid to owners simply because an expropriating authority does not wish to pay the owner's costs. [25]

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[24] The initial without prejudice offer by the expropriating authority is not necessarily limited to the compensation that must be paid under Section 25 of the *Expropriations Act*. Decisions of the Ontario Municipal Board have not been perfectly consistent in defining the meaning of "the amount offered", on which the 85% Rule is based, as is discussed at page 20, *infra*.

[25] *Law Reform Commission Report, supra* note 14 at pg 10. See the discussion on bonuses in "New Trends in Expropriation: Avoiding Expropriation", written by Shane Rayman and Guillaume Lavictoire and presented during the Spring Conference of the International Right of Way Association, Chapter 29, April 15, 2011.

The result of the present rule is that, so long as the owner can substantiate an entitlement for compensation greater than 85% of the initial offer, the expropriating authority is obligated to pay all reasonable costs. An authority has the ability to make additional without prejudice advances, based on the merits of a case, the discovery of additional facts and opinions and the resolution of issues at any time during the proceeding. It appears that courts and the Board have favoured the approach that the 85% Rule is based solely on the initial offer of compensation paid pursuant to Section 25 of the *Act* and not on subsequent advances by the respondent to the claimant.[26]

Costs must be for the determination of compensation

This includes the owner's costs in all aspects of compensation proceedings, negotiations and attendances before the Board of Negotiation.[27] Other costs that have been found to be recoverable include: steps taken to resolve title problems where the issue must be resolved in order to determine the quantum of compensation,[28] the consideration of decisions from an arbitration and whether an appeal is appropriate,[29] and steps taken to assess costs owing under the *Act*.[30]

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[26] See e.g. *Jakubowski v. Ontario (Minister of Transportation and Communication)* (1973), 6 L.C.R. 29 at para 37 (Ont. L.C.B.), appeal dismissed (1975), 9 L.C.R. 235 (C.A.); *Hewitt v. Ontario (Minister of Transportation and Communication)* (1985), 33 L.C.R. 194 at para 41 to 43 (Ont. Assessment Officer); but see *Green-Life Ltd. v. Ontario (Ministry of Transport)* (2002), 77 L.C.R. 155 (O.M.B.) and *Bellwood v. Clearview (Town)* (1995), 54 L.C.R. 185 (O.M.B.).
[27] Mark M. Orkin, *The Law of Costs*, 2nd ed. (Toronto: Canada Law Book, 2002) at pg 2-233.
[28] *Campbell v. Peel Board of Education* (1981), 24 L.C.R. 60 at para 29 and 30 (Ont. L.C.B.).
[29] *Ridgeport Developments v. Metropolitan Toronto and Region Conservation Authority (No. 2)* (1977), 12 L.C.R. 141 (Ont. Assessment Officer).
[30] *Marshall, supra* note 18; *The Law of Expropriation and Compensation in Canada, supra* note 3 at pg 393.

The Board has stated that it sees no reason to limit a costs award to those costs that are likely awarded by a court in a legal proceeding.[31]Therefore, costs awards under the *Act* produce a more wide-ranging result than litigation costs.[32]

Costs that are not recoverable, as they do not fall within the ambit of determining compensation, include steps taken to resist an impending expropriation or contest its validity,[33] an attendance before an Inquiry Officer at a Hearing of Necessity,[34] and steps taken to resolve the division of compensation between various owners having an interest in the compensation award.[35]

Certain costs incurred by owners may not be for the determination of compensation, but arise as a natural and reasonable consequence of the expropriation. These costs may not technically be payable under Section 32 of the *Act*, but may be recoverable pursuant to Section 18 of the *Act* (disturbance damages) and pursuant to the intention of the *Act* to make owners whole.

These out of pocket costs may include legal, accounting, surveying, engineering and other professional costs that are required to be incurred because of an expropriation. The recovery of these costs are at times included as part of the cost recovery under Section 32 of the *Act*, by agreement or understanding between the parties.

