

Federal Court



Cour fédérale

**Date: 20220119**

**Docket: T-967-16**

**Citation: 2022 FC 63**

**Ottawa, Ontario, January 19, 2022**

**PRESENT: The Honourable Mr. Justice Ahmed**

**BETWEEN:**

**SHAWN SOMERVILLE MILNE**

**Plaintiff**

**and**

**HER MAJESTY THE QUEEN**

**Defendant**

**SUPPLEMENTARY JUDGMENT AND REASONS**

**I. Overview**

[1] On July 19, 2021, I released my Judgment and Reasons in *Milne v Canada*, 2021 FC 765 (“*Milne*”), finding that the Plaintiff was entitled to \$1,100 in further compensation under the *Expropriation Act*, RSC 1985, c E-21 (the “*Act*”) for the expropriation of his land. My Judgment afforded each of the parties an opportunity to provide written submissions on costs. This decision is based on those submissions and the accompanying material.

[2] For the reasons that follow, I award the Plaintiff his costs, pursuant to sections 29 and 39 of the *Act*, in the amount of \$273,518.68.

## **II. Facts**

[3] The Plaintiff is the owner of a rural property that is directly adjacent to a busy railway corridor. In 2012, a small strip of his land was expropriated by the Defendant to expand the railway corridor. The Defendant provided the Plaintiff \$1,000 in statutory compensation for the Required Lands pursuant to section 16 of the *Act*.

[4] The Plaintiff claimed that he was entitled to further compensation under the *Act* for the damages resulting from the railway corridor expansion. The thrust of his claim was that the railway corridor expansion increased the noise and disturbance on his property, thus requiring the relocation of his residence or diminishing the value of his property. The Plaintiff also sought an additional \$1,100 for the expropriated land, which he claimed was not appraised correctly.

[5] For the reasons provided in *Milne*, I found the Plaintiff failed to establish that the railway corridor expansion resulted in an increase in sound and disturbance that warranted the damages he sought. I therefore dismissed the thrust of the Plaintiff's claim. I found, however, that the Plaintiff was entitled to an additional \$1,100 for the expropriated land.

## **III. Issue**

[6] The sole issue is what the appropriate costs award is for this matter.

#### IV. Relevant Cost Provisions

[7] The *Act* has particular provisions addressing the recovery of costs in expropriation matters, which I will set out, together with relevant provisions in the *Federal Courts Rules* SOR/98-106 (the “*Rules*”), before turning to the parties’ submissions.

[8] Section 29 of the *Act* addresses the legal, appraisal and other costs reasonably incurred by the expropriated party in asserting a claim for compensation, up until the date when the proceedings commenced:

**Legal, appraisal and other costs to be paid by Crown**

**29 (1)** The Crown shall pay to each person entitled to compensation under this Part an amount equal to the legal, appraisal and other costs reasonably incurred by him in asserting a claim for that compensation, except any of those costs incurred after the institution of any proceedings under sections 31 and 32.

**Taxing**

**(2)** The costs provided for in subsection (1) may be taxed by the official responsible for taxing costs in the Court.

[Emphasis added.]

**Les frais d’estimation, frais légaux et autres frais seront payés par la Couronne**

**29 (1)** La Couronne paie à chaque personne ayant droit à une indemnité en vertu de la présente partie un montant égal aux frais d’estimation, frais légaux et autres frais qui ont été raisonnablement encourus par cette personne pour faire valoir son droit à cette indemnité, sauf ceux de ces frais qui ont été encourus après l’institution de procédures en vertu des articles 31 et 32.

**Taxation**

**(2)** Les frais prévus au paragraphe (1) peuvent être taxés par le fonctionnaire responsable de la taxation des frais au tribunal.

[Je souligne.]

[9] Rule 405 of the *Rules* provides that costs shall be assessed by an “assessment officer.” Under the definition in Rule 2, an “assessment officer” includes a judge, such that I am in this case “the official responsible for taxing costs in the Court,” under subsection 29(2) of the *Act*.

[10] Subsection 39(1) of the *Act* addresses the costs of and incident to the proceedings. Subsection 39(2) specifies when costs are payable by the Crown:

### **Costs**

**39 (1)** Subject to subsection (2), the costs of and incident to any proceedings in the Court under this Part are in the discretion of the Court or, in the case of proceedings before a judge of the Court or a judge of the superior court of a province, in the discretion of the judge, and the Court or the judge may direct that the whole or any part of those costs be paid by the Crown or by any party to the proceedings.

### **Costs payable by the Crown**

**(2)** If the amount of the compensation adjudged under this Part to be payable to a party to any proceedings in the Court under sections 31 and 32 in respect of an expropriated interest or right does not exceed the total amount of any offer made under section 16 and any subsequent offer made to the party in respect of that interest or right before the

### **Frais**

**39 (1)** Sous réserve du paragraphe (2), les frais des procédures devant le tribunal en vertu de la présente partie et les frais accessoires à ces procédures, sont laissés à la discrétion du tribunal ou, dans le cas de procédures devant un juge du tribunal ou un juge de la cour supérieure d’une province, à la discrétion de ce juge. Le tribunal ou le juge peuvent ordonner, qu’en tout ou partie, ces frais soient acquittés par la Couronne ou par une partie à ces procédures.

