Ontario Land Tribunal
Tribunal ontarien de l'aménagement du territoire

ISSUE DATE: January 24, 2025 **CASE NO(S).:** OLT-21-001312

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

Claimant:	MacEwen Petroleum Inc.
Respondent:	City of Ottawa
Subject:	Determination of compensation
Description:	To facilitate the construction of the Ottawa Stage 2 Light Rail Transit system.
Reference Number:	OC1953142
Property Address:	1181 Richmond Road
Municipality/UT:	Ottawa/Ottawa
OLT Case No:	OLT-21-001312
OLT Lead Case No:	OLT-21-001312
OLT Case Name:	MacEwen Petroleum Inc. v. Ottawa (City)

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

Claimant:	Kareem George Saikaley
Respondent:	City of Ottawa
Subject:	Determination of compensation
Description:	To facilitate the construction of the Ottawa Stage 2 Light Rail Transit system.
Reference Number:	OC1953142
Property Address:	1181 Richmond Road
Municipality/UT:	Ottawa/Ottawa
OLT Case No:	OLT-21-001568
OLT Lead Case No:	OLT-21-001312
OLT Case Name:	Kareem George Saikaley v. Ottawa (City)

PROCEEDING COMMENCED UNDER subsection 9(1) of the *Ontario Land Tribunal Act, 2021*, S.O. 2021, c. 4, Sched. 6

Request by:	MacEwen Petroleum Inc.
Request for:	Written Motion for Costs

Heard:	In Writing; final submissions received on December 31, 2024

APPEARANCES:

Parties	**Counsel**
MacEwen Petroleum Inc. ("MacEwen" or "Claimant")	Douglas Kelly Philip Osterhout
City of Ottawa ("City")	Emma Blanchard Laura Robinson

DECISION DELIVERED BY WILLIAM MIDDLETON AND ORDER OF THE TRIBUNAL

INTRODUCTION

[1] This matter relates to the City's expropriation of the property located at 1181 Richmond Road ("Property"), on which MacEwen was a lessee. MacEwen sublet the Property to GRA Gas Bar, who operated a MacEwen-branded gas station and convenience store.

[2] Pursuant to the terms of the sublease, GRA Gas Bar paid MacEwen a fixed annual minimum rent, plus variable rent that was tied to its sales. MacEwen earned profit from the sale of fuel at that location and paid GRA Gas Bar a commission on every litre of fuel sold at that location.

[3] The City and MacEwan have now settled all matters relating to MacEwen's claims under the *Expropriations Act,* R.S.O. 1990, c. E.26 ("Act"), save and except for

MacEwen's entitlement to costs under s. 32 of the Act. By written motion, MacEwen previously sought a confidentiality order from the Tribunal in respect of certain business loss reports that may be relevant to the adjudication of costs – this led to a Decision of this Tribunal issued July 17, 2024. The current motion pertains solely to the determination by this Tribunal of the costs properly payable to MacEwan ("Motion").

[4] The materials delivered to the Tribunal for the Motion include the following:

(a) Claimant's Written Submissions, comprising 28 pages;
(b) Factum of City, comprising 47 pages;
(c) Appendix A to Factum of City, comprising 58 pages;
(d) Book of Authorities of the City, comprising 149 pages;
(e) Supplementary submissions of Claimant, comprising 14 pages;
(f) Supplementary Book of Authorities of Claimant, comprising 84 pages;
(g) Supplementary submissions of City, comprising 9 pages; and
(h) Correspondence received from the Claimant's counsel, copied to the City's counsel, dated December 31, 2024.

The Tribunal's Authority and Mandate in Costs Adjudication

[5] Section 32 of the Act states (below emphasis added):

> **Costs**
> **32** (1) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Tribunal and the amount awarded by the Tribunal is 85 per cent, or more, of the amount offered by the statutory authority, the Tribunal shall make an order directing the statutory authority to pay the reasonable legal, appraisal and other costs actually incurred by the owner for the purposes of determining the compensation payable, and may fix the costs in a lump sum or may order that the determination of the amount of such costs be referred to an assessment officer who shall assess and allow the costs in accordance with this subsection and the tariffs and rules prescribed under clause 44 (d). 2017, c. 23, Sched. 5, s. 35.
>
> **Same**
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> (2) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the 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, and may fix the costs in a lump sum or may order that the determination of the amount of such costs be referred to an

assessment officer who shall assess and allow the costs in accordance with the order and the tariffs and rules prescribed under clause 44 (d) in like manner to the assessment of costs awarded on a party and party basis. 2017, c. 23, Sched. 5, s. 35.