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[31] *McKean v. Ontario* (2008), 94 L.C.R. 185 at para 29 (O.M.B.) ["*McKean*"].
[32] *Ibid.*at para 29.
[33] *Kohlbrich v. Ministry of Housing* (1981), 23 L.C.R. 1 at para 8 (Ont. Assessment Officer).
[34] Section 7(10) of the *Expropriations Act* states that the costs award to an owner for a Hearing of Necessity is not to exceed $200.00.
[35] *Moto-Match Centres Ltd. v. Municipality of Metropolitan Toronto (No. 2)* (1985), 32 L.C.R. 289 at para 22 and 23 (Ont. Assessment Officer) ["*Moto-Match Centres*"].

Costs must be "reasonable"

The majority of disputes concerning costs arise as a result of differing views as to what costs are "reasonable". Needless to say, the determination of what is "reasonable" is based on subjective considerations and can only be assessed on a case-by-case basis. It is not the appropriateness of the fee that is charged by the professional to the owner that is of concern; rather it is the "*quantum* to be paid by the expropriating authority".[36]

The *Rules of Civil Procedure*[37] articulate factors to be considered in the assessment of fees and the determination of "reasonableness" in Rule 58.06(1) which reads as follows:

> **58.6** (1) In assessing costs the assessment officer may consider,
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> (a) the amount involved in the proceeding;
> (b) the complexity of the proceeding;
> (c) the importance of the issues;
> (d) the duration of the hearing;
> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
> (f) whether any step in the proceeding was,
> (i) improper, vexatious or unnecessary, or
> (ii) taken through negligence, mistake or excessive caution;
> (g) a party's denial of or refusal to admit anything that should have been admitted; and
> (h) any other matter relevant to the assessment of costs.

[36] *D.D.S. Investments Ltd. V. Toronto (City)* (2012), 107 L.C.R. 164 at para 20 (Ont. S.C.) as in *Stanton v. Scarborough (Borough) Board of Education* (1983), 26 L.C.R. 292 (Ont. S.C.).
[37] *Rules of Civil Procedure*, R.R.O. 1990, reg. 194, as amended.

These factors have been taken into consideration by assessment officers in the determination of costs under the *Act*.[38] In *Reed v. Regional Municipality of Halton*[39] the following factors were set out as considerations for an Assessment Officer's determination of reasonable costs:

1. The value of the services rendered;
2. The reasonable time spent in producing a relevant and useful report or opinion;
3. The monetary value of the compensation determined;
4. The degree of skill and competence demonstrated by the professional;
5. The duplication of efforts;
6. The under utilization of junior staff or the over utilization of senior professionals who charge higher fees;
7. Excessive charges for travel or waiting time, which are generally permitted at only a half rate;
8. Reductions for the "learning curve", which may apply to professionals with modest experience in the area of expropriation;
9. Time spent unnecessarily, indiscriminatingly or for repetitive tasks; and
10. Excessive hourly rates, which are not substantiated by the market.[40]

The actual retainer between the client and the professional is another important fact which is considered in an assessment. Hourly rates charged and periodic increases should be authorized by the client.[41] Proper disclosure of expert reports, opinions and analyses is also essential. Disclosure of the existence of an opinion, report or analysis must be

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[38] See e.g. *Mikalda Farms Limited v. Regional Municipality of Halton* (1998), 67 L.C.R. 138 at para 8 (Ont. Assessment Officer).
[39] *Reed v. Regional Municipality of Halton,* unreported decision of Assessment Officer Brzyski, February 7, 1994 at pg 3 to 8.
[40] *Ibid.* at pg 3 to 8. See also *Cohen v. Kealey & Blaney* (1985), 26 C.P.C. (2d) 211 (Ont. C.A.).
[41] *Mikalda Farms Limited v. Regional Municipality of Halton*, *supra* note 38 at para 15; *Airport Corporate Centre Inc. v. Minister of Transportation,* unreported decision of Assessment Officer Brzyski, dated May 2, 1996 at pg 18 and 19.

made in accordance with the disclosure requirements of the *Rules of Practice and Procedure* of the Board and the *Rules of Civil Procedure* even if the expert's work is not ultimately relied upon at the hearing or even produced to the opposing party.[42]

In certain instances, value is derived from an expert analysis even if it is not relied upon at the compensation hearing, as the analysis may be necessary to determine the merits of a potential claim or the quantum thereof. In such a case, however, the existence of the expert report or opinion should be disclosed in Schedule B of a party's Affidavit of Documents (privileged documents), even though the report or the contents thereof remains privileged and exempt from any requirement to produce to the other side.