### **Frais payés par la Couronne**

**(2)** Lorsque le montant de l’indemnité allouée en vertu de la présente partie à une partie à des procédures devant le tribunal en vertu des articles 31 et 32, pour un droit ou intérêt exproprié, ne dépasse pas le montant total de toute offre faite à cette partie en vertu de l’article 16 et de toute offre subséquente qui lui est faite pour ce droit ou intérêt avant le

commencement of the trial of the proceedings, the Court shall, unless it finds the amount of the compensation claimed by the party in the proceedings to have been unreasonable, direct that the whole of the party's costs of and incident to the proceedings be paid by the Crown, and if the amount of the compensation so adjudged to be payable to the party exceeds that total amount, the Court shall direct that the whole of the party's costs of and incident to the proceedings, determined by the Court on a solicitor and client basis, be paid by the Crown.

[Emphasis added.]

début de l'instruction des procédures, le tribunal ordonne, sauf s'il conclut que le montant de l'indemnité réclamée par cette partie dans les procédures était déraisonnable, que la totalité des frais des procédures et des frais accessoires supportés par cette partie soit payée par la Couronne, et lorsque le montant de l'indemnité ainsi allouée à cette partie dépasse ce montant total, le tribunal ordonne que la totalité des frais des procédures et des frais accessoires supportés par cette partie, y compris les frais extrajudiciaires que le tribunal détermine, soit payée à cette partie par la Couronne.

[Je souligne.]

[11] Section 16 of the *Act* outlines the process for when an offer of compensation is made:

**Copies to be sent and offer of full compensation to be made**

**16 (1)** When a notice of confirmation has been registered, the Minister shall,

(a) immediately after the registration of the notice, cause a copy of the notice to be sent to each of the persons then appearing to have any estate, interest or right in the land, so far as the Attorney General of Canada has been able to ascertain them, and

**Des copies sont envoyées et une offre d'indemnité totale est faite**

**16 (1)** En cas d'enregistrement d'un avis de confirmation, le ministre :

a) immédiatement après l'enregistrement de l'avis, fait envoyer une copie de celui-ci à chacune des personnes qui paraissent avoir un droit, un domaine ou un intérêt sur le bien-fonds, dans la mesure où il a été possible au procureur

each other person who served an objection on the Minister under section 9; and

général du Canada d'en connaître l'existence, et à toute autre personne qui a signifié une opposition au ministre en vertu de l'article 9;

(b) within 90 days after the day on which the notice is registered, or, if at any time before the expiration of those 90 days an application has been made under section 18, within the later of

b) dans les quatre-vingt-dix jours suivant l'enregistrement de l'avis ou si, avant l'expiration de ces quatre-vingt-dix jours, une demande a été faite en vertu de l'article 18, dans celui des deux délais suivants qui se termine le dernier :

(i) 90 days after the day on which the notice is registered, or

(i) soit les quatre-vingt-dix jours qui suivent l'enregistrement de l'avis,

(ii) 30 days after the day on which the application is finally disposed of,

(ii) soit les trente jours qui suivent celui de la décision finale statuant sur la demande,

make to each person who is entitled to compensation under this Part, in respect of an expropriated interest or right to which the notice of confirmation relates, an offer in writing of compensation, in an amount estimated by the Minister to be equal to the compensation to which that person is then entitled under this Part in respect of that interest or right, not conditional on the provision by that person of any release or releases and without prejudice to the right of that person, if the person accepts the offer, to claim additional compensation in respect thereof.

fait, par écrit, à toute personne qui a droit à une indemnité en vertu de la présente partie pour un droit ou intérêt exproprié visé par l'avis de confirmation, une offre d'indemnité d'un montant qu'il estime égal à l'indemnité à laquelle cette personne peut alors prétendre en vertu de la présente partie pour ce droit ou intérêt, sans nécessité pour elle de donner une décharge et sans préjudice du droit de cette personne, si elle accepte l'offre, de réclamer une indemnité supplémentaire à ce sujet.

[...]

**Offer to be based on written appraisal**

(3) An offer of compensation made to a person under this section in respect of an expropriated interest or right shall be based on a written appraisal of the value of that interest or right, and a copy of the appraisal shall be sent to that person at the time of the making of the offer.

**Statements to be included in copy of notice and in offer**

(4) There shall be included in any copy of a notice of confirmation sent to any person as described in paragraph (1)(a) a statement of the provisions of section 29 as that section applies to them, and there is to be included in any offer in writing sent to any person as described in paragraph (1)(b) a statement to the effect that the offer is not conditional on them providing any release or releases and is made without prejudice to their right, if the offer is accepted, to claim additional compensation in respect of the expropriated interest or right.

[Emphasis added.]

[...]

**L'offre est fondée sur une évaluation écrite**

(3) L'offre d'indemnité faite à une personne en vertu du présent article relativement à un droit ou intérêt exproprié est fondée sur une évaluation écrite de la valeur de ce droit ou intérêt et une copie de l'évaluation est envoyée à cette personne au moment où l'offre est faite.