Same

(3) If no tariffs or rules are prescribed under clause 44 (d), the assessment officer shall instead have reference to the rules made by the Tribunal for the purposes of section 20 of the *Ontario Land Tribunal Act, 2021*. 2021, c. 4, Sched. 6, s. 48 (8).

[6] The regulations under the Act provide that (below emphasis added):

R.R.O. 1990, Reg. 364: Rules to be Applied for the Purposes of Subsection 32(1) of the Act

1. (1) The amount of legal, appraisal and other costs shall be in the discretion of the assessment officer to be determined *quantum meruit* and in assessing, the officer may reduce the amount of, or disallow, any item of cost upon the ground that the same was not reasonable in amount or was not reasonably incurred. R.R.O. 1990, Reg. 364, s. 1 (1).

(2) Subject to subsection (1), legal costs shall be assessed, *quantum meruit*, by the assessment officer as on an assessment of costs as between a solicitor and his or her own client. R.R.O. 1990, Reg. 364, s. 1 (2).

[7] This matter has not been referred by the Tribunal to an assessment officer. The Tribunal accepts that the relevant terms of its mandate and discretion to determine costs under the Act includes the discretion and jurisdiction afforded to assessment officers and neither Party to this Motion has argued otherwise. Thus, this Tribunal may decide to fix the sum of costs payable and in doing so, may also choose to apply the principles of *quantum meruit*.

[8] Subsequent to the filing of the motion materials in this matter, the Tribunal's Rules of Practice and Procedure were revised ("Rules"), effective December 2, 2024. The applicable provisions concerning costs adjudication under the Act are as follows (below emphasis added):

"Expropriation Costs under Section 32 of the Act

… "*expropriation costs*" means costs under section 32 of the Act;

26.19 Application of Rules on Expropriation Costs Rules 26.19 to 26.26 apply to expropriation costs under section 32 of the Act only and are separate and apart from a request for costs on the basis

of conduct under Rule 23. A request for expropriation costs may be brought by a claimant or respondent following:

(4) the hearing of an Application by the Tribunal; or
(5) the settlement of compensation and damages under the Act where the quantum of expropriation costs payable is yet to be determined.

26.20 Expropriation Costs Will be Considered in Writing A request for expropriation costs shall be considered and disposed of by the Tribunal in writing unless a party satisfies the Tribunal by written objection that a written format is likely to cause the party significant prejudice.

26.21 Request by Claimant for Expropriation Costs A claimant may file with the Registrar a request for expropriation costs. The claimant shall serve the request on the respondent on the same day of filing.

26.22 Request by Respondent to Determine Expropriation Costs Where a claimant has not requested expropriation costs under Rule 26.21, the respondent may file with the Registrar a request to determine expropriation costs. The respondent shall serve the request on the claimant on the same day of filing.

26.23 Supporting Documents A claimant shall serve on the respondent and shall file with the Tribunal supporting documents including a bill of costs containing time dockets for all counsel and experts with amounts totalled, and copies of all disbursement and applicable expense receipts. Where the claimant initiates a request under Rule 26.21, the claimant shall serve and file supporting documents on the same day of filing the request. Where the respondent initiates a request under Rule 26.22, the claimant shall serve and file supporting documents within 15 days of service of the request.

26.24 Response on Expropriation Costs Within 15 days of service of the supporting documents under Rule 26.23, the respondent shall serve on the claimant and file with the Tribunal a written response.

26.25 Reply on Expropriation Costs Within 10 days of the service of the response under Rule 26.24, the claimant may serve on the respondent and file with the Tribunal a written reply.

26.26 Member Seized The Tribunal Member who conducted the hearing of the Application shall make the decision on the expropriation costs. If that Member is unable to hear the request for any reason, the Chair will direct another Member of the Tribunal to hear the request. Where a request for expropriation costs is made pursuant to Rule 26.19(b) following a settlement, any Member of the Tribunal may hear the request."

[9] The Tribunal asked the Parties subsequent to December 2, 2024 if they wished to make further supplementary submissions in light of the above-noted new provisions of the Rules. On December 31, 2024, counsel for the Claimant responded on behalf of both Parties as follows (below emphasis added):

> "The parties have conferred and agree that the updated Rules 26.19-26.26 do not have a substantive impact on this written cost hearing. The parties agreed to a procedure for the written hearing that was approved by the Tribunal, and submitted materials including the Claimant's bill of costs and time dockets for the contested legal costs.
>
> We note that the new Rule 26.23 identifies some additional supporting documents that should form part of the Claimant's materials, including dockets for experts and copies of disbursement and expense receipts. However, as the only matter at issue between the parties is the quantum of legal costs sought, the parties agree that this change does not affect the matter currently before the Tribunal.
>
> It is MacEwen's respectful submission that the substance of the new Rule has been met for the purposes of the hearing."