The Ontario Court of Appeal (the "Court of Appeal") in the decision of *Tripp v. Ontario (Minister of Transportation),*[43] denied the costs of an expert report that was not relied on at the hearing and was not disclosed in an Affidavit of Documents, as was required under the *Rules of Civil Procedure*.[44] This demonstrates an example of how the failure to adhere to the *Rules of Civil Procedure* and the *Rules of Practice and Procedure* of the Board can ultimately prejudice a claimant's ability to recover costs.

[42] See Rule 31.06 of the *Rules of Civil Procedure*, R.R.O. 1990, reg. 194, incorporated by reference into the procedure for the Ontario Municipal Board, *Rules of Practice and Procedure* for the Ontario Municipal Board, Section 134.
[43] *Tripp v. Ontario (Minister of Transportation)* (1999), 67 L.C.R. 161 (Ont. C.A.).
[44] *Ibid.* at para 22.

Application under the *Act*

It is critical to note that although the term "expropriate" is defined in the *Act*, the meaning of expropriation is not. The Supreme Court has taken an inclusive view of this term and reiterated that expropriation is to be "part of a continuing process".[45]

Entitlement to Pre-Expropriation Costs

The Supreme Court has recognized that:

> The approach to damages flowing from expropriation should not be a temporal one; rather it should be based upon causation. It is not uncommon that damages which occurred before the expropriation can in fact be caused by that very expropriation.[46]

As such, courts have long awarded compensation for costs incurred prior to title vesting in the authority.[47] According to the Alberta Court of Appeal, "[n]o sensible owner would sell land without good advice about its value,"[48] and so, in some situations it is in fact reasonable for an owner to seek appraisal and legal advice prior to formal notice of expropriation and without waiting for such notice. The Alberta Court of Appeal went further to state that it would be a frustration of the negotiation process to not pay an owner for the appraisal and legal advice received prior to formal notice.[49]

An owner may not know until costs have been incurred that the formal stage of the expropriation process will not come to fruition. However, there appears to be a difference between situations where costs are incurred prior to formal notice and

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[45] *Dell Holdings, supra* note 8 at para 37.
[46] *Ibid.* at para 38.
[47] See *Moto-Match Centres, supra* note 35 and *Ravvin Holdings Ltd. v. Calgary (City)* (1992), 5 Alta. L.R. (3d) 320 (Alta C.A.) ["*Ravvin Holdings"].*
[48] *Ravvin Holdings, supra* note 47 at para 5.
[49] *Ibid.* at para 5.

subsequent to informal notice, and situations where only informal notice is provided and formal notice is abandoned.

In *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority* ("*Dell Holdings*"),[50] the construction of a Mississauga GO Transit station had been recommended, and the sites of interest were both owned by Dell Holdings. However, it took the authority approximately two years to determine which lands, and how much of the lands, were required. Accordingly, the ability of Dell Holdings to continue in the business of land development was hindered due to the uncertainty as to the future of its lands.[51]

The Supreme Court held that, "damages caused by the expropriation can and frequently do occur prior to the actual date of expropriation."[52] As such, it took the position that, "the expropriated party should be and is entitled to recover those damages."[53]

The Board has imported the principles of indemnity identified by the Supreme Court into its determination of costs, as can be evidenced by cases such as *McKean v. Ontario (Minister of Transportation).*[54] In this case, the Board held that if Section 32 of the *Act* is properly interpreted, then the McKean's are entitled to compensation for costs associated with the Ministry Of Transportation having to determine the scope of the expropriation by way of court proceeding.[55]

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[50] *Dell Holdings, supra* note 8.
[51] *Ibid.* at para 2 to 4.
[52] *Ibid.* at para 42.
[53] *Ibid.* at para 42.
[54] *McKean, supra* note 31.
[55] *Ibid.* at para 24.