**Déclarations à inclure dans la copie de l'avis et dans l'offre**

(4) Est inclus dans toute copie d'un avis de confirmation envoyée à une personne visée à l'alinéa (1)a) un exposé de la façon dont les dispositions de l'article 29 lui sont applicables, et est incluse dans toute offre transmise par écrit à une personne visée à l'alinéa (1)b) une déclaration portant que cette offre n'est pas subordonnée à l'obligation, pour cette personne, de donner une décharge et qu'elle est faite sans préjudice de son droit, si elle accepte l'offre, de réclamer une indemnité supplémentaire au sujet du droit ou intérêt exproprié.

[Je souligne.]

[12] The *Act*'s cost regime is to be read alongside the discretionary power afforded to the Court under Rule 400(1) of the *Rules* and the factors outlined in Rule 400(3) of the *Rules*:

**Discretionary powers of Court**

**400 (1)** The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

[...]

**Factors in awarding costs**

**(3)** In exercising its discretion under subsection (1), the Court may consider

- (a) the result of the proceeding;
- (b) the amounts claimed and the amounts recovered;
- (c) the importance and complexity of the issues;
- (d) the apportionment of liability;
- (e) any written offer to settle;
- (f) any offer to contribute made under rule 421;
- (g) the amount of work;

**Pouvoir discrétionnaire de la Cour**

**400 (1)** La Cour a le pouvoir discrétionnaire de déterminer le montant des dépens, de les répartir et de désigner les personnes qui doivent les payer.

[...]

**Facteurs à prendre en compte**

**(3)** Dans l'exercice de son pouvoir discrétionnaire en application du paragraphe (1), la Cour peut tenir compte de l'un ou l'autre des facteurs suivants :

- a) le résultat de l'instance;
- b) les sommes réclamées et les sommes recouvrées;
- c) l'importance et la complexité des questions en litige;
- d) le partage de la responsabilité;
- e) toute offre écrite de règlement;
- f) toute offre de contribution faite en vertu de la règle 421;
- g) la charge de travail;



- |   |   |
|---|---|
| (h) whether the public interest in having the proceeding litigated justifies a particular award of costs;   | h) le fait que l'intérêt public dans la résolution judiciaire de l'instance justifie une adjudication particulière des dépens;  |
| (i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;   | i) la conduite d'une partie qui a eu pour effet d'abrèger ou de prolonger inutilement la durée de l'instance;   |
| (j) the failure by a party to admit anything that should have been admitted or to serve a request to admit;   | j) le défaut de la part d'une partie de signifier une demande visée à la règle 255 ou de reconnaître ce qui aurait dû être admis;   |
| (k) whether any step in the proceeding was  | k) la question de savoir si une mesure prise au cours de l'instance, selon le cas:  |
| (i) improper, vexatious or unnecessary, or  | (i) était inappropriée, vexatoire ou inutile,   |
| (ii) taken through negligence, mistake or excessive caution;  | (ii) a été entreprise de manière négligente, par erreur ou avec trop de circonspection;   |
| (l) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily; | l) la question de savoir si plus d'un mémoire de dépens devrait être accordé lorsque deux ou plusieurs parties sont représentées par différents avocats ou lorsque, étant représentées par le même avocat, elles ont scindé inutilement leur défense; |
| (m) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;   | m) la question de savoir si deux ou plusieurs parties représentées par le même avocat ont engagé inutilement des instances distinctes;  |
| (n) whether a party who was successful in an action exaggerated a claim, including  | n) la question de savoir si la partie qui a eu gain de cause dans une action a exagéré le   |

a counterclaim or third party claim, to avoid the operation of rules 292 to 299;

montant de sa réclamation, notamment celle indiquée dans la demande reconventionnelle ou la mise en cause, pour éviter l'application des règles 292 à 299;

(n.1) whether the expense required to have an expert witness give evidence was justified given

n.1) la question de savoir si les dépenses engagées pour la déposition d'un témoin expert étaient justifiées compte tenu de l'un ou l'autre des facteurs suivants:

(i) the nature of the litigation, its public significance and any need to clarify the law,

(i) la nature du litige, son importance pour le public et la nécessité de clarifier le droit,

(ii) the number, complexity or technical nature of the issues in dispute, or

(ii) le nombre, la complexité ou la nature technique des questions en litige,

(iii) the amount in dispute in the proceeding; and

(iii) la somme en litige;

(o) any other matter that it considers relevant.

o) toute autre question qu'elle juge pertinente.

[13] Rule 420 addresses the consequences of the failure to accept an offer to settle:

**Consequences of failure to accept plaintiff's offer**

**Conséquences de la non-acceptation de l'offre du demandeur**

**420 (1)** Unless otherwise ordered by the Court and subject to subsection (3), where a plaintiff makes a written offer to settle and obtains a judgment as favourable or more favourable than the terms of the offer to

**420 (1)** Sauf ordonnance contraire de la Cour et sous réserve du paragraphe (3), si le demandeur fait au défendeur une offre écrite de règlement, et que le jugement qu'il obtient est aussi avantageux ou plus avantageux que les conditions

settle, the plaintiff is entitled to party-and-party costs to the date of service of the offer and costs calculated at double that rate, but not double disbursements, after that date.

de l'offre, il a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et, par la suite, au double de ces dépens mais non au double des débours.

