

**Local Planning Appeal Tribunal**  
Tribunal d'appel de l'aménagement  
local



**ISSUE DATE:** December 06, 2019

**CASE NO(S):** LC140040

The Ontario Municipal Board (the "OMB") is continued under the name Local Planning Appeal Tribunal (the "Tribunal"), and any reference to the Ontario Municipal Board or Board in any publication of the Tribunal is deemed to be a reference to the Tribunal.

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

Claimant:	William R. Hume, Marlene Hume & Gord Hume Inc.
Respondent:	Ministry of Transportation
Subject:	Land Compensation
Property Address/Description:	Part Lot 31, Concession 3, Beverly, City of Hamilton, as in VM206630
Municipality:	City of Hamilton
OMB Case No.:	LC140040
OMB File No.:	LC140040
OMB Case Name:	Hume v. Ontario (Transportation)

**Heard:** July 19, 2017 in Toronto, Ontario

**APPEARANCES:**

**Parties**

Rayman Beitchman LLP

Gowling WLG

Ministry of Transportation

**Counsel**

Shane Rayman and Conner Harris

Shane Rayman and Conner Harris

Robert Lawson

**DECISION DELIVERED BY STEFAN KRZECZUNOWICZ AND ORDER OF THE TRIBUNAL**

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## **INTRODUCTION**

[1] This was a hearing into claims by Rayman Beitchman LLP and Gowling WLG (the “Claimants”) for legal, appraisal and other costs incurred in the course of their work to assist William R. Hume, Marlene Hume and Gord Hume Inc. (“Hume”) in the City of Hamilton (the “site”).

[2] The statutory authority responsible for paying compensation in this case is the Ontario Ministry of Transportation (the “Ministry”).

[3] The Tribunal heard testimony from Shane Rayman, representing the Claimant Rayman Beitchman LLP, and John Doherty, representing the Claimant Gowling WLG.

## **BACKGROUND**

[4] The background to this case begins with the expropriation in 2011 of a gas station on the site to facilitate a road/highway realignment and the construction of a nearby roundabout. After four years of negotiation before the Board of Negotiation, and mediation before the then Ontario Municipal Board, Hume and the Ministry agreed on September 3, 2015 to total compensation for Hume in the amount of \$712,810 plus interest and costs.

[5] The compensation, which covered the market value of the expropriated lands, the loss in value to Hume’s home and land, Hume’s business losses, and other damages, was paid to Hume by the Ministry in March 2016. Payment of interest on the compensation amount was made in October 2016. The Ministry has yet to reimburse any legal or other expropriation-related costs to the Claimants.

## ISSUES

[6] The parties agree that the general intent of the compensation provisions in the *Expropriations Act* is to make expropriated owners “economically whole”, not just for property taken during an expropriation but also for costs reasonably incurred during the expropriation process. They also agree that costs are to be reimbursed on a full indemnity—or 100% cost recovery—basis.

[7] The disagreement centres on:

- a. the eligibility of some of the Claimants’ costs, specifically:
  - i. certain costs in the “Gowling and Experts Bill of Costs to 2012” that the Ministry claims were not incurred for the purposes of determining compensation; and
  - ii. certain costs in the “Rayman Beitchman and Experts Bill of Costs to April 2016” that the Ministry claims are based on excessive hourly rates and include unreasonably excessive time spent.
- b. “post-judgement” or supplementary interest costs of Rayman Beitchman LLP and experts calculated for the periods April 13, 2016 to June 30, 2017 and July 1, 2017 to July 20, 2017 (the day after this hearing).

[8] During the hearing, the Ministry withdrew its opposition to interest claims by experts incurred between April 13, 2016 and June 30, 2017 and set out in Exhibit 3.

### ISSUE 1 – HOURLY RATES OF SHANE RAYMAN

[9] The Ministry contended that legal fees charged to Hume by Mr. Rayman were excessive, as they were based on an hourly rate that was higher than the usual market rate for such services. It noted that Mr. Rayman’s hourly rate increased by more than 30% between 2012, when Mr. Rayman was first retained by Hume, and 2017; a much

higher rate of increase than the 12% increase in inflation, as measured by the Consumer Price Index (“CPI”), over the same period.

[10] The Ministry also noted that Mr. Rayman’s hourly rate was very similar to that of Mr. Doherty, who is the more senior lawyer. Mr. Doherty was called to the bar in 1984; Mr. Rayman in 2001.

[11] Mr. Rayman defended his hourly rates as being commensurate with his expertise, experience, seniority, and performance. In his view, his rates have always been very competitive with market rates for experienced legal services. They were agreed to by Hume under a formal retainer and have not been challenged by other public bodies. Indeed, Mr. Rayman testified that the Ministry has itself agreed to his rates on previous occasions.