Entitlement to Costs in the Absence of a Hearing

In practice, the vast majority of claims for compensation in the expropriation process do not culminate in a hearing before the Board; rather, they are settled before a hearing takes place. Moreover, a large number of claims arising from expropriations are resolved before the issuance of a Notice of Arbitration. It is not an unusual occurrence to have the issue of compensation resolved in a taking under the compulsion of expropriation before the Plan of Expropriation is even registered. The *Law Reform Commission Report* addressed the issue of costs in the instance of a settlement as follows:

> Furthermore [the owner] should be entitled to these costs whether or not his claim went to arbitration. Merely because he settles is no reason why he should be out-of-pocket.[56]

In spite of this statement and the reality that the majority of expropriation matters settle, Section 32 of the *Act*, if read literally, only specifically recognizes a claimant's entitlement to costs at the resolution of a hearing. The rationale for this apparent gap in the legislation may be that parties to a settlement are free to define their own terms of agreement on compensation. In the majority of settlements the claimant and the respondent agree to compensation for costs in the settlement agreement that resolves the dispute, or incorporate the claimant's costs into the final payment of compensation.

Settlement agreements providing for the claimant's recovery of costs are made on the understanding that if the matter did not settle the claimant would be entitled to its costs following an arbitration before the Board. A common occurrence in settlements is that

[56] *Law Reform Commission Report, supra* note 14 at pg 39.

the parties agree to the quantum of the initial settlement and leave the issue of costs to be resolved at a later date, either by agreement or at a costs assessment.

This very issue was adjudicated before the Board in *Marshall v. Ontario*.[57] This decision came before the Board on a motion brought by the claimant following a settlement agreement being signed by the parties. Mr. Marshall sought to have his costs referred to an Assessment Officer by the Board. The Ministry, however, refused the claimant's request and wished to have the matter referred pursuant to Section 9 of the *Solicitors Act*. As the matter of costs remained outstanding, the claimant issued a Notice of Arbitration and Statement of Claim, seeking only compensation for his costs, as all other elements of compensation had been resolved. The claimant then sought an order from the Board referring the matter to a costs assessment, based on the undisputed agreement that costs in this matter be paid, pursuant to sub-section 32(1) of the *Act*.

The Board ruled in Mr. Marshall's favour and referred the matter to an assessment for the following reasons:

1. The matter before the Board arose from an expropriation, a Plan of Expropriation was registered, notices were given under the *Act*, the matter proceeded to the Board of Negotiation and, at all times, the Ministry attorned to the jurisdiction of the *Act*. A Notice of Arbitration was subsequently issued and a Reply delivered. As such, the Board found that it had the jurisdiction under sub-section 29(1) of the *Act* to determine compensation on this matter, and invoke its powers under Section 32 of the *Act*.

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[57] *Marshall, supra* note 18.

2. The Board expressly recognized that a claimant's entitlement to reimbursement for costs is an element of compensation owing under the *Act*.
3. The Board was not satisfied with any explanation as to why the *Solicitors Act* would have any relevance in the matter and stated that it was abundantly clear that the costs incurred arose from the proceedings in the context of an expropriation and not from a dispute between a solicitor and client.
4. By issuing a Notice of Arbitration, the claimant had triggered the jurisdiction of the Board, pursuant to Sections 26 and 29 of the *Act*. The jurisdiction of the Board and application of the *Act* prevails over any other legislation (including the *Solicitors* Act) relating to expropriation issues.[58]

Entitlement to Costs in the Absence of an Expropriation

Pre-expropriation losses that are incurred when an expropriation is only "intended or considered"[59] are not treated the same as if an expropriation eventually takes place.

In *Marsdin v. Hamilton (City)*[60], the claimants, upon being made aware that the City of Hamilton planned to expropriate their lands to build the new facilities for the 2015 Pan Am Games, retained legal counsel. The parties entered into negotiations with the City in light of the anticipated expropriation and sought professional assistance. Offers were exchanged, but an agreement was not reached.[61]

[58] Section 2(4) of the *Expropriations Act* states that where there is a conflict between the provision of the *Expropriations Act* and another general or specific act, the provision of the *Expropriations Act* prevails.
[59] *Marsdin v. Hamilton (City)* (2013), 110 L.C.R. 142 at para 18 (O.M.B.) ["*Marsdin*"].
[60] *Ibid.*
[61] *Ibid.* at para 3 and 5.