**Consequences of failure to accept defendant's offer**

**Conséquences de la non-acceptation de l'offre du défendeur**

(2) Unless otherwise ordered by the Court and subject to subsection (3), where a defendant makes a written offer to settle,

(2) Sauf ordonnance contraire de la Cour et sous réserve du paragraphe (3), si le défendeur fait au demandeur une offre écrite de règlement, les dépens sont alloués de la façon suivante:

(a) if the plaintiff obtains a judgment less favourable than the terms of the offer to settle, the plaintiff is entitled to party-and-party costs to the date of service of the offer and the defendant shall be entitled to costs calculated at double that rate, but not double disbursements, from that date to the date of judgment; or

a) si le demandeur obtient un jugement moins avantageux que les conditions de l'offre, il a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et le défendeur a droit, par la suite et jusqu'à la date du jugement au double de ces dépens mais non au double des débours;

(b) if the plaintiff fails to obtain judgment, the defendant is entitled to party-and-party costs to the date of the service of the offer and to costs calculated at double that rate, but not double disbursements, from that date to the date of judgment.

b) si le demandeur n'a pas gain de cause lors du jugement, le défendeur a droit aux dépens partie-partie jusqu'à la date de signification de l'offre et, par la suite et jusqu'à la date du jugement, au double de ces dépens mais non au double des débours.

**Conditions**

**Conditions**

(3) Subsections (1) and (2) do not apply unless the offer to settle

(a) is made at least 14 days before the commencement of the hearing or trial; and

(b) is not withdrawn and does not expire before the commencement of the hearing or trial.

(3) Les paragraphes (1) et (2) ne s'appliquent qu'à l'offre de règlement qui répond aux conditions suivantes:

a) elle est faite au moins 14 jours avant le début de l'audience ou de l'instruction;

b) elle n'est pas révoquée et n'expire pas avant le début de l'audience ou de l'instruction.

[14] Rule 1.1 of the *Rules* states that when there is an inconsistency between the *Rules* and an Act of Parliament, the Act prevails to the extent of the inconsistency. As a result, if there was a conflict between the costs provisions of the *Act* and those in the *Rules*, the *Act's* provisions must prevail. However, as discussed further below, I conclude that there is no inconsistency between the provisions. Rather, they are complementary and reflect similar principles, with the *Rules* helping inform the application of section 39 of the *Act* in particular. Ultimately, however, sections 29 and 39 of the *Act* apply and form the basis for a costs award in respect of proceedings brought under that statute.

## V. The Parties' Positions

### A. *The Plaintiff's position*

[15] The Plaintiff claims a total amount of \$1,429,060.51 in costs, pursuant to sections 29 and 39 of the *Act*. The Plaintiff submits that he is entitled to recover costs in the amount of

\$130,555.33, pursuant to section 29 of the *Act*, costs in the amount of \$1,289,725.42 for legal fees and experts' fees in accordance with subsection 39(2) of the *Act*, and supplementary costs incurred in preparation of his cost submissions in the amount of \$8,779.76, pursuant to section 39 of the *Act*. In the alternative, the Plaintiff requests costs in the reduced amount of \$1,086,750, as was proposed in his offer to the Defendant to settle, and payment of the Plaintiff's supplementary section 39 costs in the amount of \$8,779.76.

[16] The Plaintiff submits that his costs are reasonable and arise because of a) his legal entitlement to advance claims for compensation arising from the partial taking of his land by the Crown, b) the errors contained in the 2010 Stantec Report which were never fully acknowledged by the Crown, and c) the series of procedural steps taken by the Crown which greatly increased the costs of litigation.

[17] The Plaintiff relies on *Toronto Area Transit Operating Authority v Dell Holdings Ltd.*, 1997 CanLII 400 (SCC) ("*Dell Holdings*"), to submit that when land is taken, an owner is entitled to full, fair and just compensation including costs. In *Dell Holdings*, the Supreme Court of Canada stated that Ontario's *Expropriation Act*, RSO 1990, c E 26 is a remedial statute that "must be given broad and liberal interpretation consistent with its purpose" (at para 21), in order to "fully compensate a land owner whose property has been taken" (at para 23). The Plaintiff also cites the Federal Court's decision in *Desjardins v Canada (National Capital Commission)* (No. 2) 1982 CarswellNat 703 ("*Desjardins*"), to support the position that costs in expropriation cases are "a breed unto themselves" (at para 13) and that he is entitled to ascertain his legal rights as a consequence of the Crown's action, and is entitled the costs of the preparation of his case.

**(1) Section 29 Costs**

[18] The Plaintiff submits that the intention of section 29 of the *Act* is to wholly indemnify an expropriated party for reasonable costs incurred prior to the commencement of proceedings (*Harbour Brick Co. v R.*, 1987 CarswellNat 1132 (FCTD) (“*Harbour Brick*”) at para 14). Given the significant effort the Plaintiff spent negotiating with the Crown prior to commencing the action; the Plaintiff submits he is entitled to costs in the amount of \$130,555.33. The Plaintiff’s costs incurred up until the filing of his Statement of Claim for *Milne* on June 20, 2016 consist of: a) legal fees from Reuter Scargall Bennett LLP from October 31, 2011 to December 6, 2012 in the amount of \$17,350.43, b) legal fees from Borden Ladner Gervais LLP from May 29, 2013 to June 20, 2016 in the amount of \$52,294.34, c) appraisal fees for services provided by Metrix Realty Group Inc. in the amount of \$8,898.75, and d) consultant fees from Senes Consultants/Arcadis Canada Inc. in the amount of \$ 52,011.81.