The Tribunal agrees that the revised Rules described in paragraph [8] have no material impact on this Motion beyond the principle identified by the Tribunal in paragraph [15] below.

Claimant's Costs Claim

[10] To date, the City has paid to the Claimant costs in the amount of $199,259.92 but the Claimant seeks an additional amount of $479,789.20 based on 1026.50 hours of time spent plus interest thereon calculated from September 28, 2023, being the date of the Parties' settlement.

[11] In addition, the Claimant seeks a further amount of $78,584.72 plus interest calculated from the date of the Order made in this Decision. HST will also be payable on any such costs award.

City's Response

[12] The City counters the Claimant's costs submission arguing that (below emphasis added):

> (a) The Tribunal disallow any legal costs in an amount greater than $246,401.73 (plus HST).
>
> (b)The Tribunal order that no interest is payable on the legal costs awarded.

> (c) The Tribunal defer consideration of MacEwen's request for legal costs relating to this costs assessment (characterized by MacEwen as the "post-settlement" legal costs), pending its ruling in this assessment hearing.

[13] The City also argues that the Tribunal must undertake a *quantum meruit* assessment of the Claimant's legal costs on the basis that the settlement of the compensation claims reached by the Parties does not admit that s. 32 of the Act should apply to this proceeding. Instead, the City contends that solely Ontario Regulation 364 under the Act should guide the Tribunal (Regulation 364 is reproduced in part in paragraph [6] above).

[14] The City further argues that in order for costs to be 'incurred' they must have been actually paid by the Claimants (particularly in relation to the claim for interest on the costs). Finally, the City maintains that the Tribunal ought to take into account the fact that the Claimant's counsel expended considerably more time / resultant fees than did the City's counsel in the underlying compensation proceeding.

THE TRIBUNAL'S ANALYSIS

General Costs Principles in Expropriation Cases

[15] There is a longstanding principle that the awarding of costs under s. 32 of the Act is uniquely directed to ensuring a full measure of indemnity for Claimants. The qualification is that the cost must be reasonable in the context of the matter. This was part of the holding by the Supreme Court of Canada ("SCC") in the oft-cited *Dell Holdings v. Toronto Area Transit Operating Authority*, [1997] S.C.R. 32 ("Dell Holdings"). This Tribunal will proceed pursuant to s. 32 of the Act, which clearly is applicable to this proceeding – contrary to the submission of the City. In any event, Regulation 364 is by its terms relevant for the purposes of s. 32 of the Act. This is also consistent with the Tribunal's recently amended Rules, as detailed above in paragraph [8].

[16] In its later Decision in *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 (CanLII), [2011] 1 SCR 160 ("Smith"), the SCC went on to confirm that there is to be a comprehensive indemnification for the legal costs of a claimant under expropriation legislation analogous to the Act. In supplementary submissions, the Claimant also relies on the Smith case. The City does not disagree and in its supplementary submission stated:

> The decisions in *Alliance Pipeline Ltd. v. Smith* …affirms the requirement in an expropriation costs assessment that the adjudicator must "assess the reasonableness of the costs – legal, appraisal, or other – incurred by [the Claimant] in asserting his claim for compensation." The Supreme Court accepted the requirement that "these expenses be reasonable" is a proper limitation on the principle of full indemnification for owners impacted by expropriations.

[17] This Tribunal agrees with the City's counsel that the standard it must employ on this motion is 'reasonableness'. However, the Tribunal disagrees that for costs to be deemed incurred they must in fact have already been paid by the Claimant. This is contrary to the finding in *Windsor v. Teshuba* 2005 CarswellOnt 4903, where the Court noted:

> "I agree with counsel for Lansink that Peloquin went on to clarify that reasonable appraisal costs need not have been paid in order to satisfy the requirement that they be incurred. As well, in Wawanesa Mutual Insurance Co. v. Smith (Committee of) (1998), 42 O.R. (3d) 441 (Ont. Div. Ct.). The Ontario Divisional Court considered the word "incur" in the other legislation and gave a broad meaning. An account need not be paid by a party in order for it to be incurred. The account for services need only have been rendered so that the amount of the account is known."