The claimants were served with a Notice of Application for Approval to Expropriate Land, and following a considerable delay were advised that the City would no longer be expropriating their lands.[62] Although claimants' counsel requested an Inquiry Hearing, the request was not forwarded by the City to the Inquiry Officer since the expropriation was no longer proceeding.[63] The Application for Approval to Expropriate, which was served on the claimants at the outset, was not forwarded to Council as the Approving Authority, and so there was never any approval to expropriate the claimants' lands. Since an Expropriation Plan was never registered on title and since an agreement was never reached, the City did not hold a proprietary or legal interest in the claimants' lands at any point in time.[64]

The claimants maintained that because they were led to believe that their lands would be expropriated they experienced, "very significant interference with their private property rights when they were advised of the impending expropriation."[65] The claimants' argued that this situation was within the inclusive meaning of expropriation as the City abandoned "this expropriation"[66], as evidence by the City's Senior Solicitor's own use of language.

Although the Board acknowledged that pre-expropriation costs have been awarded in other situations, the Board did not find this case to be a situation where such an award was warranted:

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[62] *Ibid.* at para 6 and 7.
[63] *Ibid.* at para 9.
[64] *Ibid.* at para 10.
[65] *Ibid.* at para 30.
[66] *Ibid.* at para 7 and 37.

> In the absence of a formal registered expropriation, an expropriating authority should not be bound to compensate for damages or costs in a case where there is a potential for an expropriation. Furthermore, in the absence of a taking of land, negotiations for the purchase of the lands does not, and should not, attract a claim for costs, merely because the potential buyer has the power, if fully exercised, to expropriate.[67]

Comparatively, the Alberta Court of Appeal has noted that, "[w]hen an authority with power to expropriate tells a landowner that it wants to buy his land, he cannot close his eyes to the fact that that authority may decide to expropriate."[68]

It should be pointed out that the Board did not intend the above noted to pertain to situations for which there is a claim for injurious affection where no land is taken, and instead acknowledged that Section 32 of the *Act* enables the making of a costs award in such a situation.[69]

This recent decision may be a double edged sword for expropriating authorities. It may reduce costs liability in certain rare instances where projects are abandoned well into the land acquisition process. On the other hand, it may prevent owners from entering into negotiations or seeking professional advice before the formal expropriation takes place and may hinder potential settlements that would otherwise avoid expropriation proceedings.

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[67] *Ibid.*at para 79.
[68] *Ravvin Holdings, supra* note 47 at para 5.
[69] *Marsdin, supra* note 59 at para 71.

Smith v. Alliance Pipeline: Full Indemnity for Costs

Matters may not always move as smooth as one may hope, or as fast as one may wish. It is important to keep in mind that situations arise that can throw what seemed to be a straightforward matter off kilter, as was the case in *Alliance Pipeline Ltd. v. Smith.*[70]

In this case, an easement agreement was entered into in 1998 and the reclamation work on the easement was to take place in 1999 by Alliance Pipeline, whom failed to satisfy their commitment. As a result, Mr. Smith engaged in the reclamation and submitted the invoice to Alliance Pipeline. Failure to fully compensate Mr. Smith resulted in a Notice of Arbitration being filed in 2001. A hearing took place before the First Committee in 2003. Alliance Pipeline initiated proceedings of their own before the Alberta Court of Queen's Bench because Mr. Smith would not grant them access to his property to perform required maintenance on the easement.[71]

In 2005, the quorum for the First Committee was lost, and so the proceeding halted until a new committee was appointed. Subsequent to the Second Committee's ruling, Alliance Pipeline appealed the decision to the Federal Court, and then appealed that decision to the Federal Court of Appeal.[72]

The Supreme Court stated that an award of costs can be made in relation to costs incurred outside of the proceeding before it where the costs, "all related to a *single claim for*

[70] *Alliance Pipeline*, *supra* note 11.
[71] *Ibid.* at para 9 to 13.
[72] *Ibid.* at para 16, 19 and 20.