**(2) Section 39 Costs**

[19] The Plaintiff submits that in *Milne*, this Court determined that the expropriated lands were worth \$2,100 at the time of taking and found that the Plaintiff is entitled to \$1,100 in additional compensation for the expropriated lands. Since this amount exceeds “the total amount of any offer made under section 16” of the *Act*, the Plaintiff states that, pursuant to subsection 39(2) of the *Act*, he is entitled to the whole of his costs of and incident to the proceedings on a solicitor and client basis, in the amount of \$1,289,725.42, consisting of \$1,055,693.99 in legal fees and disbursements, and \$234,031.43 in expert fees.

(a) *Legal fees*

[20] The Plaintiff seeks his legal fees in the amount of \$1,055,693.99, inclusive of disbursements in the amount of \$28,702.82. The Plaintiff submits that the costs are proportionate and reasonable given this was a complicated case that took five years to litigate, including two mediation sessions and a nine-day trial with multiple experts. The Plaintiff submits that courts have found that even if they are unsuccessful, expropriation claims that are reasonably brought are entitled to the same cost treatment as successful claims (citing *D.D.S. Investments Ltd. v Toronto (City)*, 2012 CarswellOnt 10991 (SCJ) at para 43, and *Henery v London (City)*, 2012 CarswellOnt 17509 (OMB) (“*Henery*”) at paras 28-31). As in *Henery*, a case in which many of the procedural issues for which the claimant sought costs were a result of the defendant’s “vigorous opposition,” the Plaintiff argues that the Crown in this case initiated proceedings and took steps that were unreasonable, which resulted in significant costs, amounting to approximately \$225,500 in extra legal fees. But for the unnecessary positions taken by the Crown, the Plaintiff submits his legal costs under section 39 would have been approximately \$802,000, plus disbursements of \$28,702.82.

[21] In addition, the Plaintiff submits the Defendant lacked transparency and collegiality in its approach to litigation. The Plaintiff notes that on the eve of the trial, the Defendant objected to the admissibility of the entirety of the parties’ expert evidence pertaining to the assessment of noise and vibration on the Plaintiff’s residence caused by the railway corridor. The Plaintiff asserts that the Defendant’s motion was highly relevant to the key issues to be determined at

trial, yet the Defendant chose not to bring its motion beforehand, thus derailing the agreed upon schedule before the trial had even begun.

(b) *Expert fees*

[22] The Plaintiff seeks the cost of his noise and appraisal fees in the amount of \$234,031.43. The Plaintiff relies on *Charlesfort Developments Limited v Ottawa (City)*, 2021 ONCA 542 (“*Charlesfort*”), in which the Court of Appeal of Ontario accounted for the complexity of the proceedings and the potential impact of the claim when determining the reasonableness of expert fees (at para 5). The Ontario Court of Appeal in *Charlesfort* found: “a party is entitled to be paid appropriate amounts for expert reports reasonably necessary for the conduct of the proceeding, regardless of whether the expert is called to give evidence” (at para 6).

(c) *Settlement offers and efforts to settle*

[23] The Plaintiff argues that there is no reason to reduce the amount of his claimed fees on the basis of any settlement offer. In reply to the Defendant’s position that a settlement offer pursuant to Rule 420 of the *Rules* that exceeded the compensation awarded is contained in the letter sent to the Plaintiff on January 28, 2021 (settlement offer of \$450,000), the Plaintiff submits that this letter was not a proper settlement offer as the Defendant failed to address the Plaintiff’s response, sent on February 8, 2021. In the response, the Plaintiff (a) pointed out that the release required as a condition of the offer was improper because it went far beyond the confines of this action, as it included a release of “...any and all claims arising out of or



connected in any way with the corridor improvement project”; and (b) asked that a proper offer be made, which was ignored by the Defendant.

[24] The Plaintiff also submits that the offer in the January 28, 2021 letter did not exceed the compensation awarded because the Defendant was informed in November 2019 that the Plaintiff’s costs to that date were approximately \$545,000. The letter asked the Defendant to separate the issue of compensation and costs to avoid trial and the escalation of costs. This proposal, too, was ignored.

[25] Conversely, the Plaintiff submits that he made reasonable efforts to settle by a) engaging in settlement discussions with Public Works for approximately 4 years before the Crown brought its summary judgment motion; b) making two offers to settle after the commencement of the action; and c) engaging fully in the mediation process, which the Defendant did not. The Plaintiff also submits that his offer to settle on costs includes significant discounts in a genuine attempt to resolve his claim. The Plaintiff contends that the Crown failed to make a genuine effort to resolve the cost claim, and simply rejected his settlement offers.

B. *The Defendant’s position*

[26] The Defendant states that sections 29 and 39 of the *Act* are subject to a finding of the Court that the expenses incurred are “reasonable,” and submits that the trial is the result of unreasonable choices freely made by the Plaintiff. As such, the Defendant submits that an expropriated owner is not automatically entitled to the costs of preparing his case, as “the intent is to pay reasonable expenses” (*Harbour Brick* at para 26). The Defendant also notes that in

*Desjardins*, the Court referred the expropriated owner's costs back to a taxation officer (at para 123), thus demonstrating that *Desjardins* is not authority for making the expropriated owner "whole" as suggested by the Plaintiff.