[18] The Tribunal also finds that there is clear authority for the proposition that interest on unpaid – yet incurred – costs may be payable: *Greenslade v Ontario (Minister of Environment)* 23 L.C.R.289. In its supplementary submissions, counsel for the Claimant noted that it appears to be undisputed that the Claimant incurred legal fees and argued that if an account is rendered, and remains unpaid, interest accruing on the outstanding balance is compensable by the expropriation authority under s. 32 of the Act.

[19] The City's counsel in response agreed that costs are "incurred" where the owner has paid, or has a legal obligation to pay, an account, but contested the issue of whether interest on those costs has been 'incurred' and is compensable on the same basis. The City argued that (emphasis added below):

> "There is no evidence the Claimant has incurred any interest charges on its legal costs, or presently has any obligation to pay interest. No accounts or legal invoices form part of the evidentiary record in this assessment hearing. As the Claimant relies on Claimant counsel's Bill of Costs and "Draft Statement (BIM)", rather than any invoices, it is reasonable for the Tribunal [to assume] that counsel has not rendered accounts to MacEwen. … Furthermore, the retainer agreement included as an exhibit to the Kelly Affidavit specified that the client would not be billed on a regular basis, and only: "If an account is rendered, note interest will be charged on accounts not paid within 30 days." The Claimant thus has no present obligation to pay interest, and accordingly has not "incurred" any such expense… The City's position remains that the interest should not be awarded to the Claimant from the date of settlement of the Claim. Any interest awarded should only be prospective, and calculated from the date of a Tribunal Order assessing the Claimant's reasonable costs"

[20] The Tribunal determines that a reasonable amount in respect of the Claimant's legal fees is payable regardless of whether the Claimant has paid any fees invoices which may have been rendered by Claimant's counsel. The Tribunal further disagrees with the contentions made by the City's counsel and will award interest on the amount payable for legal fees. In the Tribunal's view, this is consistent with the current state of the law concerning compensation for legal fees as expressed in Dell Holdings and Smith and is also supported by the holding in Greenslade. It is also a logical outcome in these circumstances given that it is appropriate (and admitted) that reasonable fees are payable regardless of whether they have been paid. Thus, the fact that a law firm acting for a claimant to pursue compensation under the Act may for a period of time decide not to insist that its client pay contractually owed interest on legal fees should not lead to a conclusion that interest is never payable by that claimant or in turn by the expropriating authority. Again, reasonableness is the standard, and it applies to the calculation of interest which is only recoverable if it is at a legally permissible rate and is consistent with the ordinary business practices of law firms and the retainer agreements

they enter into with their clients. As noted below, the question remains as to from what date interest ought to be payable.

[21] The Tribunal notes that the City has requested that the claim for legal costs in relation to this costs adjudication be deferred, on the following basis (below emphasis added):

> "…In this case, the reasonableness of MacEwen's costs of the assessment must also be informed by the City's multiple settlement offers made in relation to MacEwen's cost claim. The City has not introduced those offers into evidence in this assessment hearing as the merits have not been adjudicated. It would be prejudicial for the Tribunal to assess the reasonableness of MacEwen's "post-settlement costs" (identified to be $78,584.72, based on 164.7 hours docketed), in the absence of that evidence. The City respectfully requests that the Tribunal defer its assessment of the costs of this hearing pending its ruling on the costs assessment."

[22] Counsel for the Claimant did not specifically respond to the City's deferral position described in paragraph [21] but the Tribunal shall presume that the Claimant disagrees with that request.

Considerations regarding an Interest Award on Legal Fees

[23] The Tribunal further notes that in this situation the Claimant is seeking interest on its legal fees calculated from the date of the settlement between the Parties reached on September 28, 2023, as is evident from both its initial factum and its supplementary written submissions (below emphasis added):

> "In the present case, the City incurred liability for MacEwen's reasonable costs on the settlement of its claim. MacEwen submits that post-judgment interest should accrue from that date. It would not be expeditious or in keeping with the purpose of the legislation to require a Claimant to obtain an order from the Tribunal confirming the details of a settlement agreement merely to ensure that post-judgment interest begins to accrue from that date. Rather, the Tribunal should adopt a broad and purposive approach to the application of interest on reasonable costs, which should apply from the date that the City became liable for their payment. "

[24] The Tribunal concurs with the position of the Claimant on the matter of interest but does so on the basis of reasonableness and in accordance with the fuller indemnity principles as gleaned from Dell Holdings and the Smith cases. It is evident to the Tribunal that it is simply reasonable in these circumstances to award interest on the reasonable legal fees incurred to the date of the settlement (i.e. whether or not paid by the Claimant), as calculated from the date of the settlement up to the date of the issuance of this Decision. Thereafter, interest on the legal fees incurred post-settlement shall accrue only from the date of issuance of this Decision.