compensation in respect of a *single expropriation* by a single *expropriating party*."[73] Furthermore, the authority can be made to bear the burden of the claimant's costs due to procedural delays, even if the authority is not at fault.[74]

The Supreme Court in this case, adhering to the principles of indemnity recognized in *Dell Holdings*[75], commented that only full indemnification, "can indemnify Mr. Smith as best one can for the inordinate amount of money -to say nothing of time- he has had to invest in what should have been an expeditious process."[76]

Practical Considerations for Ensuring the Fair Recovery of Costs

The considerations below are intended to assist respondents and claimants in optimizing their respective position on costs. The majority of these suggestions find their foundation in diligent record keeping or engaging in reasonable conduct and apply to respondents and claimants.

It is important to be aware that both the Board and the Assessment Office can assess costs, and that such an assessment can be a "time consuming and arduous exercise".[77] In *Hullmark Developments Ltd. v. Ontario (Minister of Transportation)*, a 23 year old expropriation case was resolved by way of a settlement subsequent to a 28 day hearing before the Board.[78] The assessment hearing then lasted approximately 21 days and

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[73] *Ibid.* at para 48.
[74] *Ibid.* at para 60.
[75] *Dell Holdings, supra* note 8.
[76] *Alliance Pipeline, supra* note 11 at para 76.
[77] *Hullmark Developments Ltd. v. Ontario (Minister of Transportation)* (2002), O.J. No. 3885 at para 192 (Ont. S.C.) ["*Hullmark Developments*"].
[78] *Hullmark Developments Ltd. v. Ontario (Minister of Transportation)* (2002), O.J. No. 3884 at para 11 (Ont. S.C.).

involved 16 sworn witnesses and 104 exhibits.[79] The costs awarded for the assessment of the costs assessment was $188,582.21 which represented 65% of the final bill that was submitted.[80] The costs of a costs assessment, as previously noted, are part and parcel of the determination of compensation and are therefore considered part of the costs incurred by the authority.

An Assessment Officer's decision, despite being open to appeal, is given considerable deference, absent the following:

1. Error in law;
2. Misapprehension of evidence;
3. Palpable and overriding factual error; and
4. Assessment amount that is "so unreasonable" that it constitute an error in principle.[81]

In *Rabbani v. Niagara*[82], the Court of Appeal reinstated the Assessment Officer's costs award. The Superior Court of Justice had reduced the Certificate of Assessments issued by the Assessment Officer on the basis that the amounts were not "reasonable".[83] The Court of Appeal held that this line of reasoning was in error because Maddalena J. was not entitled to substitute her view of what was reasonable with that of the Assessment Officer.[84] The deference that is illustrated by way of this case is consistent with that which is shown to most triers of fact.

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[79] *Ibid.* at para 1.
[80] *Hullmark Developments, supra* note 77 at para 195.
[81] Rabbani v. Niagara (Regional Municipality) (2012), 106 L.C.R. 235 at para 6 (Ont. C.A.).
[82] *Ibid.*
[83] *Ibid.* at para 4.
[84] *Ibid.* at para 5.

Practical Considerations for Respondents

The respondent can take steps to manage and minimize professional fees for both itself and for the claimant for which the respondent will ultimately be responsible. Such steps are as follows:

1. Contemporaneously document discussions, documentary exchanges and agreements with the claimant and/or its consultants, so the respondent maintains its own record of issues relevant to a costs assessment. It is often impossible at a costs assessment, frequently taking place many years after the claim began, to reconstruct all that went on and challenge the claimant's cost on this basis.
2. Attempt to resolve issues or obtain agreements on facts early in the litigation process so that efforts are not unnecessarily undertaken by the claimant to substantiate issues or facts that may not be contested at the hearing. Examples of resolving issues or facts early to reduce the costs of a proceeding include:
    a. Arriving at an early resolution on the quantum of certain areas of loss or damages. If the respondent and the claimant are in substantial agreement about the market value of a property, or portions thereof, it may not be necessary for the claimant to expend considerable resources on expert analysis relating to the resolvable issue;
    b. Agreeing on facts or issues that arise in the litigation. If the claimant and the respondent are in agreement on the highest and best use of a

property, a detailed planning analysis may be avoidable or the scope of such an analysis may be reduced;

c. Narrowing or eliminating minor issues, which may cost more to litigate than the actual quantum of the amount claimed. There is little point in both parties going to great lengths to determine compensation for fencing or trees removed from a property when these issues can be nipped in the bud by an early agreement; and

d. Disclose the existence of and be prepared to share information containing objective and/or primary data which would not usually be contested even if this information may technically be subject to litigation privilege.[85] This information may include surveys, environmental test results, aerial photographs or geotechnical studies for which there is no need to have two separate versions independently created.