[27] The Defendant submits that the costs claimed by the Plaintiff are unreasonable in light of the Plaintiff's failure to prove his claim for injurious affection and disturbance damages. The Defendant notes that the Plaintiff only received the \$1,100 he sought in additional compensation for the expropriated land, which the Plaintiff conceded was "minor" in comparison to the other damages he claimed. The Defendant proposes three alternative approaches to costs, discussed below, with their main position being that both parties should bear their own costs (Option 1).

**(1) Option 1: parties bear their own costs**

[28] The Defendant proposes that given the divided success in this case (the Plaintiff had success on the summary judgment motion and summary judgment appeal, and the Defendant successfully defended the \$1.4 million compensation claim at trial), a fair cost award is for each party to bear their own costs and for no award to be made for costs under sections 29 or 39 of the *Act*. The Defendant submits that the Plaintiff should not be rewarded for his "consistently unreasonable approach" to this action, including his refusal to accept general offers to settle made prior to the expropriation and during the proceedings. The Defendant also asserts the Plaintiff engaged in sharp practice, as the Plaintiff sought to file lengthy written submissions for closing arguments on the final day of trial without first notifying the Defendant or the Court.

**(2) Option 2: Plaintiff is awarded reasonable costs under sections 29 and 39 of the Act, in accordance with the Federal Court Tariff Column IV, up to the date of the Defendant's offer under Rule 420 of the Rules**

[29] The Defendant submits that, given the outcome of the trial and the Plaintiff's refusal to accept the Defendant's Rule 420 offer to settle, the Plaintiff is not entitled to the whole of his costs incurred. To support this position, the Defendant cites the costs taxation decision in *C & B Vacation Properties v. Canada*, 1997 CanLII 5863 (FC) ("*C & B Vacation Properties*"):

[7] There are cases that set out an academic analysis of different categories or scales of taxation, and I should not contribute more to that discussion. Here, plaintiffs are entitled to full compensation of expenditures that were reasonable at the time they were incurred. The criteria to consider in establishing whether an expenditure is reasonable are outlined in *Camp Robin Hood v. Canada* [1982] 1 F.C. 24 at 27, 28. They are quoted by Taxing Officer Lamy in *Temkin Inc. v. Canada* (A-641-92) as follows: "(1) the amount of the offer, (2) the amount of the award, (3) the complexity of the issues involved, (4) the skill and competence required to present the issues, (5) the experience of solicitors and counsel, (6) the time expended on preparation, and (7) the fees allowed in ... Tariff B ... as a possible comparable guide."

[8] This approach does not amount to a "Crown cheque made out in blank" (*Harbour Brick*). As stated in *Singer v. Singer* 1975 CanLII 662 (ON SC), [1975] 11 O.R. (2d) 234 at 241: "For instance, the retaining of two or more counsel where only one was necessary, the employment of several consultants such as engineers, appraisers, architects, where only one or two were necessary, and that kind of thing should not lead to increased liability on the losing party to pay his opponent's costs, even on the solicitor-and-client or so-called full indemnity basis ...."

[Emphasis added.]

[30] The Defendant proposes that the Court take into account the following to establish whether an expense was reasonable under subsection 39(2) of the Act:

(1) the amount of the offer in expropriation cases (*The Crown's all inclusive offer of \$450,000*);

(2) the amount of the award (*\$1,100 awarded to the Plaintiff*);

(3) the complexity of the issues involved (*The issues were only complex because the Plaintiff attempted to create liability where there was none, including seeking compensation for a house that was not taken and exclusive and improper reliance on provincial jurisprudence when there was a substantial body of federal jurisprudence on point*);

(4) the skill and competence required to present the issues (*The case was only complex because of the Plaintiff's argument about perceptible increase in noise, despite the CTA finding and his obfuscation of the legal test for proving diminished market value under s. 25*);

(5) the experience of solicitors and counsel (*The Plaintiff engaged up to 3 lawyers at the same time*);

(6) the time expended on preparation; and,

(7) the fees allowed in any applicable tariff (*In this instance, resort can be had to Tariff B, the party and party tariff as a possible comparable guide in certain circumstances*).

[31] The Defendant submits that the Plaintiff unreasonably claims almost double the legal costs incurred by Canada: \$1,064,473.75 (excluding experts and disbursements) versus Canada's \$468,622.24 in legal costs for the action and summary judgment motion and \$30,218.92 for the appeal. The Defendant also submits that if the Court decides to compensate for trial costs, the Plaintiff's claim of over \$294,000 for experts is unreasonable and should be reduced.

[32] The Defendant submits that the Plaintiff's costs should be referred to the official responsible for taxing costs in the Court, with directions on which of the categories of costs should be included. The Defendant proposes that the high end of Column IV is appropriate.