[25] A question remains as to the appropriate rate of interest on legal fees incurred to the date of the settlement. Neither counsel for the Claimant or for the City spent much time on this issue. The Claimant proposes that interest be at the post-judgment interest rate under the *Courts of Justice Act* R.S.O. 1990, c. C.43, the relevant provisions of which are:

> "bank rate" means the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short-term advances to banks listed in Schedule I to the *Bank Act* (Canada)
>
> "date of the order" means the date the order is made, even if the order is not entered or enforceable on that date, or the order is varied on appeal, and in the case of an order directing a reference, the date the report on the reference is confirmed;
>
> "postjudgment interest rate" means the bank rate at the end of the first day of the last month of the quarter preceding the quarter in which the date of the order falls, rounded to the next higher whole number where the bank rate includes a fraction, plus 1 per cent;
>
> **Postjudgment interest**
> **129** (1) Money owing under an order, including costs to be assessed or costs fixed by the court, bears interest at the postjudgment interest rate, calculated from the date of the order…
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> **Costs assessed without order**
> (4) Where costs are assessed without an order, the costs bear interest at the postjudgment interest rate in the same manner as if an order were made for the payment of costs on the date the person to whom the costs are payable became entitled to the costs.
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> **Discretion of court**
> **130** (1) The court may, where it considers it just to do so, in respect of the whole or any part of the amount on which interest is payable under section 128 or 129,
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> (a) disallow interest under either section;
> (b) allow interest at a rate higher or lower than that provided in either section;
> (c) allow interest for a period other than that provided in either section.

Same
(2) For the purpose of subsection (1), the court shall take into account,
(a) changes in market interest rates;
(b) the circumstances of the case;
(c) the fact that an advance payment was made;
(d) the circumstances of medical disclosure by the plaintiff;
(e) the amount claimed and the amount recovered in the proceeding;
(f) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding; and
(g) any other relevant consideration. R.S.O. 1990, c. C.43, s. 130.

[26] The Act does not contain a provision relating to interest on legal costs. The sole provision of that Act pertaining to interest is section 33 which states:

"**Interest**
33 (1) Subject to subsection 25 (4), the owner of lands expropriated is entitled to be paid interest on the portion of the market value of the owner's interest in the land and on the portion of any allowance for injurious affection to which the owner is entitled, outstanding from time to time, at the rate of 6 per cent a year calculated from the date the owner ceases to reside on or make productive use of the lands.

Variation of interest
(2) Subject to subsection (3), where the Tribunal is of the opinion that any delay in determining the compensation is attributable in whole or in part to the owner, it may refuse to allow the owner interest for the whole or any part of the time for which the owner might otherwise be entitled to interest, or may allow interest at such rate less than 6 per cent a year as appears reasonable.

Same
(3) The interest to which an owner is entitled under subsection (1) shall not be reduced for the reason only that the owner did not accept the offer made by the expropriating authority, although the compensation as finally determined is less than the offer. R.S.O. 1990, c. E.26, s. 33 (3).

Same
(4) Where the Tribunal is of the opinion that any delay in determining compensation is attributable in whole or in part to the expropriating authority, the Tribunal may order the expropriating authority to pay to the owner interest under subsection (1) at a rate exceeding 6 per cent a year but not exceeding 12 per cent a year. 2017, c. 23, Sched. 5, s. 36.

[27] Section 33 of the Act relates only to interest potentially awardable on market value of the owner's interest in the land expropriated or for injurious affection. Although the Claimant presumably seeks interest at the postjudgment rate as determined under the *Courts of Justice Act*, the City's counsel made no submissions on the specific governing rate – focusing instead on its argument that no interest is payable at all. For its part, the Claimant also does not propose a specific percentage rate and therefore there is no current evidence before this Tribunal as to what that applicable rate is.

