Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: January 11, 2024 **CASE NO(S).:** OLT-22-002455

PROCEEDING COMMENCED UNDER subsection 26(1) of the *Expropriations Act*, R.S.O. 1990, c. E.27

Claimant:	1353837 Ontario Inc.
Respondent:	City of Stratford
Description:	Determination of compensation
Reference Number:	Plan 44R-3154
Property Address	Parts 13, 16 and 17 on Registered Plan 44R-3154
Municipality/UT:	City of Stratford
OLT Case No.:	OLT-22-002455
Legacy Case No.:	LC120027
OLT Case Name:	1353837 Ontario Incorporated v. Stratford (City)
Heard:	November 6, 7,8 and 9, 2023, by Video Hearing

APPEARANCES:

Parties	**Counsel**
1353837 Ontario Inc.	John Doherty Tristan Neill
City of Stratford	Christopher Williams Andrea Skinner Tim Hill Codie Mitchell

DECISION DELIVERED BY JEAN-PIERRE BLAIS AND ORDER OF THE TRIBUNAL

Link to Final Order

INTRODUCTION

[1] The matter before the Tribunal was the penultimate chapter in an interminable legal battle, of nearly Dickensian proportions, relating to the expropriation by the City of Stratford ("City") of the lands of the historic Grand Trunk Railroad Repair Shops. This tale features a hard fought legal battle over many years, a monstrous narrative with many subplots, the tragic death of the central protagonist whose vision for the Cooper site never came to fruition, a bereft family left with a final compensation award that was far less than what their patriarch had hoped for, and a concluding chapter where, like in the fictional case of *Jarndyce and Jarndyce*, the last juridical debate is sadly and mostly about the payment of legal fees by or to a corporation with no assets.

[2] Procedurally, the Tribunal was seized with two Motions for Costs.

[3] These Motions for Costs follow the final determination on the expropriation compensation claim made by Vice-Chair Sarah Jacobs in a decision issued on October 15, 2021 ("Merit Decision").[1]

[4] In addition to making their respective claims for costs, both 1353837 Ontario Inc. ("Claimant") and the City seek dismissal of the other Party's Motion for Costs and seek their own costs for their respective Motions for Costs.

[5] At its core, the dispute between the Parties is whether the conduct of the Claimant (including the refusal or non acceptance of settlement offers) was of such a

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[1] *1353837 Ontario Incorporated v. Stratford (City)*, 2021 CanLII 101820.

nature, either through action or inaction, that the Tribunal should exercise its discretion to award the Claimant less or even no costs, and to award the City all or some of its costs. The applicability of decision of the Ontario Court of Appeal in *Shergar Development Inc. v. Windsor (City)*, as well as the lower-level decisions that resulted in that judgment (together the "*Shergar* Decisions"), is central to this determination.[2]

Claimant's Motion for Costs

[6] On June 22, 2023, the Claimant filed a Motion for Costs pursuant to section 32(1) of the *Expropriations Act*, R.S.O. 1990, c. E.26 ("Act") demanding from the City $6,679,125.74 for its costs in pursuing its expropriation compensation claim. This was comprised of:

a. $5,527,589.98 in legal fees (including HST and disbursements) on a solicitor-client scale; and,

b. $1,151,535.76 in expert costs (including HST and disbursements).

[7] In the alternative, the Claimant originally urged the Tribunal to exercise its discretion under section 32(2) of the Act to fully indemnify the Claimant:

a. $5,036,747.78 (including HST and disbursements) on a solicitor-client basis until April 12, 2021; and

b. $985,426.78 (including HST and disbursements) on a partial indemnity scale of 60% after that date.

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[2] 151 O.R. (3d) 653 (Ont. C.A.).

[8] Subsequently, on October 6, 2023, through its Factum, the Claimant began shifting the basis of its Motion for Costs from section 32(1) to section 32(2) of the Act, which it did fully on October 18, 2023, through its Responding Factum, and reduced its claim for costs to $6,102,513.04:

a. $4,274,456.66 on and before April 13, 2021, based on a full indemnity scale;

b. $561,940.81 after April 13, 2021, on partial indemnity scale; and,

c. $1,266,115.57 in disbursements (including expert fees).

[9] The Claimant only claims costs incurred after January 11, 2010, as the Claimant and the City have settled the issue of costs incurred before that date through Minutes of Settlement dated January 10, 2010 (“2010 Minutes”).

City’s Motion for Costs

[10] The City filed on June 22, 2023 a Motion for Costs pursuant to section 32(2) of the Act, Rule 26.25 [now Rule 26.29 [3]] of the Tribunal’s *Rules of Practice and Procedure* and Rule 49 of the *Rules of Civil Procedure*, R.R.O 1990, c. C.43 [4] (“Rule 49”) against the Claimant in the amount of $4,139,201.93 on a full indemnity basis.

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[3] On October 13, 2023, the Tribunal amended its *Rules of Practice and Procedure*, including renumbering its Rule 26.25 as Rule 26.29. This Rule has been present since at least Rule 141 of the 2008 *Rules of Practice and Procedur*e of the Ontario Municipal Board.

[4] Adopted under the *Courts of Justice Act,* R.S.O. 1990, c. C.43.

[11] In the alternative, the City claimed in the amount of $3,716,812.26 on a substantial indemnity basis.

[12] And, on a further alternative basis, the City claimed in the amount of $2,901,386.15 on a partial indemnity basis.

[13] These amounts are inclusive of legal fees, expert fees, disbursements and applicable taxes.

Outcome on the Cost Motions

[14] For the reasons set out below, the Tribunal concludes that this is not a situation where the Claimant should be denied its costs entirely. However, the Tribunal finds that there ought to be costs consequences due to the Claimant's conduct, including its inaction. The conduct of the Claimant was unreasonable in some respects, but not to the degree present in the *Shergar* Decisions. The City had made a proper offer on June 15, 2018, which was unreasonably refused or not accepted by the Claimant. Moreover, the City should be awarded part of its costs due to the Claimant's conduct throughout the proceeding which was unreasonable, inappropriate and wasteful of both the Tribunal's and the City's time.

[15] Accordingly, the Tribunal awards the Claimant $3,709,367.13, comprised of:

a. $1,640,564.50 on or before June 15, 2018, on a full-indemnity scale, subject to a reduction of $492,169.35 [being a reduction of 30% as a proxy for partial docket entries that relate to other litigation, partial docket entries that are unrelated to the expropriation compensation proceeding and partial docket entries related to administrative and non legal work] for a total of $1,148,395.15;

b. $1,882,063.80 after June 15, 2018, on a partial indemnity basis of 60%, subject to an additional reduction of $564,619.14 [being a reduction of 30% as a proxy for partial docket entries that relate to other litigation, partial docket entries that are unrelated to the expropriation compensation proceeding and partial docket entries related to administrative and non legal work], for a total of $1,317,444.66; and,

c. $1,243,527.32 in disbursements (including expert fees and HST, where appropriate) [reflecting a reduction of $22,588.25 for irrelevant invoices of MPW Chartered Accountants].

[16] And the Tribunal awards $2,901,380.15 to the City on a partial indemnity basis (60%) throughout the proceeding, including disbursements.

Procedure for the Cost Motions

[17] The procedure for hearing these two Motions for Costs was set out by the Tribunal (by a panel differently constituted) further to a Case Management Conference ("CMC") Decision delivered orally on March 22, 2023, and issued on April 25, 2023. The Tribunal ruled that the two Motions for Costs would be considered together and that the issues of entitlement to costs and the quantum of costs for both Motions would also be considered concurrently.

[18] The CMC Decision also stipulated that Parties in preparing their Motion materials had to include copies of all documents, transcripts, exhibits, and materials they were intending to rely upon. The Parties were not to simply cross-reference a document or material contained within the Tribunal's file or the hearing record with the expectation that this will be readily accessible to the Panel from the Tribunal's voluminous files. As directed, copies of all source material and relevant documentation were included in the

written record presented in support of the Motions such that it was unnecessary for the Tribunal to go beyond the written materials filed on the Motions for Costs.

[19] The materials that are before the Tribunal are identified in **Attachment 1**. The submissions were complete on December 14, 2023, when the Tribunal received, at its request, a Microsoft Excel Version of the Claimant's Chronological Dockets of its Bill of Costs which includes 6,876 lines of data.

[20] The hearing of the Motions for Costs was held over four days of oral submissions and was based on a considerable record containing over 19,000 pages. This Decision constitutes the 21st Decision issued by the Tribunal (and its predecessor Boards and Tribunals) concerning the compensation claim resulting from the City's expropriation of the Claimant's property.

[21] Although the numerous Counsels for both Parties forcefully advocated for their respective clients, they did so with professionalism and in a helpful manner to this Member. Counsels for both Parties came dangerously close to inviting the Tribunal to delve too deeply into and reconsider the merits of the claim decided by Vice-Chair Jacobs but in no instance did they bring the Tribunal to cross that line.

BACKGROUND

[22] The background to these Motions is extensive and complex, both with respect to the machinations of the expropriation process itself and the multiplicity of motions, contentious discovery processes, related proceedings before the Courts, including the Ontario Superior Court of Justice and the Ontario Court of Appeal, and numerous disputes relating to case management and procedural compliance. The extent to which each of the Parties has opposed positions and perspective was fully demonstrated to this Tribunal Member both at the CMC and in the hearing of these Motions.

Expropriation Scheme

[23] For present purposes, as was decided in the Merit Decision, the expropriation scheme began in April 2008 when the City decided to acquire the 11.42 acres of lands ("Expropriated Lands") then-owned by the Claimant since 2001. At that time, the City sent an anonymous offer to the Claimant. In December 2008, the City issued a public notice of its intention to expropriate the Expropriated Lands. The Expropriated Lands are just outside the City's central business district, housed a large 220,000 square feet industrial building, which was partially damaged.

[24] On May 25, 2009, the City approved the expropriation through the adoption of By-law No. 99-2009, registered the plan of expropriation on June 15, 2009, and served a Notice of Expropriation on June 16, 2009, indicating that the transfer of possession would occur on September 18, 2009. The City was eager to take possession to facilitate the development in the City of a satellite campus for the University of Waterloo.[5]

[25] Due to, amongst other things, this previous industrial use, the presence of asbestos and lead-based paints, the Expropriated Lands were contaminated and would require remediation. It was a matter of disagreement amongst the experts how remediation could be best addressed and at what cost.

Section 25 Offer and Mathematical Error

[26] On September 11, 2009, the City made an offer of compensation under section 25 of the Act in the amount of $500,000 ("Section 25 Offer"). On its face, this offer was made jointly to the Claimant, Republic Mortgage Investment Corporation ("Republic

[5] The satellite campus was never built on the Expropriated Lands.

Mortgage"). and three other parties. The three other Parties were Canadian National Railway Company, 913162 Ontario Inc. and Libro Credit Union Limited.

[27] This offer was based on an appraisal prepared by Ray Bower of Ray Bower Appraisal Services Inc. In his report, Mr. Bower concluded that the fair market value of the Expropriated Lands was $4,300,000, as though "clean", *i.e.,* that there were no environmental issues associated with the Expropriated Lands and that they were available for immediate development. However, based on expert reports which were available to him at the time, which estimated quite significant costs for environmental remediation to make the Expropriated Lands usable, Mr. Bower arrived at a negative value. Nevertheless, based on prior transactions, he concluded that the Expropriated Lands had a nominal speculative value of $500,000 ("2009 Bower Appraisal").