[33] Alternatively, the Defendant provided a proposed bill of the Plaintiff's costs post-commencement of the action and up to the date of the Defendant's Rule 420 offer on January 28, 2021. Calculated under Tariff B, Column IV, the draft bill of the Plaintiff's costs concludes that reasonable and permitted recoverable legal costs are \$46,612.50 (inclusive of H.S.T.), and the reasonable and recoverable disbursements and expert costs are \$122,600.03. The Defendant explains that the total costs, including reasonable disbursements, combined with the compensation adjudged are significantly less than the Defendant's \$450,000 offer to settle, made on January 28, 2021.

**(3) Option 3: Lump sum of 25% of reasonable costs**

[34] The Defendant proposes a lump sum award calculated at 25% (the low end of the range identified in federal jurisprudence for determining a lump sum) of the sum of the Plaintiff's actual, reasonable costs, excluding unreasonable expenses. The Defendant states that requests for lump sum awards should be accompanied by a Bill of Costs and an affidavit in respect of disbursements outside the knowledge of the solicitor, but submits that neither of these have been provided by the Plaintiff in this case.

**VI. Analysis**

**A. *Section 29 Costs***

[35] Pursuant to subsection 29(1) of the *Act*, the Plaintiff ought to receive the costs *reasonably* incurred by him before the proceedings commenced. This includes the legal, appraisal and other

costs reasonably incurred by the Plaintiff in assessing his claim for compensation. I agree with the Plaintiff that the *Act*, like the Ontario *Expropriation Act*, is a remedial statute such that the Supreme Court of Canada's guidance that it "must be given a broad and liberal interpretation consistent with its purpose" of fully compensating a land owner applies, including in respect of the costs provisions (*Dell Holdings* at paras 21, 23; *Milne* at para 168). Nonetheless, subsection 29(1) of the *Act* is clear that recoverable pre-litigation costs are limited to those that are reasonable, to avoid the subsection becoming a "Crown cheque made out in blank" (*Harbour Brick* at paras 14, 26; *C & B Vacation Properties* at para 8).

[36] Further to the costs stated at paragraph 18 of this decision, with respect to the consultant fees, Senes Consultants/Arcadic Canada Inc. conducted a noise and vibration monitoring and modelling program to compare levels of noise and vibration to those predicted in the Screening Level Noise and Vibration Assessment (SLSVA) completed by Stantec in 2010 in support of the expansion project. I find that it was reasonable of the Plaintiff to seek out his own assessment of the effects the expansion project had on noise and vibrations on his property.

[37] I do not find the fees associated with the appraisal of the Plaintiff's property by Metrix Realty Group Inc. in the amount of \$8,898.75 to be reasonable and agree with the Defendant that the section 29 costs claimed by the Plaintiff improperly includes the Metrix invoice. I also find the legal fees claimed by the Plaintiff to be excessive and unreasonable, particularly given that the Plaintiff hired two separate law firms, leading to an overlap in work.

[38] I find that the Plaintiff is to be awarded the reasonable costs incurred prior to the commencement of the proceedings in the amount of \$104,306.15, representing Borden Ladner Gervais' fees and the Senes Consultants/Arcadis Canada Inc. consultant fees.

B. *Section 39 Costs*

[39] Subsection 39(1) of the *Act* does not expressly limit the recoverable costs of expropriation litigation to those that are reasonable. However, it provides that, subject to subsection 39(2) which I will turn to shortly, the costs of the proceedings are “in the discretion of the judge.” This discretion parallels the “full discretionary power” granted to the Court over the costs of proceedings by Rule 400(1) of the *Rules*. In my view, this inherently invokes notions of reasonableness (*Harbour Brick* at para 26) and the factors set out in Rule 400(3) of the *Rules*, while keeping in mind the fact that this is an expropriation case and the general interpretive principles dictated by the Supreme Court of Canada in *Dell Holdings*. In my view, subsection 39(1) is not inconsistent with the *Rules* with respect to costs, such that Rule 1.1 does not apply to exclude consideration of Rule 400(3) factors.

[40] My discretion to award costs is, however, potentially limited by the provisions pertaining to offers set out in subsection 39(2). These provisions are different in scope and nature to Rule 420 governing offers to settle and should be applied first to determine whether any of the conditions in subsection 39(2) dictate the amount of recoverable costs.

[41] To determine the costs payable by the Crown pursuant to subsection 39(2) of the *Act*, the provision requires me to determine whether the amount of the compensation adjudged exceeds

“the total amount of any offer made under section 16 and any subsequent offer made to the party in respect of that interest of right before the commencement of the trial of the proceedings.”

[emphasis added]. As can be seen, the subsection refers to consideration of both (i) offers made formally pursuant to section 16 of the *Act*, which must have particular features including that they not be conditional on providing a release and that they be based on an appraisal, and (ii) “any subsequent offer” made prior to trial. On my reading of the subsection, “any subsequent offer” does not need to be a section 16 offer, or else the inclusion of those words would be redundant.

[42] On or around January 24, 2012, the Defendant offered the Plaintiff \$1,000, in accordance with section 16 of the *Act*. In a letter dated June 13, 2016, the Plaintiff accepted the Defendant’s offer of compensation, but sought further compensation, as he was entitled to do. In *Milne*, I found that the expropriated lands were worth \$2,100 at the time of taking and found that the Plaintiff is entitled to \$1,100 in additional compensation for the expropriated lands.