[12] Mr. Rayman is a Toronto-based lawyer. Mr. Doherty, who works out of an office in Kitchener, testified that hourly rates for legal services are generally higher in Toronto than in other parts of the Province, a reflection of higher overhead costs and market demand. Mr. Doherty has in the past sat on the management committee at Gowlings WLG, where his duties included reviewing lawyers’ compensation and rates. He supported Mr. Rayman’s hourly rates as a reasonable reflection of the market.

[13] I find Mr. Rayman’s hourly rates to be appropriate for the purposes of fixing costs in this appeal. My reasons for this finding are as follows:

- a. Mr. Rayman’s rates were set by a retainer agreement with Hume and the terms of the agreement were not changed during the course of the retainer (see Exhibit 4b, Tab 56). The rates were therefore, in my view, transparently established and consistently applied. Moreover, Mr. Rayman affirmed that he never alters his hourly rate based on who he works for; the same hourly rate is charged to all his clients.

- b. Mr. Rayman's CV, backed up by his testimony, make clear that he has accumulated specialist knowledge and considerable experience in expropriations law. The vast majority of his 16-year career has focussed on expropriations and related litigation and he is a senior litigator in good standing in his profession. He has undertaken more than 750 individual retainers for public and private sector clients. He has served as President of the Ontario Expropriation Association, and he has authored more than 10 papers on expropriations topics (see Exhibit 4b, Tab 97).
- c. Mr. Rayman is a founding partner of Rayman Beitchman LLP, a firm specializing in expropriations law. He and his partner, Jason Beitchman, run the firm. Mr. Rayman's professional liabilities and responsibilities therefore extend well beyond providing direct legal services to clients in a manner more befitting a senior lawyer at a large law firm.
- d. Mr. Rayman's hourly rates have not been challenged by other expropriation authorities during expropriation proceedings, including the Cities of Toronto and Hamilton, Regions of York and Durham, and Metrolinx (for examples of his retainers see Exhibit 4b, Tabs 25-50). A retainer of Mr. Rayman's submitted into evidence as Exhibit 4b, Tab 57, makes clear that his hourly rate was, in 2015, below the range of rates for experienced legal practitioners estimated by his client (a Regional municipality in the Greater Toronto Area).

[14] I am not persuaded by the Ministry's contention that the escalation of Mr. Rayman's hourly rate during the course of his retainer with Hume was excessive. Mr. Doherty's description of how hourly rates are set at law firms—typically based on annual reviews of the market, the supply and demand of work at a firm, inflation and cost of living, and an individual's performance, expertise, experience, value to the firm, and other intangibles—was thorough and based on first-hand knowledge. His observations that an experienced lawyer's rates tend to climb quickly in the early years of seniority, then plateau as a lawyer gets to be very senior, and that rates in Toronto

tend to be higher than in other parts of Ontario, were supported by concrete examples (see example, Exhibit 1, Tab AA) and were not challenged by contradictory evidence.

[15] Finally, I am not persuaded by the Ministry's claim that the rate of inflation is a particularly relevant benchmark in this case. In reviewing Mr. Rayman's credentials, I am in no doubt that his experience and efficiency increased faster than CPI in the years 2012 to 2017.

## **ISSUE 2 – ELIGIBILITY OF COSTS**

[16] Gowling WLG was originally retained by Hume in April 2009 and worked to establish compensation for the expropriation until 2012, when Rayman Beitchman LLP took over the file.

[17] The Ministry claimed that the overall time spent on compensation matters by Rayman Beitchman LLP was excessive. It pointed to time spent on statements of claim—Gowlings produced a draft statement of claim in 2012; Rayman Beitchman produced a final statement of claim in 2014—background research, and organization of documents during the transition of responsibilities in 2012 as an unnecessary duplication of effort.

[18] The Ministry also asserted that some of the costs claimed by Gowling and its experts were not incurred for the purposes of determining compensation. It highlighted a plan by Hume to redevelop part of the site for a Tim Hortons restaurant that predated the expropriation and was, according to the Ministry, unrelated to it. In the Ministry's view, time spent on this redevelopment proposal was incorrectly included in the Gowling bill of costs.

[19] The Claimants responded that all costs claimed are eligible for compensation as they represent actual time spent on what was a very complex expropriation. They

produced detailed time dockets for individuals and by task to support their assertion that their claims were reasonable. In the case of the Tim Hortons redevelopment proposal, Mr. Doherty testified that there was some overlap between the proposal and the expropriation. His view was that costs associated with that overlapping work are eligible for compensation.

[20] Acknowledging that the dockets cannot always be clear on why a certain amount of time was spent on any one task, or on whether all time spent represents actual eligible costs, the Claimants proposed an “anti-quibbling reduction” of 5% on all professional legal fees in both firms’ bill of costs.