[28] The amount of $500,000 in the 2009 Bower Appraisal was a result of a mathematical error. In a November 13, 2020 Witness Statement, at paragraph 85, Mr. Bower formally acknowledged the error and revised the valuation to $290,000. This error was, in a sense, to the advantage of the Claimant, as the City had offered the higher amount of $500,000 in its Section 25 Offer. In any event, the Claimant became aware of the error well before November 2020. John Simmons, the Claimant's expert, provided a technical review of the 2009 Bower Appraisal on November 22, 2009 ("Simmons Technical Review"). Mr. Simmons was highly critical of the 2009 Bower Appraisal and opined that it did not comply with the Standards of the Appraisal Institute of Canada, and contained errors and omissions that resulted in a report that was inadequate and misleading. The Claimant's evidence on these Motions for Costs acknowledges that Mr. Simmons had identified to the Claimant Mr. Bower's mathematical error in 2009.[6]

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[6] Affidavit of Wendy Ryan dated June 22, 2023, paragraph 40; Simmons Technical Review, page 23.

[29] The Claimant refused to grant possession and commenced proceedings on September 17, 2009 in the Superior Court of Justice to indefinitely extend the possession date. The City opposed this application and commenced a counter-application on October 22, 2009 seeking a firm possession date of no later than December 1, 2009. This first judicial clash was a sign of what further skirmishes were to follow over the next 14 years.

Minutes of Settlement of 2010

[30] To expedite the development of the University of Waterloo campus, the City agreed to settle the possession application by entering into the 2010 Minutes. Under those Minutes, the City amended its section 25 offer of September 11, 2009, and agreed to pay $4,500,000 as compensation for the Expropriated Lands along with interest and legal fees. The City eventually paid $5,024,629.86, comprised of $746,708.84 directly to the Claimant and $4,277,920.84 to Republic Mortgage (the Claimant's lender that held security interests in the Expropriated Lands and other properties). Both the Claimant and Republic Mortgage were "owners" pursuant to the Act. The payments were without prejudice to the final determination of compensation by the Tribunal. The payment to the Claimant was comprised of:

a. $566,935.27 in compensation;

b. $22,273.57 in interest at the statutory rate of 6%; and,

c. $157,500 in legal and consulting costs (exclusive of GST) as per paragraph 7 of 2010 minutes.

[31] Republic Mortgage subsequently released its claim to compensation under the Act and was not a party to the compensation proceeding. The settlement of Republic Mortgage's claim and the repayment of loan removed a considerable sword of

Damocles over the Claimant and its sole shareholder as the loan bore an interest rate of 12% and was secured not only against the Expropriated Lands but also other properties, including the Ryan family farm properties.

Statement of Claim and Merit Decision

[32] By contrast to Republic Mortgage, the Claimant served on the City a Notice of Arbitration and Statement of Claim, dated July 17, 2012, seeking compensation of $25,000,000 as fair market value of the Expropriated Lands and more than $79,000,000 for alleged business and other losses. As a result of refinements to its position, by the time of the hearing on the merits, the Claimant sought $22.7 million for market value compensation and approximately $1.07 million for disturbance damages and business losses.

[33] There was thus a considerable chasm between the Parties as to the amount payable under the Act to the Claimant following the expropriation by the City.

[34] At the time of the expropriation, Lawrence Ryan was the sole shareholder, director and officer of the Claimant until his sudden and unexpected death in December 2019. He died intestate at the age of 63. As of February 7, 2020, the responsibility of pursuing the compensation claim has fallen on his widow, Wendy Ryan.

[35] The issue of the amount of compensation payable under the Act was eventually heard by the Tribunal before Vice-Chair Jacobs starting on April 26, 2021 (“Merit Hearing”). During a 26-day hearing, which considered the evidence of 32 witnesses (including 19 witnesses qualified as expert witnesses), Vice-Chair Jacobs issued a lengthy Merit Decision in which she considered two issues pursuant to subparagraphs 13(2)(a) and (b) of the Act, namely: (1) the market value of the Expropriated Lands; and (2) the disturbance damages, if any, that were owed to the Claimant. The Tribunal found in favour of the City, upheld the market value in the corrected 2009 Bower Appraisal,

determined that the existing buildings on the Expropriated Lands had no contributory value due to the costs to make them usable, concluded that remediation costs significantly exceeded the fair market value of the Expropriated Lands as if clean, awarded $290,000 in nominal speculative value and set the wasted development costs at $51,683.

[36] The City chose to waive its right under the 2010 Minutes to seek reimbursement for the overpayments made to the Claimant. As noted by Vice-Chair Jacobs, at paragraph 393 of the Merit Decision, the City indicated “that out of respect for Mrs. Ryan and her family, it is not taking the position that it be repaid any overpaid funds.”

[37] Vice-Chair Jacobs noted in her Merit Decision as follows:

> [7] The road to this compensation hearing was long, complicated, and hindered by many factors. These two parties have long been involved in litigation outside of this proceeding, including before the Ontario Superior Court of Justice, the Ontario Labour Relations Board, and the Health Services Appeal Board. There were many procedural steps requiring the Tribunal’s adjudication to bring this Claim to a compensation hearing.

[38] At paragraphs 47 to 62 of the Merit Decision, Vice-Chair Jacobs describes the “unusually long” road to the compensation hearing. That journey need not be reiterated here at this stage but will be referred to where appropriate below.

The Matter of Costs in the Merit Decision and in the Interlocutory Decisions

[39] On the issue of Costs, Vice-Chair Jacobs stated as follows in her Merit Decision:

> [389] Costs awards are determined in accordance with s. 32 of the Act and are dependent on the amount offered by the authority. Where the Tribunal awards an owner 85% or more of the amount offered by the authority, s. 32(1) requires the Tribunal to make an order directing the authority to pay the reasonable legal, appraisal and other costs incurred by the owner for the purpose of determining compensation.

> [390] Conversely, where the amount awarded by the Tribunal is less than 85% of the amount offered by the authority, s. 32(2) affords the Tribunal discretion to make an order for the payment of costs as it considers appropriate.
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> [391] The parties agreed that submissions regarding the applicability of s. 32 shall be made following the Tribunal's determination of compensation in this Decision. The Tribunal will remain seized for the purpose of determining costs in accordance with s. 32 of the Act and will establish the procedure, including a hearing date, to fix the costs associated with this Claim.

[40] Vice-Chair Jacobs did not express any views specifically with respect to how the Tribunal would or ought to exercise its discretion on the matter of costs. Similarly, all interlocutory decisions prior to the Merit decision either remained silent on the issue of costs or reserved the issue of cost to be considered after the issuance of the Merit Decision.

[41] Consideration of the issue of costs was delayed. First, the Claimant sought, but was unsuccessful, to obtain a review of the Merit Decision by the Tribunal. Second, the Claimant appealed the Merit Decision pursuant to the statutory right of appeal provided under s. 31 of the Act. On November 22, 2022, a panel of the Divisional Court unanimously dismissed the Claimant's appeal.

[42] In the normal course, Vice-Chair Jacobs would have remained seized with respect to all matters relating to Costs. However, given her retirement from the Tribunal in late 2021, the Chair of the Tribunal, pursuant to section 3(1)(5)(b) of the *Ontario Land Tribunal Act*, 2021, S.O. 2021 C.4, assigned Vice-Chair David Lanthier (also now retired) and this Member to consider the CMC, and subsequently assigned this Member consideration of the two present Motions for Costs.

[43] As presaged in the CMC Decision, this Member did not have the benefit of hearing all the evidence and conducting the hearing on the merits first-hand and had to assimilate and scrutinize a considerable volume of information and argument.

[44] The Tribunal notes that Motions for Costs relate solely to matters before the Tribunal and its predecessor bodies, as the costs for proceedings before the Courts were considered as part of those proceedings.

ENTITLEMENT TO COSTS

The Applicable Legislative Test

[45] Both Motion for Costs are now based on s. 32(2) of the Act which provides as follows:

> 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 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 […] [Emphasis added]

[46] Rule 1.4 of the Tribunal's Rules provides that "if the Rules do not provide for a matter of procedure, the Tribunal may adopt or follow the procedures set out in the *Rules of Civil Procedure* where appropriate [emphasis added]". More importantly, under Part II of the Tribunal's Rules which applies to expropriation procedures, Rule 26.29 provides that if an offer to settle is made and it is not dealt with in the Act, the *Rules of Civil Procedure* apply.

[47] The relevant portions of the Rule 49 provide as follows:

> **49.10** (2) Where an offer to settle,
>
> (a) is made by a defendant [*i.e.,* the expropriating authority for our purposes] at least seven days before the commencement of the hearing;
> (b) is not withdrawn and does not expire before the commencement of the hearing; and
> (c) is not accepted by the plaintiff [*i.e.,* a claimant for our purposes],
> and the [claimant] obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the [claimant] is entitled to partial indemnity costs to the date the offer to settle was served and [the expropriating authority] is entitled partial indemnity costs from that date,

> unless the [Tribunal] orders otherwise. […]
>
> (3) The burden of proving that the judgment is as favourable as the terms of the offer to settle, or more or less favourable, as the case may be, is on the party who claims the benefit of subrule […] (2).
>
> **49.13** Despite rules 49.03, 49.10 and 49.11, the [Tribunal], in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer. [Emphasis added]

[48] The award of Costs to either the Claimant or to the City is a matter of discretion for the Tribunal to be made along a broad spectrum of possible outcomes including awarding no costs. The Parties took different positions as to what factors ought to guide the Tribunal in the exercise of its discretion.

Guidance from the *Shergar* Decisions

[49] Both Parties cited extensively the relatively recent series of decisions in the *Shergar* matter to argue in favour of their respective positions, either by seeking to apply its principles to the present Motions or to distinguish the facts of that case from the case at hand. It therefore is important for the Tribunal to consider the *Shergar* Decisions in the analysis of the issues below. However, at this point, it is useful to summarize the history of a series of cases that began at the predecessor of this Tribunal, the Ontario Municipal Board ("OMB"), and which eventually made their way to the Ontario Court of Appeal.[7]

[7] The application for leave to appeal to the Supreme Court of Canada was dismissed with costs on March 11, 2021: 2021 CanLII 18045.

[50] The genesis of those cases is a decision of the late Vice-Chair R.G.M. Makuch on the matter of costs.[8]

[51] In 1998, the City of Windsor expropriated lands owned by Shergar Development Inc. ("Shergar") along the Detroit River. The matter did not come before the OMB for a considerable amount of time as the hearing commenced in February 2016. In its decision of May 25, 2016, the OMB rejected Shergar's evidence and awarded considerably less than the claim presented by Shergar. In addition, the OMB awarded Shergar its costs in the proceeding.

[52] The City of Windsor sought a rehearing before the OMB solely on the issues of costs and interests. It sought reconsideration of the award of costs because the City had not been allowed to make submissions before costs were awarded to Shergar. In the Rehearing Decision, Vice-Chair Makuch found that an offer made by the City of Windsor in 2015 constituted "the amount offered by the statutory authority" under section 32 of the Act, denied Shergar its costs entirely after that valid Rule 49 settlement offer (but not before), and granted costs in favour of the City of Windsor following the date of that offer. The assessment of costs was referred to an assessment officer of the Superior Court of Ontario for determination.

[53] Shergar appealed the OMB decision to the Divisional Court.[9] The Division Court, held that the "amount offered by the statutory authority" in section 32 of the Act refers to any offer made by an expropriating authority and not just an offer made pursuant to section 25 of the Act. Since the 2015 offer was not dealt within the Act, the Divisional Court held that the OMB could have regard to Rule 49 in exercising the OMB's

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[8] *Shergar Development Inc. Windsor (City),* 2018 CanLII 3074 (ON LPAT).