[43] On January 28, 2021, before the commencement of the trial, the Defendant sent the Plaintiff an offer to settle the action for a sum of \$450,000, inclusive of all costs and interest. The Plaintiff contends that the January 28, 2021 letter was not a proper settlement offer as it failed to address the Plaintiff’s response letter dated February 8, 2021, which pointed out that the release required as a condition of the offer was improper for going beyond the confines of the action.



[44] I agree with the Plaintiff that the January 28, 2021 offer was not an offer made in accordance with section 16 of the *Act*. However, I find that the offer to settle made to the Plaintiff on January 28, 2021 is considered a “subsequent offer made to the party in respect of that interest or right before the commencement of the trial of the proceedings,” as that expression is used in subsection 39(2) of the *Act*.

[45] As a result, while the amount of the compensation adjudged does exceed the total amount of the offer made by the Defendant under section 16 of the *Act*, I find that the amount of the compensation adjudged does not exceed the subsequent offer made to the Plaintiff.

[46] As such, subsection 39(2) of the *Act* requires that the whole of the party’s costs of and incident to the proceedings be paid by the Crown (but not on a solicitor and client basis), unless I find the amount of compensation claimed by the party in the proceedings to be unreasonable. In the present case, the Plaintiff claimed \$967,534 in compensation for disturbance damages or, alternatively, \$247,100 in compensation for injurious affection damages. In *Milne*, I dismissed both of these claims.

[47] In my view, the amounts claimed by the Plaintiff in the proceedings were not reasonable. The Plaintiff claimed compensation for disturbance damages for the following losses (*Milne* at para 177):

- (a) the cost to relocate his residence and the associated moving costs;

- (b) the cost of relocating the Plaintiff's family for 13 months beginning in late 2012, and the increased costs of farm operations during that period;
- (c) the increased cost to operate the farm once the new residence is constructed, which will be located further back from the railway corridor and the farm improvements; and,
- (d) the cost to build a temporary sound barrier.

[48] In *Milne*, I found that the need to relocate the Plaintiff's residence away from the railway corridor due to an increase in sound was not a natural and reasonable consequence of the expropriation. I also found that the nature and character of the Plaintiff's residence and the Plaintiff's property were not fundamentally altered by the expropriation and the expansion of the railway corridor. Before the expansion project, the Plaintiff's residence was a rural dwelling on farmland that was located directly adjacent to an already busy railway corridor; post-expansion, the corridor was somewhat busier and the traffic somewhat closer, but the disturbance from the railway corridor was not perceptibly greater. I appreciate that there is a difference between a claim that is simply unsuccessful and one that is unreasonable. However, in the present circumstances, given the size of the claim made, the substantial disparity between the claim made and the compensation received, and the tenuous basis for the asserted claim for disturbance damages, I do not find that the Plaintiff's disturbance damages claim was reasonable.

[49] With respect to the Plaintiff's compensation claim for injurious affection damages, the Plaintiff claimed that the expropriation and the expansion of the railway corridor have decreased

the value of his remaining property. As discussed in *Milne*, I do not find this claim to be reasonable, as it was largely based on the illogical assumption that the Plaintiff's residence is only suitable for a rental property (at paras 197-198).

[50] I therefore find that the Plaintiff's claims for compensation were unreasonable. Pursuant to subsection 39(2) of the *Act*, I am therefore not required to direct that "the whole of the party's costs of an incident to the proceedings be paid by the Crown."

[51] I am left to determine what portions of the Plaintiff's costs should be payable, if any.

[52] In my view, much of the costs incurred by the Plaintiff in advancing his position could have been avoided if he had accepted the Defendant's reasonable offer from January 28, 2021, which well exceeded the compensation payable to the Plaintiff for the expropriated land. Given this significant offer, the trial as a whole may not have been necessary. I do not find the Plaintiff's section 39 costs to be reasonable. I agree with the Defendant's submission that the Plaintiff is to be awarded reasonable costs from the commencement of the action (the Statement of Claims was filed on June 20, 2016) up to the date of the Defendant's offer (January 28, 2021), and no costs thereafter, including the Plaintiff's trial costs.

[53] Based on the bills of costs of the parties, and considering the foregoing factors and those set out in Rule 400(3) of the *Rules*, I find that the Plaintiff is to be awarded legal costs in the amount of \$46,612.50 and expert costs in the amount of \$122,600.03 pursuant to section 39 of the *Act*.

**VII. Conclusion**

[54] In light of the above, I award the Plaintiff \$273,518.68 in costs, payable by the Defendant forthwith.

**SUPPLEMENTARY JUDGMENT in T-967-16**

**THIS COURT'S JUDGMENT** is that the Defendant shall pay the Plaintiff the all-inclusive amount of \$273,518.68, plus post-judgment interest at a rate of 5% per annum from the date of this Judgment.

"Shirzad A."

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-967-16

**STYLE OF CAUSE:** SHAWN SOMERVILLE MILNE v HER MAJESTY  
THE QUEEN

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE BETWEEN  
TORONTO AND OTTAWA, ONTARIO

**DATE OF HEARING:** MARCH 22, 23, 24, 25, 29, 30, 31, 2021  
APRIL 1, 27, 2021

**SUPPLEMENTARY  
JUDGMENT:** AHMED J.

**DATED:** JANUARY 19, 2022

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