3. Make attempts to formally resolve potentially contested issues through admissions in the pleadings or by a Request to Admit, under Rule 51 of the *Rules of Civil Procedure*.[86] These requests for admissions often entrench a party in a position on an issue and require a formal denial or admission in the litigation process. If the respondent issues a Request to Admit and the facts

[85] The production of privileged documents should be made with care in order to ensure that the production of certain documents does not amount to an "implied waiver of privilege" or "cherry-picking" that can result in privilege being lost over additional documents that would otherwise attract privilege: see discussion in *S. & K. Processors Ltd*. v. *Campbell Ave. Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

[86] Rule 51 of the *Rules of Civil Procedure* is not incorporated into the *Rules of Practice and Procedure* for the Ontario Municipal Board. This Rule, however, can be incorporated into the procedure leading up to a hearing before the Ontario Municipal Board if it is included in a procedural order issued by the Board. It is rare that the Board will resist attempts by the parties to narrow issues, arrive at agreed facts and ultimately shorten a hearing.

are admitted by the claimant, it becomes difficult for the claimant to demonstrate the reasonableness of incurring costs relating to the admitted fact or issue, after the admission is made. Correspondingly, if the respondent seeks a factual admission and the claimant denies this fact, which is ultimately established in the respondent's favour, the respondent can challenge the reasonableness of the claimant's costs relating to the denied fact or issue ultimately proven in favour of the respondent.[87]

4. Ensure that contested claims are promptly advanced to resolution. Unlike in civil proceedings, the respondent can commence the litigation process by issuing a Notice of Arbitration, pursuant to sub-section 26(b) of the *Act* and Rule 126 of the *Rules of Practice and Procedure* of the Ontario Municipal Board.[88] The respondent can also assert a degree of control over the speed at which a proceeding is advanced by seeking a procedural order from the Board. In addition to serving the interests of justice, avoiding delay in a proceeding inevitably reduces the costs of both parties.

5. Consider costs strategies in the determination of the initial offer of compensation, pursuant to Section 25 of the *Act*. Although an expropriating authority is only statutorily obligated to provide full compensation for the market value of the lands taken, providing additional compensation for what is reasonably considered injurious affection and disturbance damages can

[87] Rules 51.07, 57.01(1)(g) and 58.06(1)(g) of the *Rules of Civil Procedure* provide the Court and Assessment Officers with the discretion to consider in their determination of costs, "a party's denial of or refusal to admit anything that should have been admitted." This rule may ultimately factor into the Assessment Officer's consideration of the reasonableness of a cost claimed. See application of this rule in a civil matter in *Bakhtiari v. Axes Investments Inc.* (2004), 69 O.R. (3d) 671 (C.A.).

[88] See *Sleiman v. Windsor (City)*, [2002] O.M.B.D. 637 for a discussion addressing the ability of a Respondent to issue a Notice of Arbitration and advance an arbitration by moving for the Board to issue a procedural order.

avoid matters advancing to formal litigation.[89] In certain instances, a reasonable and fulsome initial offer of compensation can motivate owners to accept full and final settlements and can deter owners from going forward with claims, as they risk having an ultimate award of compensation below the sum that triggers the entitlement to costs under Section 32 of the *Act*.