[9] 2019 ONSC 2623 (CanLII) (*per* Wilton-Siegel J., Swinton and Shead JJ. concurring).

discretion under section 32(2) and costs could be awarded against the expropriated party.

[54] On appeal, the Ontario Court of Appeal[10] agreed with the Divisional Court and stated, at paragraph 4:

> In sum, the interpretation advanced by [Shergar] is inconsistent with the text of the Act, its scheme, and its underlying public policy objectives. Such an interpretation would also represent an unwarranted and unwise intrusion into the discretion provided to the OMB [now the Tribunal] to award costs. Indeed, this case is a perfect example of why the OMB must be free to use a cost award to sanction inappropriate and wasteful conduct by a claimant during an expropriation proceeding. [Emphasis added]

ANALYSIS OF ISSUES

[55] To resolve these two Motions for Cost, the Tribunal must consider the following key sub-issues:

a. Subject to exceptional circumstances, is the Claimant entitled to its costs?

b. Did the Claimant unreasonably refuse a “proper” offer of settlement that was materially higher than compensation awarded by the Tribunal?

c. What Impact, if any, does the Claimant’s Reliance on Advice Received by Experts have on the Reasonableness of the Claimant’s Position with respect to the City’s Offers?

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[10] 151 O.R. (3d) 653 (Ont. C.A.) (*per* Hourigan J.A., Rouleau and Hoy JJ.A. concurring).

d. Is the Claimant's Refusal of the Offers Reasonable because the City's Offers Kept Increasing or Evolving?

e. Was the Expert Evidence of the Claimant at the Merit Hearing fair, objective and non-partisan?

f. What Impact, if any, does the Presence of Litigation Funders have on the Exercise of the Tribunal's Discretion?

g. Overall did the Claimant Reasonably Pursue its Claim without Undue Delay?

h. Is the City Entitled, on an Exceptional basis, to its Costs as well?

[56] The Tribunal will consider those issues in order.

a. Subject to exceptional circumstances, is the Claimant entitled to its costs?

[57] The Claimant takes the position that it is entitled to its costs pursuant to section 32(2) of the Act and the City should not be awarded its costs.

[58] The Claimant maintains that the Indemnity Principle, set out by the Supreme Court of Canada in *Dell Holdings Ltd. V. Toronto Area Transit Operations Authority*[11], as well as the statutory scheme and purpose of the Act supports awarding costs to the Claimant. The Claimant submits that there is a very strong presumption that expropriated landowners will receive full compensation for their costs even when they are not successful. The Claimant further reasons, based on the decision of the Supreme

[11] [1997] 1 S.C.R. 32.

Court of Canada in *Alliance Pipelines*, that to give effect to the Indemnity Principle, costs on a solicitor-client basis should generally be given.[12] Consequently, Mr. Neill, Co-Counsel for the Claimant, points out that costs may be awarded in an amount significantly greater than the compensation itself.

[59] The City argues that unlike under section 32(1) of the Act, there is no presumptive requirement that the expropriated party be compensated for its costs under section 32(2) of the Act. For the City, under Rule 49, the City is entitled to its costs of the entire proceeding because the City made a payment under the 2010 Minutes and made further proper offers to settle the claim in an amount well above the amount awarded to the Claimant in the Merit Decision. The City submits that there is a "presumption" that the City is entitled to its costs because "it beat all of its offers," and that the City did not have to demonstrate that the Claimant engaged in egregious conduct. Nevertheless, the City qualified the Claimant's action as a "reckless pursuit of an unwarranted claim."

[60] For the Tribunal, based on the *Shergar* Decisions, the relevant underlying public policy objectives on Motions for Costs are twofold. These principles must guide the Tribunal in the interpretation and application of the Act. The first policy imperative is that the Act is a remedial statute enacted for the specific purpose of adequately compensating those whose lands are taken to serve a public interest. Thus, the Act must be given broad and liberal interpretation consistent with its purpose (widely labelled as the "Indemnity Principle").[13] The second policy imperative encourages early

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[12] *Smith v. Alliance Pipelines Ltd.*, 2011 SCC 7, paragraph 74.

[13] *Toronto Area Transit Operation Authority v. Dell Holdings Ltd.* [1997] 1 S.C.R. 32; paragraphs 19 and 21.

settlement of claims on an equitable basis.[14] For the purposes of this Decision, this second principle is referred to as the “Efficiency Principle”.

[61] Moreover, these two imperative objectives are not incompatible and are particularly relevant when the Tribunal exercises its discretion under section 32(2) of the Act. This approach is important to allow the Tribunal control of its processes by sanctioning, using costs awards, unreasonable, inappropriate or wasteful conduct by a party during an expropriation proceeding.

[62] On this first issue, the Tribunal agrees with the Claimant but only in part. A claimant who fails to meet the 85% threshold, as is now admittedly the case in this instance, is not automatically barred from compensation for its costs. Similarly, the Claimant’s failure to meet the 85% threshold does not automatically reverse the Claimant’s onus and entitle the expropriating authority to get its costs as the City contends. Such a result would be contrary to the Indemnity Principle and would not necessarily advance the Efficiency Principle.

[63] The City correctly refers the Court of Appeal in Shergar in support of the proposition that a responsible expropriating authority should be afforded some measure of costs protection where it makes a fair offer, and a claimant unreasonably refuses to accept it.[15] However, the *measure of protection* need not be an automatic reversal of the onus. The “measure” may be awarding a claimant less of its costs, without necessarily awarding the expropriating authority anything. There is no “*prima facie* entitlement to costs” in favour of an expropriating authority as pleads by the City’s Co-

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[14] *Rotenberg v. Borough of York (No. 2),* 13 OR (2d) 101 (Ont. C.A.).

[15] *Shergar Development Inc. v. Windsor (City)*, 2020 ONCA 490, paragraph 28.

counsel, Mr. Williams. That simply and incorrectly stands the *Shergar* Decisions on their head. The approach applicable in civil matters[16] should not indiscriminately be imported into land compensation claim matters as the legislative scheme has an exceptional purpose.

[64] Whilst the award of costs to a claimant is "generally" the norm, this is not an absolute. It certainly does not fully dispose of the issues between the Parties in this case without further inquiry. There are factual circumstances that may give rise to the Tribunal exercising its discretion differently, especially given the second policy objective identified by the Ontario Court of Appeal in *Shergar* with respect to fair and expeditious treatment of a claim, the Efficiency Principle.

[65] At paragraph 34 to 36, the Ontario Court of Appeal in *Shergar* stated:

> An innocent party whose property is taken must be fully compensated, and it will not generally have to bear its costs for reasonably disagreeing with the amount offered for that taking, even where the offer exceeds the ultimate award by a considerable margin. But the statutory protection provided by the Act is not a blank cheque that permits a claimant to act unreasonably. At the very least, there must be a *potential* for adverse cost consequences where the claimant forces a wholly unnecessary proceeding or otherwise acts unreasonably.
> In short, the objective of full and fair compensation cannot be divorced from the objective of the efficient resolution of claims. The appellant's interpretation would permit the prospect of an unreasonable claimant delaying proceedings, running up legal costs, and wasting the [Tribunal's] resources, all the while safe in the knowledge that unreasonable refusals of subsequent offers cannot adversely affect its entitlement to legal costs. [Emphasis added]

[66] The factual circumstances that the Tribunal may consider in exercising its discretion against the "general" approach include: (1) the existence of a "proper" offer to

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[16] *Jarbeau v. McLean*, 2017 ONCA 115 (per Pardu JA, Simmns and LaForme JJ.A. concurring), paragraph 82.

settle made by the expropriating authority; (2) the unreasonable refusal or non acceptance of a “proper” offer; (3) whether the expert evidence advanced by a claimant was fair, objective and non-partisan; (4) the conduct of a claimant who may have unduly delayed the expropriation proceeding, including frustrating or obfuscating the determination of the claim on its merits; and (5) other relevant factor that go to the reasonableness or unreasonableness of the conduct of Parties. Globally, in exercising its discretion, the Tribunal must ask itself whether the Claimant, through its conduct (including its inaction), reasonably pursued its claim, and whether unreasonable conduct was sufficiently egregious to not only affect the Claimant’s own costs, but also to trigger the emergence of a claim for cost in favour of the City against the Claimant. The conduct must be viewed in its totality.[17]

[67] Although the Tribunal finds that the Claimant would, in principle, be entitled to its costs, the extent of that entitlement may be affected by relevant factors that must now also be considered.

b. Did the Claimant unreasonably refuse a “proper” offer of settlement that was materially higher than compensation awarded by the Tribunal?

[68] Both Parties agree that when undertaking its costs analysis, the Tribunal may consider settlement offers made by the expropriating authority. The Claimant reasons, however, that the Tribunal is not bound by Rule 49 because section 32(2) of the Act, at its core, is discretionary.

[69] For the Claimant, even if Rule 26.29 refers to Rule 49(10), it does not call for a rigid application of the later. The Claimant submits that, unlike in an ordinary civil

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[17] *Shergar Development Inc. v. Windsor (City),* 2018 CanLII 3074 (ON LPAT), paragraph 89.

litigation process, costs in an expropriation are “part of the expropriation award.” Rule 49 does not fetter the discretion of the Tribunal and should not be applied in expropriation matters in the same way as in non-expropriation cases. In an expropriation context, the degree of a claimant’s success is less of a factor, provided that the claim is not frivolous and that there is a reasonable anticipation of success. The Claimant relies on OMB cases in support of this proposition.[18] For the Claimant, *Shergar* did not displace these authorities. The Claimant says that in *Shergar,* the OMB did not in fact rigidly apply Rule 49 because Vice-Chair Makuch allowed full indemnity of the Claimant’s costs before the date of the settlement offer.[19]

[70] The Claimant argues that many of the City’s settlement offers were not “proper offers” for the purposes of costs and should not be considered by the Tribunal.

[71] The City pleads that it is entitled to its costs from the time of the 2010 Minutes. For the City, there are at least three valid Rule 49 settlement offers, two of which remained open at the start of the Merit Hearing.

[72] In exercising its discretion under section 32(2) of the Act, the Tribunal is of the view that it may draw upon Rule 49 to inform its analysis regarding the criteria for a proper. The use of Rule 49 is on a *mutatis mutandis* basis as expropriation proceedings are, at their core, distinct from ordinary civil proceedings. The OMB in *Shergar* found that a written offer must be easily discernable, sufficiently certain to engage costs consequences, understandable and open at the commencement of the hearing, and present no difficulty in interpreting the quantum. In essence, a “proper” settlement offer

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[18] *Rosemond Metals Ltd. v. Toronto (City)*, 1984 CarswellOnt 1862 (OMB); *Henery v. London (City)*, 2012 CarswellOnt 17509 (OMB).

[19] *Shergar Development Inc. Windsor (City),* 2018 CanLII 3074 (ON LPAT), paragraph 37.

by an expropriating authority is an offer that is actionable upon its acceptance by a claimant, keeping in mind that in this proceeding the Merit Decision awarded the Claimant $341,683.

[73] The City made multiple offers to the Claimant in writing. Nearly at all times before the start to the Merit Hearing, there was some sort of offer on the table. The key offers are as follows:

a. Offer of September 11, 2009;

b. Offer in the Minutes of Settlement of January 10, 2010;

c. Offer of June 27, 2013;

d. Offer of June 15, 2018; and,

e. Offer of April 13, 2021.