[28] The key authority cited by the Claimant's counsel to support its position is the decision of the Court of Appeal in *Tripp v. Ontario Ministry of Transportation* [1999] 123 O.A.C. 278, ("Tripp") where Weiler, J.A. for that Court stated (below emphasis added):

> "***3. Should interest be paid on the costs awarded?***
> 23 The MTO submits that no interest on costs is payable because s. 32, which governs all substantive rights with respect to reimbursement of the owners' costs, does not state that interest is payable. The section is silent in that regard. In support of its position the MTO relies on *WMI Waste Management of Canada Inc. v. Toronto (Metropolitan)* (1982), 34 O.R. (2d) 708 (Ont. H.C.) at 710-11 and *Kimpe v. Union Gas Ltd.* (1985), 51 O.R. (2d) 112 (Ont. Div. Ct.) which follows *WMI*
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> 24 This was, in effect, the conclusion of Blair J.A. in *Kidd Creek Mines Ltd. v. Northern & Central Gas Corp.* (1988), 66 O.R. (2d) 11 (Ont. C.A.) . There, the Court of Appeal was asked to determine whether an award of the Ontario Energy Board, filed with the registrar of the Supreme Court and accordingly enforceable as an order of that court, could attract post-judgment interest under what was then s.139(1) of the *Courts of Justice Act* , 1984, S.O. 1984, c. 11. Section 29(1) of the *Ontario Energy Board Act* , R.S.O. 1980, c. 332 provided that an order of the Board was enforceable as a court order upon it being filed with the registrar, but the *Act* was itself silent on the question of whether an order so filed could attract post-judgment interest.
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> 25 For the court, Blair J.A. held that such an order did indeed attract post-judgment interest under the *Courts of Justice Act.* In so holding, he distinguished the holding in *WMI* and *Kimpe* on two grounds. First, he held that the ratio in *WMI* turned on the court's interpretation of the *Expropriations Act* as a complete code. On the facts before him, no such interpretation was required of the *Ontario Energy Board Act* . Secondly, he held that the decision in *WMI* flowed from the court's finding that the *Statutory Powers Procedure Act* , R.S.O. 1980, c. 484, (the "*SPPA* ", under which the orders of the Land Compensation Board (the predecessor of the OMB in expropriation matters) were then made enforceable as orders of the court, was procedural rather than substantive in nature. In Blair J.A.'s opinion, the provisions of the *Courts of Justice Act* could not be said to be merely procedural, but in fact conferred substantive rights; see p. 16.
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> 26 In my opinion, the reasoning of Blair J.A. is correct and must be preferred over that developed in *WMI* . Although the *Expropriations Act* is undoubtedly, as stated by Callaghan J. in *WMI* , a complete code, the fact remains that the *Courts of Justice Act* is not simply a procedural enactment, but does confer substantive rights. As stated by Blair J.A. at p. 16, "[t]he fact that the right [to prejudgment interest] is set out in a statute which deals mainly, but certainly not entirely, with procedural matters does not detract from its substantive effect." Amongst these substantive rights is included the right of a party to seek post-judgment interest on an award made by a statutory tribunal when such award has been made enforceable by the courts.
>
> 27 Assuming, without deciding, that *WMI* was correct in its categorizing the SPPA as procedural in nature, subsequent amendments to the *Expropriations Act* have rendered this decision of little precedential value when considering the *Expropriations Act* . Prior to 1983, orders of the Land Compensation Board were enforceable as court orders under s.19 of the *SPPA* . However, pursuant to S.O. 1983, c. 47, the *Expropriations Act* was amended so as to replace the Land Compensation Board by the Ontario Municipal Board. Pursuant to s.86(1) of the *Ontario Municipal Board Act* , orders of the Ontario Municipal Board are enforceable under the *Courts of Justice Act* , rather than the *SPPA* . Accordingly, following Blair J.A. in *Northern &*

> *Central Gas Ltd.* , an Ontario Municipal Board order so enforced may attract post-judgment interest under that statute.
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> 28 The owners' position is that a copy of any decision made by the Board may be filed with the superior court and enforced as a judgment, pursuant to s. 86(1) of the *Ontario Municipal Board Act* , R.S.O. 1990 c. O.28, as amended, and that a judgment attracts interest until it is paid, pursuant to s. 129(1) of *Courts of Justice Act* . 4
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> 29 The MTO's response is that these provisions create a conflict with s.32 of the *Expropriations Act*, and that s. 2 of the *Expropriations Act* states that in the event of a conflict the *Act* prevails. Hence, no interest is payable. In my opinion, however, no conflict arises simply because s. 32 is silent on the matter of interest. The award cannot be enforceable as a judgment in some respects and not others. Inasmuch as the award of costs is enforceable as a judgment, everything, including the payment of interest on costs, follows. Accordingly, this ground of appeal is dismissed."