Practical Considerations for Claimants

The following should be considered in order for the claimant to fairly recover their costs:

1. Have a retainer agreement signed at the time professional services are first engaged. Retainer agreements should include: (a) the scope of services to be rendered, (b) the names of the professionals or staff rendering services, (c) their respective chargeable rates, (d) the treatment of disbursements, (e) interest on unpaid accounts, and (f) periodic changes in hourly rates.[90] The initial retainer agreement may be complemented by periodic reports to clients and interim accounts, intended to keep the client aware of the hours billed, the hourly rates charged and any interest that may be accruing on the account.
2. Maintain accurate, detailed and contemporaneous timekeeping records or dockets, which describe the service performed and state the time spent. These records often become a critical element of demonstrating the reasonableness of the professional services for which recovery is sought. As Mr. Justice Southey stated in *Re Harper's Wholesale Ltd. and City of Hamilton,* "there is

[89] Interestingly, the *Ontario Royal Commission Report* recommended (at page 1029) that expropriating authorities advance 100% of the "full amount of compensation as estimated by the expropriating authority" before taking possession. In its drafting of the *Expropriations Act*, the legislature, however, required that expropriating authorities pay only the "market value of the owner's lands" before taking possession.
[90] *The Law of Costs, supra* note 27 at pg 3-34 to 3-36.

a responsibility on the solicitors to keep sufficient records that they can demonstrate the fairness of the account they ultimately present".[91] The importance of recordkeeping applies not only to lawyers, but to all professionals who seek reimbursement for their accounts. Inaccuracies, lack of particulars, ball park estimates, block time entries or claims for undocketed time are subject to a finding of being unreasonable and may result in portions of an account being unrecovered.[92]

3. In addition to docket entries clearly delineating the scope and reasonableness of services rendered, it is often useful for professionals to maintain internal records, file notes and memoranda contemporaneously describing the services rendered. These records can include notes of telephone conversations and meetings that are held, as well as internal memoranda explaining why attention is being given to specific issues and the rationale for costs being incurred. By the time a costs assessment takes place in a complicated matter, the Assessment Officer may be evaluating the reasonableness of services rendered many years earlier, the rationale and support for which may be lost but for the existence of contemporaneous records.

4. Maintain an external written record justifying the necessity of services and expenses. This often entails a claimant seeking admissions on certain issues or potentially contested facts from the respondent before commissioning services that will increase the costs of advancing a claim. This is not to say that the claimant requires the respondent's permission before engaging

[91] *Re Harper's Wholesale Ltd. and City of Hamilton* (1978), 15 L.C.R. 9 at para 4 (Ont. H.C.J.).
[92] *Airport Corporate Centre Inc. v. Minister of Transportation, supra* note 41 at pg 16 to 19.

services; rather, establishing a record to support the necessity of the service for which fees are charged provides reinforcement for the reasonableness of the service. Likewise, the reasonableness of obtaining independent assessments and confirmation of primary facts such as surveys, aerial photographs or environmental tests, will be supported if this information does not exist or if a respondent is not prepared to share this primary information with a claimant.

5. Attempts should be made to advance claims to their ultimate resolution with relative promptness.[93] It is inevitably the case that where a matter is drawn out over many years with intermittent periods of inactivity, the costs will increase and the duplication of services will occur. In all likelihood, when a claim is brought to a hearing five, ten or even twenty-five years after the expropriation takes place, the initial experts engaged in the matter may not be available to provide evidence at the hearing.

Conclusion

In all facets of litigation or dispute resolution, the issue of costs presents a necessary evil and can potentially detract from a party's right to access justice and achieve a fair resolution to the dispute. In the context of expropriation, the legislature recognizes the importance of dispossessed landowners having the right to a fair resolution and to have access to professional assistance to ensure a fair resolution. Consequently, the legislature

[93] Delay to the advancement of a proceeding that results in additional costs can constitute grounds for reducing a costs award if the delay is found to have been caused by the party seeking costs or its solicitor: see discussion in *Bifolcki v. Sherar (Litigation Administrator of)* (1998), 38 O.R. (3d) 772 (C.A.) and *The Law of Costs*, *supra* note 27 at pg 3-45.

has attempted to provide owners with the assurance of substantial recovery for their reasonable costs.

The statutory scheme to bring about this recovery should ensure fair and consistent treatment for all expropriated owners by encouraging access to professional advice for all owners and treating those who settle early in the expropriation process in a similar way to those who proceed into formal litigation. In addition, the *Act* should balance a claimant's entitlement to costs with the needs of a respondent to have some degree of control over its costs exposure.

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