Offer of September 11, 2009 (the Section 25 Offer)

[74] On September 11, 2009, the City made an initial offer of $500,000 purportedly pursuant to section 25 of the Act jointly to the Claimant, Republic Mortgage and three others.

[75] The Claimant says that this offer was not a proper section 25 offer and that it was reasonable for the Claimant not to accept it. The City disagrees.

[76] The Tribunal agrees with the City that whether or not this offer was a proper offer for the purposes of section 25 (which the Claimant extensively argues), it is an offer for the purposes of section 32(2) of the Act and Rule 49. The Court of Appeal in *Shergar*

held that the phrase “the amount offered” in section 32 of the Act does not refer exclusively to an offer made under section 25 of the Act. It also encompasses other offers, such as those that meet the criteria of a Rule 49. Thus, an offer that falls short of being an offer that meets the requirements of section 25 is still an offer for the purpose of applying section 32(2) of the Act. On these Motions for Costs, the Tribunal need not decide whether the offer of September 11, 2009 was correctly a legitimate offer pursuant to section 25 of the Act.

[77] Nevertheless, the Tribunal is not persuaded that this offer of September 11, 2009 is one that should have a direct impact on the Claimant’s entitlement to its costs and the exercise of the Tribunal’s discretion. At this very early and initial stage of the proceedings, it was objectively reasonable for the Claimant to reject or not accept the offer. First, the offer was made jointly to the Claimant and four other entities, including Republic Mortgage. The Claimant’s portion of that offer was unclear. Second, the offer was deficient. This was not because of the mathematical error in the 2009 Bower Appraisal, but because that Appraisal relied on a report dated April 10, 2008, prepared by R.J. Burnside & Associates Limited, which considered the costs of remediation of not just the Expropriated Lands, but also an adjacent parcel of land. Third, the professional opinions available to the Claimant could, at that time, suggest that the offer was low, and could be open to reasonable criticism.

[78] The Claimant had the Simmons Technical Review which was extremely critical of the 2009 Bower Appraisal on numerous grounds. The Claimant also had an analysis prepared by XCG Consultants Ltd. (“XCG”) which also was critical of an element of the 2009 Bower Appraisal and suggested that the costs of remediation would be significantly less than the 2009 Bower Appraisal assumption of between $7,900,000 and $16,000,000. XCG opined that the costs of remediation would instead be in the range of $1 million.

Offer of January 10, 2010 (2010 Minutes)

[79] On January 10, 2010, through the 2010 Minutes, the City amended the September 11, 2009 offer. The offer was now made solely to the Claimant and Republic Mortgage in the amount of $4,500,000. It was clear that under this accepted offer, the Claimant would receive nearly 567,000$ in interim compensation, in addition to interim legal and consulting costs. It was also at this point that Republic's interests were beginning to be extricated from the expropriation proceeding.

[80] Nevertheless, the Tribunal is not persuaded that this offer is one that should have a direct impact on the Claimant's entitlement to its costs and the exercise of the Tribunal's discretion on the Motions for Costs. This settlement was not a final offer for the expropriation claim because the Claimant reserved the right to pursue its claim and City reserved its right to seek reimbursement if the final compensation award was less than the amount in the 2010 Minutes. Moreover, and more importantly, the offer was inextricably bound with the issue of the possession of the Expropriated Lands being argued in the Ontario Court of Justice. It was not an actionable offer for the purpose of the expropriation compensation proceeding. Nevertheless, this offer is relevant as it forms the foundation of subsequent offers made by the City.

Offer of June 27, 2013

[81] On June 27, 2013, the City made an offer of additional compensation of $2,435,000 for a total of $7,000,000 plus reasonable legal, appraisal and other costs (exclusive of interest). The Claimant disputes that this was a proper offer. The City submits that this offer was sufficiently clear to qualify as a Rule 49 offer and, even though it was withdrawn before the Merit Hearing, its very existence affects the reasonableness of the Claimant's behaviour.

[82] As this offer was withdrawn on October 4, 2017, *i.e.,* well before the start of the Merit Hearing, the Tribunal is not persuaded that this offer is one that should have a direct impact on the Claimant's entitlement to its costs. To be relevant, Rule 49 offers must remain open to acceptance at the start of the hearing. The Tribunal sees no reason why this general practice in Rule 49 should not be applied in the expropriation context, as was determined by the late Vice-Chair Makuch in *Shergar*.

Offer of June 15, 2018 ("2018 Offer").

[83] On June 15, 2018, the City amended the offer contained in the 2010 Minutes and offered an additional compensation of $1,435,000 for a total of $6,000,000 (exclusive of interest). This offer remained open for acceptance at the start of the Merit Hearing.

[84] The City maintains that this offer was sufficiently clear to qualify as a Rule 49 offer.

[85] The Claimant contends that this offer did not have the requisite level of clarity to determine "whether the judgment obtained was more or less favourable than the offer made." For the Claimant, it was an all-inclusive offer that did not indicate what portion of the offered amount was for costs and what amount was for other compensation, and therefore could not fulfil the role of a Rule 49 offer.

[86] The City argues that the Claimant's position is not sustainable because the very scenario of uncertainty is addressed in Rule 49.07(5) which states that "where an accepted offer to settle does not provide for the disposition of costs, the plaintiff [in our case the Claimant] is entitled to costs assessed to the date the [Claimant] was served with the offer." For the City, if there was potential uncertainty, the offer would be deemed an offer on compensation "plus costs" pursuant to Rule 49.07(5). Even if the Claimant's costs might not have been known to the City, they would have been known

to the Claimant. The City submits that the 2018 Offer met all the necessary criteria to be considered a valid Rule 49 offer.

[87] The Tribunal agrees with the City and finds that a claim for costs is not a "compensation" in the context of this offer. The 2018 Offer was to settle "any and all claims for compensation" conferred on the Claimant under the Act. Section 13 of the Act expressly provide what constitutes a compensation under the Act. Costs are a separate matter from compensation. On its face, the 2018 Offer was not an "all-inclusive offer" as asserted by the Claimant; it was a "plus costs" offer and the Tribunal so finds. Contrary to what the Claimant maintains, the Tribunal disagrees that the use of different language in the other offers made by the City displaces the Tribunal's conclusion that the 2018 Offer was a "plus costs" offer.

[88] The Tribunal also agrees with the City and finds that the 2018 Offer was both clear and understandable. Although a good practice, an offer need not be itemized to separately show the amount attributable for compensation and for costs. The 2018 Offer was sufficiently certain to engage cost consequences. Through the application of Rule 49.09 it would become, upon acceptance, fully actionable with respect to both the amount of compensation for the claim itself, as well as the costs and disbursements for pursuing the claim. This settlement offer was for an amount significantly greater than the compensation amount awarded to the Claimant in the Merit Decision. The City has met the burden of proof set out at Rule 49(3).

[89] The Claimant knew or ought to have known that the refusal of the 2018 Offer would have consequences on the award of costs as this was a regular feature of the City's correspondence with the Claimant's attorneys.

[90] Therefore, the Tribunal finds that this 2018 Offer was a proper offer and its refusal or non-acceptance by the Claimant was unreasonable in the circumstances (subject to the related arguments advanced by the Claimant and dealt with below under

Issues c and d below). This finding is central to the exercise of the Tribunal's discretion on the matter of costs.

Offer of April 13, 2021

[91] On April 13, 2021, the City again amended the offer contained in the 2010 Minutes and offered an additional compensation of $5,339,929.14 for a total of $9,904,929.14, plus reasonable legal, appraisal and other costs (exclusive of interest). This offer remained open for acceptance at the start of the Merit Hearing which began a few days later.

[92] The City submits that this offer was sufficiently clear to qualify as a Rule 49 offer. The Claimant admits that this offer was relevant and proper when the Tribunal exercises its discretion, and maintains that, from that date, the Claimant's costs could be on a partial indemnity basis.

[93] Although the Tribunal concludes above that the earlier 2018 Offer was a proper offer, the Tribunal finds that the offer of April 13, 2021 was also a proper offer for the application of Rule 49 on a *mutatis mutandis* basis. It was in writing, was on a "plus costs" basis, remained open at the start of the hearing, and it was clear, certain, understandable and actionable. This settlement offer was for an amount significantly greater than the compensation amount awarded to the Claimant in the Merit Decision.

[94] As mentioned above, the Claimant makes two further arguments on the issue of whether refusing or not accepting a proper offer was reasonable in the circumstance: (1) the Claimant acted reasonably because it relied on advice from experts (analyzed under heading c. below); and (2) the Claimant acted reasonably because the City's offers kept increasing, or at least evolving (analyzed under heading d. below).

c. What Impact, if any, does the Claimant's Reliance on Advice Received by Experts have on the Reasonableness of the Claimant's Position with respect to the City's Offers?

[95] The Claimant argues that it reasonably relied on the advice of experts in its decisions to reject or not to accept the various settlement offers made by the City. The Claimant further submits that the reasonability of the Claimant's reliance on expert advice is not to be judged by the amount the Tribunal ultimately awarded on the claim in the Merit Decision, as a claimant cannot guarantee the performance of the expert at the hearing. Rather, a claimant, being an expert neither on the subject matter nor on what constitutes expertise, may rely on the opinion of an expert who is "competent in fact or by reputation".

[96] Moreover, the Claimant contends that it had no obligation to obtain an appraisal report, nor did it make sense for the Claimant to invest resources in an appraisal report while defending the City's numerous attacks on its claim or while the discovery process had not yet concluded. The latter point being that information gathered though the discovery process would be relevant to the appraisal, as if, curiously, an appraisal report could not be updated or amended when new facts become available.

[97] The City contends that the position of the Claimant is misleading in particular because: (a) the Claimant had in its possession three prior appraisals from reputable appraisers which were in line with the 2009 Bower Appraisal; (b) the Claimant retained a number of its experts only shortly before the Merit Hearing; and (c) the Claimant never had a proper expert report on the financial viability of the Claimant's project and the significant costs to bring the building to a state of occupancy.

[98] For the Tribunal, clearly the Parties had a substantial disagreement about the fair market value of the Expropriated Lands. The unique nature of the Expropriated Lands (being the largest parcel in the City's downtown core on which there were historic

buildings), the environmental remediation issues, the cost of refurbishing the existing structure and the difficulty in finding comparable sales made the appraisal challenging. There were diverging viewpoints among qualified experts on the potential development scenarios, and the Claimant's position may not have always been unreasonable. But this is only so up to a given point in the proceeding.

[99] The Tribunal finds that there was reasonability of the Claimant's position based on the advice from its experts, but only for a given period of time. The Tribunal disagrees with the Claimant that the reasonability of that position extended until the offer made by the City on April 21, 2021, nearly on the eve of the Merit Hearing. The reasonability of the Claimant's position progressively deteriorates as the opinions of experts became more stale and significantly incomplete on foreseeably core issues. The Claimant's conduct was not marked by diligence. The Claimant failed to reasonably assess and re-assess the strength of its case in a timely and ongoing manner, especially in 2018. When relying on expert advice, a claimant must do more than attack the experts of the expropriating authority.

[100] The Claimant says that it was hampered in its efforts by its limited financial resources and the City's forceful litigation strategy. In early 2015, in a cross-motion to the City's Motion to Strike, the Claimant sought payment of interim costs on February 25, 2013. The Claimant's motion explained that it would be very difficult for the Claimant to retain the necessary experts and move its claim forward. Noting that the City has paid $150,00 for interim costs under the 2010 Minutes, the deciding panel denied the request for interim costs on June 15, 2013.[20]

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[20] Decision of Associate Chair Lynda Tanaka (as she was then) issued on June 21, 2013, paragraphs 3 and 55-63.