[29] While counsel for the City disputes whether any interest is properly payable on the Claimant's legal costs, it does point out that Tripp speaks to interest payable from the date of a Tribunal Order – not the date of a settlement which is the situation here. The Claimant's counsel argues that, in practical effect, the date of the binding settlement ought to be treated the same way as an Order of the Tribunal would be.

[30] Counsel for the Claimant also relies on a Decision of this Tribunal's predecessor in *Hume v. Ontario Ministry of Transportation* (December 6, 2019) LPAT No. LC140040 ("Hume") which permitted interest on legal costs to run from the settlement date. However, the analysis of the Tribunal on this narrow question is rather economical:

> [27] I have determined that the supplementary costs at issue in this hearing are compensable. Moreover, the Claimants have been deprived of access to compensation for these costs through no fault of their own. I therefore find that denying interest on this compensation—even during a period when it was in dispute—would be manifestly unfair and contrary to the overriding principle that the Claimants be made economically whole.
>
> [28] I therefore find for the Claimants on this issue. Interest on costs incurred between the date of the settlement and the date of this decision, as well as interest accruing between the date of this decision and the date at which payment of compensation is made to the Claimants by the Ministry, is compensable.

[31] In Hume, the LPAT did not enumerate the actual interest rate in its Order, and it is unclear whether it intended to use the 6% rate set out in the Act or the postjudgment rate under the *Courts of Justice Act* (whatever that was at the time). The City's counsel

characterizes the Hume decision as an ‘outlier’ but does not cite any cases that reached contrary conclusions in analogous circumstances. Counsel for the City also points out that the Claimant did not propose an amount for legal costs until November 1, 2023, and that an offer to settle the legal costs was made by the City on November 29, 2023 (which was not accepted).

Reasonableness Matters

[32] The Tribunal must emphasize that a motion for the determination of costs payable in an expropriation case is not an opportunity for the Parties to relitigate the issues. Here the Parties have settled the compensation claim, but it is clear from the materials that neither party agrees with the positions taken by the other on this motion for costs adjudication. However, although it appears that the underlying, now resolved expropriation claim related to business loss claims, there were complex environmental issues at play as well as positions taken by the City that necessitated certain responses from the Claimant. Much time and effort was expended by counsel for both Parties to analyze the positions taken and defended in the underlying litigation, but the Tribunal does not intend to offer any detailed evaluation of those positions. Simply put, it is unnecessary to do so in order to determine the proper quantum of costs payable to the Claimant.

[33] Moreover, as a general principle, the Tribunal is and ought to be cognizant of the realities and vagaries of expropriation litigation and must be careful not to in effect ‘penalize’ the Claimants for testing their claim through the underlying proceedings or, for that matter, the City for defending them. Of course, the positions appropriately taken in response by the City will also have an impact on how the litigation unfolds. Whatever may appear with hindsight to suggest that ultimately the compensation claims were simpler than originally envisioned will not lead this Tribunal to conclude that a host of unnecessary investigations and steps were taken by the Claimant – or that any particular strategies and tactics employed by the City served to increase costs.

[34] While the final settlement figure should not dictate the costs determination, in the Tribunal's view, it is informative that the Claimants were successful. (Near nil, then ~$173,700 to a recovery of $1.3 million, with the original claim being ~$1.7 million). The offers by the City were well below the figure eventually agreed to after the mediation which to the Tribunal indicates the necessity to properly prepare for and conduct the mediation.

[35] The Tribunal notes that expropriating authorities often have in-house resources and embedded experience / expertise that would not be reflected in the accounts of an authority's external counsel. Part of an experienced Claimant's counsel's role, as was demonstrated here, is to assist an impacted owner – who has no prior knowledge of let alone expertise in expropriation matters - to understand the process and the scheme of the Act. Simply put, "more explaining" is usually required by Claimants than is needed by the representatives of an expropriating authority. Thus, in the Tribunal's view, the comparison of legal costs as between the two sets of counsel also cannot be wholly determinative of the Claimant's costs entitlement.

[36] In the Tribunal's view, the reality is that the onus to prepare, prosecute and resolve the claims borne by the claimant can sometimes require greater work than perhaps might be required for the expropriating authority to respond. Moreover, as already noted, it may be that the authority and its counsel have considerable expertise and past experience which can serve to streamline and expedite their efforts and costs. Even where a claimant hires experienced expropriation counsel to prosecute its claims, it can be anticipated that its case will take longer to prepare and may involve many additional steps.