[101] For the Tribunal, it is from this point that the Claimant knew or should have known that it needed to secure financial resources to further advance its compensation claim. Although the Claimant eventually secured litigation financing in September 2020, this was based on steps Mr. Ryan began in January 2018. Whilst Mr. Ryan's death may explain why the litigation financing was only finalized in 2020, nothing explains why it was not being sought between June 2013 and June 2018 (when the 2018 Offer was made), *i.e.,* for five years. Faced with an unsuccessful decision on interim financing in 2013, the Claimant failed to diligently seek financing for its compensation claim, in one way or another, which cascaded into its failure to obtain proper and fulsome expert advice.

[102] The Claimant was on notice by the Tribunal that its lack on funding to retain experts was not a compelling position. In December 2020, the Tribunal heard the Parties on interlocutory matters because the Claimant had breached the Procedural Order and the Parties had both failed to exchange expert reports. The Claimant sought to amend the Procedural Order, after the fact. Member Jacobs (as she was then) dismissed the Claimant's motion and ordered the witness statements to be served. She wrote:

> [5] The Tribunal explained that it performs an essential gatekeeper function in controlling its proceedings in order to ensure the most just, efficient, and cost-effective determination of the matter before it. The Tribunal has reminded these parties on numerous occasions of the importance of this function in this proceeding involving more than eight years of procedural matters and motions on the road to the hearing of the merits. In any proceeding where non-compliance with a Tribunal Order, including a PO, threatens to derail a scheduled hearing, the Tribunal must act swiftly to bring the matter back on track. […]
>
> [6] […]135's submission that delayed litigation funding caused it to be unable to retain experts in time to meet the exchange date is not a new one. 135 made this same argument to the Tribunal during the September 1, 2020 CMC, and the Tribunal dealt with this in the corresponding September 2020 Decision. A motion to now amend the PO on the same basis the Tribunal previously considered and rejected is an inefficient use of the Tribunal's resources, and is not the appropriate avenue to challenge a decision of the Tribunal.

> [9] This case, involving a complicated and lengthy procedural history, has accounted for an extraordinary amount of time on the Tribunal's calendar. As such, the Tribunal made clear that any further non-compliance with a Tribunal Order, including the PO, will leave the panel open to considering the Tribunal's dismissal powers under all applicable legislation.
> [Emphasis added]

[103] In both September and December 2020, the 2018 Offer continued to be open for acceptance.

[104] In expropriation matters, the degree of success by a claimant is less of a factor than in ordinary civil litigation. A claimant should be placed in a position which gives them the "freedom of action" to seek advice and to verify that it was not unfairly treated by the expropriating authority. [21] However, this does not amount to freedom of inaction.

[105] Early on, before 2010, the Claimant had expert evaluations, namely:

a. Simmons Technical Review dated November 22, 2009 which was critical of the 2009 Bower Appraisal;

b. XCG remediation assessments dated November 23, 2009, May 3, 2010, and September 14, 2010;

c. Morrison Hershfield engineering report dated September 2009 and November 23, 2009;

d. Thomas P. Rylett Limited report on the value of the existing building dated October 18, 2000; and,

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[21] The Ontario Law Reform Commission*, Report on the Basis for Compensation on Expropriation (1967)*, 39-40.

e. City's development plans for the site in the 1990s.

[106] After spending six years addressing various preliminary motions, including a bifurcation to the Divisional Court and the Ontario Court of Appeal on one of the Tribunal's interlocutory rulings[22], in November 2018 the Parties were finally able to put the Claim on track for a hearing. The Procedural Order was finalized in March 2019, after yet another Motion, this time to impose a discovery plan. At that time, the hearing had been set for June 15, 2020 date[23]. As it turns out subsequently, that hearing date was frustrated by events outside the control of the Parties, namely the COVID-19 global pandemic. On March 24, 2020, the Tribunal advised the Parties that hearings up to June 30, 2020 would be adjourned due to the pandemic.

[107] Nevertheless, despite a hearing putatively planned for June 2020, the Claimant had not updated the assessment of its various experts nine and a half years after the start of the expropriation in 2009 and 6 years after it initiated its expropriation claim in 2012. It was not until December 2020 that the Claimant received additional reports from experts, namely:

a. Appraisal of the fair market value by John Simmons Realty Services Ltd. on December 18, 2020;

b. XCG's updated remediation assessment on December 3, 2020;

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[22] Decision of Member Jacobs (as she was then) issued October 14, 2016.

[23] Decision of Member Jacobs (as she was then) issued January 24, 2019.

c. Morrison Hershfield supplementary engineering report on December 17, 2020;

d. Bob Dragicevic's (RDLandPlan) land use planning report on December 18, 2020;

e. Jamie Tate's market opportunity report on December 3 and 17, 2020;

f. Tim Zimmerman and Dawson Coneybeare's (RSM Canada) business loss report on December 18, 2020 (updated on March 12, 2021); and,

g. Jim Ryan's (Pelican Woodcliff) quantity surveyor report on December 17, 2020.

[108] While the Claimant asserts it had a team of highly qualified experts in April 2021 supporting a compensation claim of $24,000,000, it failed to do so earlier. In 2020, when the compensation claim could have proceeded on the Merits, and earlier when the City made the 2018 Offer, the Claimant had commissioned no expert reports on certain very relevant issues, including financial viability of the Claimant's project and land use planning evaluation of the site. Such expert reports would be essential to support the merits of the compensation claim. Moreover, those expert reports the Claimant did possess were stale and essentially focused on attacking the position of the City rather than a positive assessment of the merits of Claimant's claim.

[109] Moreover, as indicated by the City, the Claimant had in its possession reports that raised serious doubts about the alleged fair market value of the Expropriated Lands including from the Morassutti Group (1998), from Valco Consultants (2000), and from the Altus Group (2005).

[110] From at least 2012, the City repeatedly and steadfastly implored the Claimant to prepare and to share the Claimant's appraisal report, which was eventually done, but only in December 2020. This is despite the Claimant initiating its claim on July 17, 2012 alleging a very significant fair market value of $25M.

[111] It would have been extremely helpful for the efficient conduct of this proceeding to have better and timely expert advice when the Parties were eventually forced in 2012 to attend a mediation at the Board of Negotiation over the objections of the Claimant. That mediation attempt failed largely because the Claimant resisted it and did not have an appropriate appraisal report to support its compensation claim.

[112] Although Mr. Simmons stated in his examination in chief at the Merit Hearing that he was first retained in about mid-August 2009, and "basically continued on that file ever since", on cross-examination it was clear that he had very little involvement between 2010 and 2020.[24]

[113] Accordingly, the Tribunal is of the view that a claimant may theoretically rely on the opinion of its experts to support its argument that it was reasonably refusing a "proper" offer. However, the expert evidence must be more than defensive, *i.e.,* attacking the case of the expropriating authority. There must be an offensive element to those expert opinions, *i.e*., asserting positively the basis of a claimant's compensation claim. And, most importantly, those expert report must be relatively recent or updated, and consider the core issues on which expertise is required. Such an approach advances the Efficiency Principle, the second principle outlined by the Court of Appeal in Shergar.

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[24] Hearing Transcript, May 10, 2021, page 14; Hearing Transcript, May 12, 2021, page 109-112.

[114] Based on the evidence, the argument of the Claimant about its reliance on the views of experts is not supported by the facts for the purposes of the 2018 Offer. The Claimant had a bundle of expert evidence of 2009 and another bundle in December 2020. The 2009 bundle did not cover significant issues such as land use planning, financial viability of the Claimant's project, and the costs associated with the readaptive use of the existing historic structure. The Tribunal concludes that, from the time when the City made the 2018 Offer on June 13, 2018 to December 2020 (when the offer continued to be open for acceptance), the Claimant did not have (nor did it seek to obtain) the kind of expert analysis to establish that it *reasonably* rejected or failed to accept that 2018 Offer. The Claimant's conduct was marked by inaction which may bring about cost consequences. The 2009 bundle was stale, incomplete and defensive rather than offensive.

[115] Although a claimant in an expropriation compensation proceeding is entitled to make an informed decision on a settlement offer, the lack of information to make such an informed decision cannot be attributable to the claimant's own unreasonable inaction. This would be neither fair nor equitable.

[116] The Tribunal hastens to add that the assessment of a claimant's reliance on expert advice did not and should not take the form of an inquiry into the subjective beliefs of the Claimant (or its directing mind) when it decided to reject or not to accept an offer to settle. On this point, the Tribunal agrees with Ms. Skinner, Co-counsel for the City. The analysis must be objective. Otherwise, the Tribunal would have to engage in a kind of mini trial of a claimant's subjective state of mind in light of those expert reports. This would be time consuming, inefficient for the Parties and the Tribunal, and would likely require an inquiry into the privileged opinions of a claimant's legal counsel. This is contrary to the Efficiency Principle.

d. Is the Claimant's Refusal of the Offers Reasonable because the City's Offers Kept Increasing or Evolving?

[117] The Claimant also argues that its refusal or non acceptance of offers prior to April 2021 was reasonable because of the increasing and changing amounts being offered by the City through its various settlement offers. For the Claimant, this constitutes a reasonable basis for the Claimant not to accept or to refuse the settlement offers. In essence, the Claimant submits that it was reasonable for the Claimant to draw conclusions on the strength of City's case based on the evolution of the amounts being offered.

[118] The City maintains that an expropriating authority should not be punished for making a more generous settlement offer.

[119] For the Tribunal, the argument advanced by the Claimant would result in a perverse outcome, would be counter-productive and would work against the Efficiency Principle. Therefore, the Tribunal rejects the Claimant's proposed approach.

[120] To do otherwise would undermine the normal "to and fro" inherent in any negotiation. As an expropriation case proceeds, there will naturally be a dynamic evolution of the parties' assessment of their respective litigation risks based on such things as the impact of interlocutory decisions, the availability or unavailability of witnesses or evidence, the availability of financial resources for both a claimant and an expropriating authority, and the risk of creating an unfavourable precedent for other litigation.

[121] It is entirely normal for settlement offers to evolve, whether up or down. For example, the death of Mr. Ryan created a litigation risk because some of his evidence

would not be available at the Merit Hearing.[25] Similarly, Mr. Williams, Co-counsel for the City, explains that the Offer of June 27, 2013 was withdrawn in October 2017, and the amount of the subsequent Offer of June 15, 2018 was reduced, because the City had been successful in January 2018 before the Divisional Court on its motion for partial summary judgment.[26]

[122] Even assuming all other terms and conditions of a subsequent offer to be equal to a previous offer (which is no way certain), and thus the sole difference is the amount being offered, an increase in the amount being offered cannot reasonably be taken as an admission or signal by the expropriating authority of a weak or weakening case. Like sausages, settlement offers are made up of many ingredients. The Tribunal would descend at its peril into an entrail-reading exercise of what the expropriating authority was “thinking” and what a claimant was “thinking” of the expropriating authority’s “thoughts”. This not efficient, rational or probative. The amounts proposed in sequential settlement offers vary for a myriad of reasons, which may or may not include doubts as to the strength of an expropriating authority’s case.

[123] Moreover, to allow a claimant to assert that it may reasonably refuse a settlement offer based on some sort of illusive escalating pattern of offers, would also be contrary to the Efficiency Principle. For the Tribunal, and admittedly for reasons of good public policy, it is crucial that nothing should discourage a negotiated settlement of a compensation claim, including discouraging the making multiple settlement offers. If accepted by the Tribunal, the Claimant’s position would chill the action of an

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[25] Decision of Vice-Chair Sarah Jacobs issued on April 21, 2019.

[26] *1353837 Ontario Inc. v. Stratford (City),* 2018 ONSC 71 (per Pierce J., Henderson and Fregeau JJ. concurring)

expropriating authority who may be seeking, through successive settlement offers, to find the right equitable compensation through negotiations.

[124] Accordingly, the Tribunal finds that the evolution of the amount of the various offers did not make the refusal or non acceptance of the 2018 Offer reasonable.

e. Was the Expert Evidence of the Claimant at the Merit Hearing fair, objective and non-partisan?

[125] In the *Shergar* decision issued by the OMB, Vice-Chair Makuch accepted on rehearing the finding of the initial OMB panel that the expert evidence led by the claimant was not “fair, objective and non-partisan.” This finding was one of the factors that led the rehearing panel to exercise its discretion and deny the claimant its costs after the 2015 settlement offer and to award costs to the expropriating authority.

[126] The City maintains that the same approach should be followed in this case as Mr. Simmons, the Claimant’s lead expert, had stepped outside of his role as a fair, objective and independent expert. The Claimant disagrees.

[127] The Tribunal is not prepared to accept the arguments of the City. Vice-Chair Jacobs’ comments and findings with respect to Mr. Simmons’ expert evidence were not of the same nature as the findings of the initial panel findings (and Vice-Chair Makuch’s echoing findings) in *Shergar*. The claimant in that case led expert evidence that not only was rejected, but it was also found not to be fair, objective and non-partisan, requiring the expropriating authority to expend considerable extra costs of its own to respond to a variety of groundless arguments advanced by the claimant. In this case, by contrast, Vice-Chair Jacobs made no adverse finding of misconduct by the Claimant’s expert witness. She primarily rejected his evidence and preferred the evidence of Mr. Bower.

[128] Vice-Chair Jacobs in the Merit Decision did question the worth of Mr. Simmons evidence, but he was qualified as an expert to provide opinion evidence with respect to real estate appraisal and land valuation[27]. Indeed, Mr. Simmons had over 40 years of experience and had sat on the Board of Negotiation. The Tribunal notes that Vice-Chair Jacobs in fact chose not to qualify another witness, John Porter, as an expert.[28]

[129] In her Merit Decision, Vice-Chair Jacobs wrote:

> [89] Despite the chasm between the appraisers, Messrs. Simmons and Bower share some important areas of agreement. [...]
>
> [289] […] The Tribunal's overall impression of Mr. Simmons' evidence—both as reflected in his written witness statements and his testimony—was it that it did not consider the perspectives of a prudent and knowledgeable buyer and seller. Instead, his evidence was narrowly focused on the perspective of one particular seller: Mr. Ryan. […]
>
> [290] Mr. Simmons was so committed to Mr. Ryan's vision for the property that it led him to disregard key components in the highest and best use analysis. He disregarded land use planning evidence and made an incorrect assumption about the rail line, that it would nearly sterilize the property from development if the building were removed. He made no attempt to assess financial feasibility of a specifically defined project in his highest and best use analysis, instead assuming that it was feasible because Mr. Ryan thought so. He did not consider any potential costs of repurposing the building and made incorrect assumptions about its contributory value and the cost of demolition. Mr. Simmons had very little interest in the evidence of other witnesses in this hearing and held rigidly to his positions. He similarly did not show much interest in the opinions of the Claimant's own experts. He merely referenced their reports to confirm his already formed conclusions.
>
> [291] The Tribunal also found that during Mr. Simmons' lengthy cross-examination by Mr. Williams, spanning three days of the hearing, he was rigid in his conclusions even when confronted with evidence that contradicted them. Many of his recollections were vague and unreliable. His review of expert reports relevant to the highest and best use analysis was cursory, at best, and led to incorrect assumptions.

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[27] *1353837 Ontario Incorporated v. Stratford (City)*, 2021 CanLII 101820 (ON LT), paragraph 63.

[28] *1353837 Ontario Incorporated v. Stratford (City)*, 2021 CanLII 101820 (ON LT), paragraphs 65-68.

> [292] Overall, the Tribunal found Mr. Bower to be more comprehensive and reasonable in his analysis and testimony. […] [Emphasis added]

[130] These statements did not amount to saying that Mr. Simmons engaged in partisan advocacy, or participated in expert witness misconduct that was present in the *Shergar* Decisions.

[131] The Tribunal notes further that, before the start of the Merit Hearing, the various *Shergar* decisions had become final. The Supreme Court of Canada had refused the motion for leave to appeal the decision of the Ontario Court of Appeal on March 11, 2021. As a senior and experienced Member of the Tribunal, Vice-Chair Jacobs was familiar with the *Shergar* Decisions before she issued her Merit decision in October 2021. Yet, she made no findings on Mr. Simmons evidence anywhere close to the findings of Vice-Chair Makuch in *Shergar*.

[132] On December 4, 2020, Member Jacobs (as she was then) specifically referred to cost implications flowing from the Ontario Court of Appeal decision in *Shergar* when she issued an interlocutory decision to the Parties when they failed to exchange expert reports as prescribed in the Procedural Order.[29]

f. What Impact, if any, does the Presence of Litigation Funders have on the Exercise of the Tribunal's Discretion?

[133] The City argues that the Claimant's litigation funders would stand to gain from any award of costs at the expense of the City's taxpayers. The City submits this would be both unjust and inappropriate. For the City, section 32(2) of the Act does not contemplate awarding costs to litigation funders because litigation funders, as opposed

[29] Memorandum of Oral decision of S. Jacobs (as she was then) issued on December 16, 2020.

to an expropriated party, make the free decision to invest in a claim. If the Tribunal awards costs to the Claimant, the City reasons that it is the funders who would benefit while being insulated from any costs being made against them.

[134] The Claimant contends that without litigation financing, it could not have advanced its claim. The Claimant asserts that it was unsuccessful before the Tribunal in its attempt to get an interim cost award and could not obtain traditional funding from a bank or otherwise. For the Claimant, the source of financing is irrelevant. It further contends that the City's position is contrary to access to justice principles.

[135] The Tribunal has no information with respect to the terms and conditions governing the participation of the litigation funders in these proceedings. The Claimant refused to disclose that information on cross-examination before these Motions for Costs were heard orally, and the City did not pursue this any further. Although invited to do so by the City, the Tribunal has decided not to make any inference, one way or the other, on this matter.

[136] However, one thing is certain. The Tribunal's award of costs is solely to the Claimant regardless of any arrangement transferring all or part of those sums to the litigation funders. There simply are no costs being awarded to the litigation funders by the Tribunal as the City claims.

[137] Similarly, the City's argument that the Claimant is not entitled to its Costs because Gowlings WLG, the Claimant's lawyers, deferred payment of their fees is also without merit. The Claimant has received a Statement of Account from its lawyers, and that amount is reflected in the Bill of Costs. Whether or not the legal fees are paid or payable is irrelevant to a determination pursuant to section 32(2) of the Act if the fees

charged are otherwise appropriate.[30]

[138] Based on the available evidence, the Tribunal finds that the Claimant's source of financing is irrelevant to the exercise of its jurisdiction under section 32(2) of the Act, and financing may very well include traditional loans, unpaid accounts and litigation funding.

g. Overall did the Claimant Reasonably Pursue its Claim without undue delay?

[139] The City submits that the Claimant's conduct was unreasonable throughout the proceeding and that the entire decade-long proceeding flowing from the 2009 expropriation could have been avoided. The City specifically pleads: (1) that the Claimant acted in patently unreasonable manner; (2) that its claim was extravagant, unwarranted and at odds with three prior appraisals; (3) that the Claimant's pleadings included numerous improper claims and allegation that had nothing to do with the expropriation; (4) that the Claimant rejected multiple generous settlement offers; (5) that the Claimant repeatedly refused to narrow the issues; and (6) that the Claimant pursued a claims for compensation "which were proven to be overzealous at best and completely delusional at worst" . The City also alleges that the Claimant demonstrated stubborn and wilful blindness to insurmountable problems with its redevelopment vision and that there was a huge evidentiary gap as there was no evidence assessing the financial viability of the Claimant's development scenario. The City maintains that the Claimant wasted an inordinate amount of the City's and the Tribunal's resources.

[140] By contrast, the Claimant says that it conducted its claim in a reasonable manner and that this was a complex case. It submits that nothing indicates that this matter

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[30] *Windsor (City) v. Teshuba*, 2005 CarswellOnt 4903.

should be the “very rare” exception where costs are not awarded to a claimant. Moreover, the Claimant stated that the *Shergar* decision is distinguishable on the facts, and that the granting of costs in that case to the expropriating authority was based on the totality of the claimant’s misconduct and not just on the claimant’s unreasonable refusal of a settlement offer. For the Claimant, this is not an analogous case. However, Mr. Neill, Co-counsel for the Claimant, in his oral submissions concedes that all the aggravating factors in *Shergar* need not be present for a cost consequence to be warranted.

[141] The Claimant also contends that the City prolonged the proceeding, delayed the hearing and increased the costs by bringing a series of five Motions namely: (a) a Motion to stay the proceeding in 2012 and force the Claimant to attend the Board of Negotiation; (2) a Motion to strike in 2013; (3) an informal Motion disputing an amended statement of claim in 2013; (4) a Motion to stay in 2015; and, (5) a summary judgment Motion in 2016.

[142] The Tribunal finds that the City overstates its case when it asserts that the entire proceeding could have been avoided, but its position has merit in some other respects.

[143] Based on the *Shergar* Decisions, a claimant’s actions that result in significant delay and obfuscation, wasting the Tribunal’s valuable time, may be grounds to award costs against a claimant. In *Shergar*, the misconducts on the part of the claimant in that case included:

a. Shergar actively delaying the pursuit of its claim for years while resolving a negligence claim against its own lawyers even though that matter would have no bearing on the expropriation claim;

b. Shergar’s expropriation claim followed a long and tortuous history, spanning 22 years after the 1998 expropriation. Shergar spent very little time pursuing

its claim, electing instead to pursue other remedies. This included engaging in parallel proceedings rather than advancing claim for compensation. There were long delays due to collateral litigation that were found to be without merit;

c. Shergar refused to grant the City access to the Expropriated Lands;

d. Shergar challenged the expropriation until the issue was finally resolved by the Ontario Court of Appeal some nine-and-one-half years after the expropriation;

e. Shergar refused to resolve the matter of compensation before the Board of Negotiation;

f. Shergar delayed the preparation of an appraisal for some 14 years;

g. Shergar delayed its claim for compensation for 15 years;

h. Shergar delayed the determination of compensation for 18 years

[144] The evaluation of the Parties' procedural conduct in this proceeding would have been best assessed by Vice-Chair Jacobs had she been seized with these two Motions for Costs. Quite apart from having rendered the Merit Decision, she was seized with the case since 2015 and had direct knowledge of all the interlocutory twists and turns for six years. Although Vice-Chair Jacobs did not rule on the issue of costs, her statements with respect to applicable interest rates is relevant with respect to the conduct of the Parties.

[145] Section 33 of the Act allows the Tribunal to vary the interest rate where it is of the opinion that any delay in determining compensation is attributable to either the owner or

the expropriating authority. When considering the submission of the Parties on this issue, Vice-Chair Jacobs wrote, at paragraph 394 of the Merit Decision, that she "observed delays occasioned by both parties, as well as delays beyond the control of either the Parties or the Tribunal". As there was no amount outstanding on the fair market value determined by the Tribunal given the payment made to the Claimant under the 2010 Minutes, the section 33 issue became moot.