[37] Where an expropriating authority challenges positions taken by a claimant this will usually necessitate that additional experts must be retained by the claimant. In those circumstances, the authority will be hard pressed to deny such costs, particularly

when the resolution reached seems ultimately to indicates the appropriateness of the claimant's position as is evident in the circumstances of this case.

[38] Notwithstanding any of the above, as already stated, the Tribunal's view is that the reasonableness standard applies and that the costs at issue must be assessed based on the particular circumstances of each case. There are no binding rules to be derived from the observations made above that serve to restrict the Tribunal's discretion in this case or in future proceedings.

[39] Having stated the above, the Tribunal is nonetheless of the view that the City's position on this motion regarding the duplication of work by the Claimant's counsel and, as one example, excessive internal discussions, does have merit.

[40] In the Tribunal's view, upon careful review of all materials and the costs itemization and descriptions of effort submitted by both Parties on this motion and in exercise of its discretion under s. 32 of the Act and in the Rules, a reasonable overall percentage reduction of the Claimant's legal costs claim regarding the "Stages 3.2, 5, 6 and 7" (as utilized in the City's submissions) is 20%. This is based on the Tribunal's review and assessment of the City's identification of excessive internal discussions and other activities reflected in the Claimant's bill of costs. On the same basis, a modest reduction of 10% to the Stage 4 legal costs is also appropriate, in the Tribunal's opinion.

[41] The result of the above-noted reductions and conclusions, is summarized as follows:

		COSTS CLAIMED		REDUCTIONS			TRIBUNAL COSTS CONCLUSIONS	
STAGE	**PERIOD**	**HOURS**	**FEES**	**%**	**HRS**	**FEES**	**HOURS**	**FEES**
1	March 11 2016 to March 31, 2018	69.70	$ 28,550.00	**0%**	-	$ -	69.70	$ 28,550.00
2	April 1, 2018 to January 31, 2019	49.10	$ 22,529.00	**0%**	-	$ -	49.10	$ 22,529.00
3.1	February 1, 2019 to February 28, 2020	84.70	$ 35,227.00	**0%**	-	$ -	84.70	$ 35,227.00
3.2	March 1, 2020 to January 30, 2021	116.50	$ 45,147.50	**20%**	23.30	$ 9,029.50	93.20	$ 36,118.00
4	February 1, 2021 to June 30, 2021	25.60	$ 11,462.50	**10%**	2.56	$ 1,146.25	23.04	$ 10,316.25
5	July 1, 2021 to January 31, 2022	203.00	$ 81,985.00	**20%**	40.60	$ 16,397.00	162.40	$ 65,588.00
6	February 1, 2022 to March 31, 2023	272.30	$ 110,895.00	**20%**	54.46	$ 22,179.00	217.84	$ 88,716.00
7	April 1, 2023 to September 28, 2023	205.60	$ 87,139.00	**20%**	41.12	$ 17,427.80	164.48	$ 69,711.20
TOTAL HRS/FEES		**1,026.50**	**$ 422,935.00**	**20%**	**162.04**	**$ 66,179.55**	**864.46**	**$ 356,755.45**

[42] The Tribunal notes that the Claimants are pursuing an amount for the legal costs incurred by the Claimant post-settlement in relation to this costs motion in the sum of $78,584.72 to the Claimant. No specific critique of this amount has yet been proffered by counsel for the City as it has instead asked that this matter be deferred.

ORDER

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

(a) The City of Ottawa ("City") shall pay the sum of $356,755.45 to MacEwen Petroleum Inc. ("Claimant") in respect of its legal costs to the date of the settlement on September 28, 2023, as determined under section 32 of the *Expropriations Act*;

(b) The City shall pay interest on the amount described in (a) above at a rate as agreed upon by the Parties or as further determined by this Tribunal calculated from November 1, 2023. In the event that the Parties are unable to reach agreement on the applicable rate,

supplementary submissions shall be delivered in accordance with the same schedule as set out in paragraph [43] (c) below;

(c) The City and Claimant shall deliver supplementary written submissions regarding the further amount of $78,584.72 claimed in respect of the Claimant's costs relating to this costs adjudication proceeding, pursuant to the following timetable:

i. the City shall provide its further submissions within 15 days of the date of issuance of this Decision;
ii. the Claimant shall provide its responding submissions within 15 days of its receipt of the City's submissions; and
iii. the City shall provide its Reply, if any, within seven days of its receipt of the Claimant's submissions

[44] This Vice Chair shall remain seized of this proceeding.

"William R. Middleton"

WILLIAM R. MIDDLETON
VICE-CHAIR