[146] Certainly there were delays occasioned in the proceeding beyond the control of either Parties including (1) the COVID-19 pandemic, which resulted in the Emergency Order made under the *Emergency Management and Civil Protection Act*, which delayed hearing indefinitely (which was to commence on June 15, 2020); (2) the death of Mr. Ryan; and, (3) Vice-Chair Jacobs' year-long parental leave which put the case in abeyance as of April 2019 until April 2020[31].

[147] Like Newton's Third Law, which states that all forces in the universe occur in equal but oppositely directed pairs, the aggressive procedural positions of the Claimant responded in kind and force to the aggressive procedural positions of the City, and *vice versa*. There were two strong opposing forces that prevented an expeditious conclusion of the *lis* between the City and the Claimant.

[148] Nevertheless, the Tribunal considers the following aggravating factors in its assessment of the Claimant's conduct:

a. The Claimant initially attempted to challenge the City's possession of the Expropriated Lands, but that was resolved relatively quickly in 2010;

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[31] Memorandum of Oral Decision delivered by Member Jacobs (as she was then) issued on April 30, 2020, paragraph 3.

b. The Claimant filed its Notice of Arbitration and Statement of Claim in July 2012, three years after the expropriation (compared to 15 years in *Shergar*);

c. The Claimant delayed the preparation of a fulsome appraisal after the expropriation for 11 years, although it did have in its possession the preliminary Simmons Technical Report in 2009 (compared to 14 years in *Shergar*);

d. The Claimant did not have a complete expert assessment of its case until December 2020, and failed to assemble the financial resources required to advance its case between June 2013 (when its motion for interim costs was denied) and January 2018 (when Mr. Ryan started seeking litigation financing);

e. The Claimant resisted attendance before the Board of Negotiation (as was the case in *Shergar*), and the City was required to bring a Motion to compel the Claimant to participate in this mandatory mediation, which was successful[32];

f. The Claimant's notice of claim comprised issues outside the jurisdiction of the Tribunal and the City successfully moved to strike the Claimant's pleadings.[33] Although the costs of this motion and the Claimant's cross-motion were reserved to the panel hearing the compensation claim, the Tribunal stated that the Claimant had little success and "must recognize that the

[32] Decision of the OMB Chair Lynda Tanaka issued November 6, 2012.

[33] Decision of the OMB Chair Lynda Tanaka issued on June 21, 2013.

inconsistency in positions described in these reasons have made the proceedings more costly than otherwise";

g. The City brought a motion for partial summary judgment which was largely successful[34], and the Claimant unsuccessfully sought to overturn the Tribunal's decision by seeking recourse to the Divisional Court and the Ontario Court of Appeal. This delayed the proceeding by approximately two years;

h. The Claimant's proposed discovery plan was unreasonable, as it proposed a very lengthy process, on numerous irrelevant issues, which required the intervention of the Tribunal to settle the matter[35];

i. More than half of the Tribunal's interlocutory decisions were required to be made after the 2018 Offer was refused or not accepted;

j. The Claimant forced the Tribunal to hear various motions over multiple days;

k. The Claimant breached the Procedural Order by failing to deliver its expert reports and only sought to amend the Procedural Order after the breach;

l. The Claimant made no offer or counter-offer to settle its claim, nor is there any evidence brought to the attention of the Tribunal that the Claimant sought clarification of the numerous offers made by the City;

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[34] Decision of Member Sarah Jacobs (as she was then) issued on October 14, 2016.

[35] Decision of Member Sarah Jacobs (as she was then) issued on May 14, 2019.

m. The determination of the expropriation claim took 12 years from the expropriation in 2009 (compared to 18 years in *Shergar*), but some of that delay was due to factors beyond the control of either Parties.

[149] Based on this, the Tribunal finds that globally the Claimant's conduct did not amount to reasonably pursuing its claim without undue delay, particularly due to its inaction to prepare its case for significant periods of time.

h. Is the City Entitled, on an Exceptional basis, to its Costs as well?

[150] The Tribunal has discretion to award costs against a claimant. Similarly, the Tribunal has discretion to award costs to a claimant on a scale other than a solicitor-client basis, and to adjust the scale for different periods of the proceeding.

[151] Based on the above, the Tribunal concludes that the Claimant's overall conduct, both before and after its refusal or non-acceptance of the 2018 Offer was unreasonable, was wasteful of the Tribunal's and the City's time and warrants a costs consequence. However, that costs consequence should not be to the level observed in *Shergar*. The Tribunal finds that the Claimant's costs should be awarded on a partial indemnity basis after it received the 2018 Offer.

[152] Under Rule 49, a successful defendant in an ordinary civil litigation matter would normally receive, subject to a court ordering otherwise, its costs on a substantial indemnity basis after a plaintiff refuses or does not accept a proper offer. In an expropriation matter, the Tribunal must balance both the Indemnity Principle and the Efficiency Principle when applying Rule 49 on a *mutatis mutandis* basis. The Tribunal is not prepared to award the City its costs on a substantial indemnity basis from the date of the 2018 Offer.

[153] The Tribunal notes that in *Shergar* the claimant received no costs after its refusal or non-acceptance of a proper offer. The Tribunal rejects the City's submission to do the same in this case.

[154] Given the conduct of the Claimant throughout this proceeding described at paragraph [147] above, the Tribunal finds that it is more appropriate to award the City's costs throughout the proceeding and to do so on a partial indemnity basis.

[155] In answer to the Tribunal's question, Mr. Neill, Co-counsel for the Claimant, submits that the Tribunal has jurisdiction to award costs concurrently to both the Claimant and the City on their respective Motion for Costs. The City makes no contrary submission.

SUMMARY OF CONCLUSIONS ON ENTITLEMENT

[156] Subject to adjustments explained below with respect to the Claimant's Bill of Costs, the Tribunal concludes that, based on the Indemnity Principle, the Claimant is entitled to its cost on a solicitor-client basis up until it received a proper offer, namely the 2018 Offer. However, given Rule 49 and the Efficiency Principle, after June 15, 2018, when the Claimant unreasonably refused a proper offer, the Claimant is awarded its costs on a partial indemnity basis. Unlike in *Shergar*, the Claimant's conduct was not so egregious that it should be denied all costs after unreasonably refusing or not accepting that offer. Nevertheless, the Claimant's unreasonable conduct merits some degree of costs consequences by awarding the Claimant only its costs on a partial-indemnity scale for refusing or not accepting a proper offer.

[157] Moreover, because of the Claimant's unreasonable and wasteful conduct throughout the proceeding, the Tribunal also awards the City its costs on a partial indemnity basis throughout the proceeding. The Tribunal finds this too to be an appropriate cost consequence on the facts of this case.

[158] This is not an extraordinary outcome as the Court of Appeal in *Shergar* clearly stated that "[a]t the very least, there must be a *potential* for adverse cost consequences where the claimant forces a wholly unnecessary proceeding or otherwise acts unreasonably." Potentiality has simply become reality.

BILL OF COSTS AND QUANTUM

[159] Section 32(2) of the Act provides that the Tribunal 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 assess the costs.

[160] The directives of the Tribunal in the CMC Decision were not intended to fetter the ultimate manner in which this Member might consider the Motions and decide the issues. This included the discretion to consider whether any part of the assessment and quantification of costs should be deferred or directed to an assessment officer under section 32 of the Act, or to stand down to consider a particular question before continuing, and to otherwise organize the hearing as the Panel may deem appropriate in its discretion.

[161] As the oral phase of the hearing on the Motions for Costs afforded the Parties and the Tribunal sufficient time to consider both the issue of entitlement to costs and the quantum of those costs, the Tribunal directed at the hearing that both matters be considered orally. The Tribunal heard submission from the Parties on the issue of quantum and their respective Bills of Costs.

[162] This has the added advantage of not further splitting the proceeding if one or other of the Parties decides to appeal this decision, a consideration also noted in the CMC Decision.

[163] Both Parties had filed their Bills of Costs for their respective Motions for Costs.

[164] The Claimant's Bill of Costs is 1,420 pages in length, setting out detailed dockets both by timekeeper and chronologically, as well as details of disbursements. The Bill of Costs was for a total of $6,679,125.74. This included total legal fees by Gowlings WLG (Canada) LLP ("Gowling") ($4,777,290.50), taxes on legal fees ($621,047.77), and disbursements charged by Gowling, various experts and taxes ($1,280,787.48).

[165] The City's Bill of Costs is 18 pages in length, and includes total fees and disbursements based on three rate scenarios: partial indemnity, substantial indemnity, and full indemnity. Under the partial-fees scenario, the City claimed $2,901,386.15, including total legal fees for Aird & Berlis LLP ("Aird") ($1,439,274.05), taxes on those fees ($187,105.63), total disbursements by Airds and taxes ($392,038.35), and total expert disbursements and taxes ($882,968.12). Their fees on substantial and full indemnity scale are as follows:

	Substantial Indemnity	Full Indemnity
Total Legal Fees	$2,160,890.08	$2,534,686.25
Taxes on Legal Fees	$280,951.71	$329,509.21
Total Legal Fees	$2,441,841.79	$2,864,195.46
Aird's Disbusements and Taxes	$392,038.35	$392,038.35
Total Expert Disbursements and Taxes	$882,968.12	$882,968.12

Legal Costs

[166] The City argues that the Claimant's legal costs were "beyond exorbitant", "grossly excessive", "fanciful", and disproportionate to the City's legal costs. The City also submits that substantial portions of the amounts claimed are unrelated to the determination of compensation, relate to other litigation or other activities of the Claimant and its principal, duplicative, unreasonable and inappropriate.

[167] The Claimant makes few if any comments on the City's Bill of Costs other than to submit that the City should not be entitled to any legal costs.

[168] Neither Party challenges the proposed hourly rates of various legal professionals, including lawyers, law clerks and students.

[169] The Claimant maintains that the costs were reasonably incurred and are proportionate to the City's costs, with a similar number of experts and counsel. The Claimant says that its legal costs were reasonable given the complexity of the issues, the existence of reasonable disagreement among the numerous experts, as well as the number of the issues. For the Claimant, the work undertaken by legal counsel were proportional to the complexity of the case.

[170] Rather than addressing each docket contained in the Claimant's extensive Bill of Costs individually, the City prepared a colour-coded annotated reproduction of the Chronological Dockets and the Dockets by Timekeeper contained in the Claimant's Cost Brief. Portions of dockets unacceptable to the City were separately colour-coded under the following categories:

a. Separate litigation between the Claimant and the City (yellow);

b. Legal matters unrelated to the expropriation hearing (blue);

c. Administrative non-legal work (red);

d. Negotiating and securing litigation funding (green); and,

e. Costs that the Claimant incurred on the various motions that it was unsuccessful on (purple).

[171] The Claimant argues that costs for organizing documents and obtaining litigation funding were reasonably incurred for the purpose of determining compensation. Furthermore, the Claimant disputes the relevance of excluding costs allegedly related to “unsuccessful” interlocutory motions.

[172] The Tribunal agrees with the City that the fees under headings a., b. and c. in paragraph [170] are inappropriate. The challenge for the Tribunal is that the highlighting proposed by the City covers 788 pages and only portions of the 6,876 individual dockets.

[173] The Claimant submits that if the Tribunal wished to make adjustments to the dockets, a more efficient and proportionate approach is to apply a percentage reduction to the total Bill of Costs rather than a line-by-line or motion-by-motion analysis. Mr. Neill, Co-counsel for the Claimant, says that a reduction of 35% would be at the “high end” and that a “5% to 10% range might be more appropriate”. The City reasons that once an inappropriate cost was included in part of a docket, the entire docket should be removed, even if this resulted in removing legitimate costs.

[174] The Tribunal finds that applying a proxy is an efficient, proportionate and practical approach, and that a 30% proxy reduction is fair and reasonable in the circumstances for fees under headings a., b. and c. in paragraph [170]. The City’s approach to removing an entire docket that is only partially tainted is too draconian and is simply unfair. Thus, the Claimant’s fees on or before the 2018 Offer calculated on a solicitor-client scale are reduced by $492,169.35, for a total of $1,148,394.65 [$1,640,564.50 – (30% x 1,640,654.50) = $1,148,395.15], and the Claimant’s legal fees calculated on a partial-indemnity scale (60%) after the 2018 Offer are reduced by $564,619.14 for a total of $1,317,444.66 [$1,882,063.80 – (30% x $1,882,063.80) = 1,317,444.66].

[175] Thus, the total legal fees the Tribunal awards to the Claimant are $2,465,839.31, and to the City $1,626,379.68 [$1,439,274.05 + $187,105.63 = $1,626,379.68].

Disbursements

[176] With respect to disbursements, the Claimant makes no submission on the City's Bill of Costs. However, the City argues that the Claimant's claim for disbursements was excessive and irrelevant. The Claimant's disbursement Bill of Costs, which contained 339 pages, was highlighted in grey by the City when it disputed a given disbursement claimed by the Claimant. In some regards, the City's arguments entered the realm of objecting to *minutia* including, in one instance, to a disbursement of $5.20.

[177] On reviewing the Claimant's Bill of Costs for disbursements, the Tribunal finds that the Claimant included disbursements charged to other entities and not directly related to the proceeding. Mr. Neill, Co-counsel for the Claimant, acknowledges in his oral submissions that the Claimant was no longer seeking costs for certain services provided by MPW Chartered Accountants for a total of $21,545.26. The Tribunal has struck the following from the Claimant's Bill of Costs, for a total of $22,588.25:

a. $4,909.85, being invoice number 280118 for services rendered by MPW Chartered Accountants to Sydenham Deer Corporation;

b. $5,842.78, being invoice number 280117 for services rendered by MPW Chartered Accountants to 1459651 Ontario Limited;

c. $1,689.35, being invoice number 280116 for services rendered by MPW Chartered Accountants to 1459650 Ontario Limited;

d. $467.59, being invoice number 281755 for services rendered by MPW Chartered Accountants to 1459650 Ontario Limited;

e. $2,143.72, being invoice number 281749 for services rendered by MPW Chartered Accountants to 1459651 Ontario Limited;

f. $2,744.21, being invoice number 281751 for services rendered by MPW Chartered Accountants to Sydenham Deer Corporation;

g. $1,384.25, being invoice number 282223 for services rendered by MPW Chartered Accountants to Sydenham Deer Corporation;

h. $1,351.14, being invoice number 282224 for services rendered by MPW Chartered Accountants to 1459651 Ontario Limited;

i. $1,012.37, being invoice number 282225 for services rendered by MPW Chartered Accountants to 1459650 Ontario Limited;

j. $553.36, being invoice number 282447 for unrelated services rendered by MPW Chartered Accountants to the Claimant; and,

k. $489.63, being invoice number 284067 for unrelated services rendered by MPW Chartered Accountants to the Claimant.

[178] The Tribunal finds no reason to exercise its discretion to adjust any further other disbursements incurred by the Claimant. These are fair and reasonable.

[179] The Tribunal finds the City's Bill of Costs to be fair and reasonable for both legal disbursement and expert fees.

[180] The Tribunal notes that the Claimant's adjusted claimed disbursements ($1,243,527.32) and the City's claimed disbursements ($1,275,000.47) are proportional.

COSTS ON THE MOTIONS FOR COSTS

[181] At the conclusion of the hearing on the two Motions for Costs, the Tribunal heard submissions from both Parties on the matter of their respective costs on the Motions themselves. Both Parties are seeking their costs on their respective Motion for Costs.

[182] As Instructed by the Tribunal, the Parties submitted their respective Bills of Costs for their Motions for Costs on November 24, 2023.

[183] The Claimant submitted a Bill of Cost in the amount of $188,517.75 (including HST) on a partial indemnity basis (60%), comprised of $188,190.77 for legal fees and $326.98 in disbursements.

[184] The City submitted a Bill of Costs in the amount of $113,751.23 (including HST) on a partial indemnity basis (60%), comprised of $57,382.30 in legal fees for preparation, cross-examination and preparing the costs outline, $55,123.10 in legal fees for preparation and attendance at the hearing that began on November 6, 2023, and $1,245.83 in disbursements.

[185] The City contends that the Claimant's costs on the Motion for Costs should be adjusted downwards because of the Claimant's conduct, namely waiting quite late in the proceeding to shift its claim for costs from section 32(1) to 32(2) of the Act. The Claimant submits that it reasonably altered its position but concedes that the Tribunal may decide otherwise.

[186] The Tribunal agrees with the City. Through extremely creative juridical gymnastics and complex arguments, the Claimant attempted to make its case under section 32(1) of the Act. It was very late in the process, namely on October 18, 2023, when the Claimant fully abandoned its claim for costs on the basis section 32(1) of the Act. This was a mere twelve (12) business days before the start of the oral hearing on

the Motions for Costs. Such an approach was wasteful of the time of both the City and the Tribunal.

[187] Even though section 32(1) of the Act represented half of the basis for the Claimant's legal argument, the Tribunal finds that a reduction of 35% would be more reasonable as some of the considerations and submissions pursuant to section 32(1) of the Act were equally applicable for 32(2).

[188] The Claimant is also claiming legal fees for preparing and attending the CMC on March 22, 2023. The Claimant's legal fees for that CMC were already included in the Claimant's Bill of Costs on its Motion for Costs on the expropriation compensation claim. There was therefore a double counting. The amount claimed was $8,612.40 on a partial indemnity basis (60% of $14,354). Consequently, the Tribunal has reduced the Claimant's Bill of Costs on the Motion for Costs by that amount. [$188,190.77 – (60% x $14,354) = $179,578.37]

[189] Considering these two adjustments, the Tribunal finds that the Claimant Bill of Costs for its Motion for Costs should be set below the amount claimed and awards the Claimant $117,052.92 for its costs for the Motion for Costs. [$179,578.37 – ($179,578.37 x 35%) + $326.98 = $117,052.92]

[190] No adjustments are required for the City's Bill of Costs on the Motion for Costs and the Tribunal awards the City its requested costs of $113,751.23 on a partial indemnity basis set at 60%.

[191] The Tribunal notes that it has makes no adjustments based on the length and complexity of the Motion materials presented, which increased the preparation time for the Parties and the Tribunal. The complexity of the Motion materials was a direct consequence of the retirement of the Vice-Chair Jacobs. The Parties cannot be faulted

for this as this was beyond their control. The extensive material presented was at the request of the Tribunal in the CMC Decision.

OVERALL CONCLUSION

[192] The Tribunal finds that these awards, *i.e*., on the two Motion for Costs and the two requests for costs on those Motions, strike the appropriate balance and have an appropriate regard to both the Indemnity Principle and the need for the Tribunal to sanction unreasonable, inappropriate, or wasteful conduct under the Efficiency Principle. Overall, the Claimant's position places too much emphasis on the Indemnity Principle; and the City places too much emphasis on the Efficiency Principle. Accordingly, the Tribunal makes the following Order.

ORDER

[193] **THE TRIBUNAL ORDERS THAT**:

a. The application for costs by the Claimant with respect to its claim for compensation under the *Expropriation Act* is granted in part and directs the Corporation of the City of Stratford to pay 1353837 Ontario Inc. a costs award in the amount of $3,709,367.63.

b. The application for costs by the Claimant with respect to its Motions for Costs is granted in part and directs the Corporation of the City of Stratford to pay 1353837 Ontario Inc. a costs award in the amount of $117,052.92.

c. The application for costs by the City with respect to the Claimant's claim for compensation under the *Expropriation Act* is granted in part and directs 1353837 Ontario Inc. to pay the Corporation of the City of Stratford a costs award in the amount of $2,901,380.15.

d. The application for costs by the City with respect to its Motions for Costs is granted in part and directs 1353837 Ontario Inc. to pay the Corporation of the City of Stratford a costs award in the amount of $113,751.23.

e. The above cost awards are to be paid within one month of this Order and subject to interest calculated in accordance with section 129 of the *Courts of Justice Act.*

"Jean-Pierre Blais"

JEAN-PIERRE BLAIS
MEMBER

ATTACHMENT 1

Claimant's Material before the Tribunal on its Motion for Costs

1. Motion Record of the Claimant, Volumes 1 to 9, dated June 22, 2023

2. Book of Authorities of the Claimant in support of the Notice of Motion, dated June 22, 2023

3. Responding Motion Record of the Claimant, dated August 17, 2023

4. Reply Motion Record of the Claimant, dated August 31, 2023

5. Supplementary Book of Authorities of the Claimant in support of the Motion, dated August 31, 2023

6. Factum of the Claimant, dated October 6, 2023

7. Book of Authorities of the Claimant in support of the Factum, dated October 6, 2023

8. Responding Factum of the Claimant, dated October 18, 2023

9. *Sheareen Ltd. v. Nepean (Township) No. 1*, 1980 CarswellOnt 1721, 21 L.C.R. 318, submitted November 9, 2023

10. *Expropriation Law in Ontario* (Williams, Skinner, Helfand), 1 General Framework for Costs Awards – Section 32, submitted November 9, 2023

11. Bill of Costs of the Claimant, dated November 24, 2023

City's Material before the Tribunal on its Motion for Costs

1. Motion Record of the City, dated June 22, 2023

2. Responding Motion Record of the City, dated August 17, 2023

3. Reply Motion Record of the City, dated August 31, 2023

4. Factum of the City, dated October 6, 2023

5. Book of Authorities of the City, dated October 6, 2023

6. Responding Factum of the City, dated October 20, 2023

7. Responding Book of Authorities, dated October 20, 2023

8. Compendium of the City, dated October 25, 2023

9. Facta brief of the City, dated October 25, 2023

10. Summary of Claimant's experts' involvement in the proceeding, dated November 8, 2023

11. May 4, 2021 transcript from the expropriation hearing, submitted November 8, 2023

12. May 12, 2021, transcript from the expropriation hearing, submitted November 8, 2023

13. *Farrell v. Kavanagh*, 2020 ONSC 8154, submitted November 8, 2023

14. *Jarbeau v. McLean*, 2017 ONCA 115, submitted November 8, 2023

15. *Ontario Municipal Bord Rules of Practice and Procedure*, dated August 11, 2008, submitted November 8, 2023

16. Expropriation hearing exhibit 7, submitted November 8, 2023

17. *Canadian National Railway Corp. v. Royal and Sunalliance Insurance Co*., 2005 CanLII 33041, submitted November 8, 2023

18. *Toronto Transit Commission v. Gottardo Construction Ltd*., 2005 CarswellOnt 4019, submitted November 8, 2023

19. Legend to Annotated Costs Brief of the Claimant, submitted November 8, 2023

20. Letter from C. Williams to J. Doherty, dated August 23, 2023

21. Remainder of the transcripts from the expropriation hearing, submitted November 9, 2023

22. Cost Outline of the City, dated November 24, 2023