[21] I have carefully reviewed the dockets set out in Exhibit 7 (for Rayman Beitchman) and Exhibit 1 (for Gowling). I find that they represent a very detailed accounting of time spent, a clear and logical progression of the work undertaken by each firm, and an appropriate balance of work between lawyers and experts, as well as between senior lawyers, junior lawyers, and clerical staff on tasks. The dockets support Messrs. Rayman and Doherty’s description of the sequence of work done for Hume and the key milestones reached during the expropriation process. Altogether, I find that the dockets support the Claimants’ position that the costs were reasonably incurred.

[22] That said, I accept that the dockets are sometimes unclear on how much of the total time spent on the Tim Hortons proposal was included in the Gowling bill of costs. This is particularly true of the time spent by Edward Fothergill, the planner who oversaw the proposal as well as the planning matters associated with the expropriation (see Exhibit 1, Tab 1 A-J). However, I see no evidence that the accounting of Mr. Fothergill’s time was unreasonable, especially given the obvious difficulty in separating time spent between two highly inter-related processes. In any case, I am satisfied that any incorrectly billed time would be less than is represented by the 5% discount in professional fees offered by the Claimants.

[23] My finding on this issue is further informed by evidence that demonstrates that:

- a. This was a very complex expropriation. The site contained a home, a gas station, a repair garage, a towing yard, a gas/diesel delivery operation, a storage shed, and a restaurant. It had four vehicular entrances, a pond, and a provincially significant wetland to the immediate rear. As such, the expropriation engaged planning issues, such as zoning lines on and off-site, safety and design issues that necessitated transportation and civil engineering expertise, and environmental issues such as flooding.
- b. The determination of compensation was also complex, engaging as it did the market value of the property as well as injurious affection and business losses.
- c. The work undertaken by the law firms included mitigation activities and lengthy negotiation, mediation, and adjudication over several years. Though several tasks proved redundant—Gowlings 2012 draft statement of claim for example—my view is that decisions to undertake the work were at the time both prudent and, more often than not, necessary.
- d. The work undertaken by the Claimants was punctuated by requests for substantial disclosure of documents by the Ministry and many unnecessary delays. Based on the detailed correspondence of Rayman Beitchman provided in Exhibit 3, Tabs 36-52, I am satisfied that the Claimants made significant efforts to expedite the process; the delays were unequivocally not the fault of either Hume or the Claimants.

[24] Finally, and importantly, I note that excepting the Tim Hortons proposal, the Ministry provided very few instances where specific costs were incorrectly billed. The Ministry did provide me with proposed cost reductions for various tasks. However, these reductions were not supported by much more than speculation that they were unreasonable. Ultimately, the Ministry's proposals were of little assistance to me in my effort to fix costs.



### ISSUE 3 – “POST-JUDGEMENT” INTEREST

[25] The purpose of including interest in compensation payments is to allow Claimants to be made “whole” by ensuring that costs that are rightly compensable are paid out in current dollars. The parties agree that interest is appropriate in this case.

[26] However, the start date for the calculation of interest is disputed. The Ministry claims that interest should apply only from the date this Tribunal fixes costs, that is the date of this Tribunal’s decision. The Claimants take the view that interest should apply from the date of the settlement (September 3, 2015).

[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.

### ORDER

[29] Pursuant to s. 32 of the *Expropriations Act*, I order that costs in this case be fixed so as to include:

- a. All costs identified in the “Gowling and Experts Bill of Costs” to 2012 (Exhibit 1) less 5% of all professional legal fees. I direct Mr. Doherty, who

acknowledged a double counting of costs included on pp.1-2 of Exhibit 1, to further the costs in Exhibit 1 so as to correct this double counting. The reduction for double counting is to be made over and above the 5% reduction in fees.

- b. All costs included in the “Gowling Supplementary Bill of Costs As Amended” in Exhibit 8 *less* 5% of all professional legal fees.
- c. All costs set out in the “Rayman Beitchman and Experts Bill of Costs to April 2016” (Exhibit 2) *less* 5% of all professional legal fees *less* \$4,043 identified in Exhibit 2, Tab 12, which represent incorrect double counting of eligible costs.
- d. All costs set out in the “Supplementary Bill of Costs of Rayman Beitchman Including Supplementary Interest Costs of Experts, April 13, 2016 – June 30, 2017” (Exhibit 3) *less* 5% of any professional legal fees.
- e. All costs set out in “Supplementary Bill of Costs of Rayman Beitchman July 1, 2017 – July 20, 2017” (Exhibit A) *less* 5% of any professional legal fees.
- f. All interest on costs identified in Exhibit 3 and Exhibit A calculated at the prescribed rate of interest and extending from April 16, 2016 to the date the Ministry makes final payment of compensation to the Claimants.

*“Stefan Krzeczunowicz”*

STEFAN KRZECZUNOWICZ  
MEMBER

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**Local Planning Appeal Tribunal**

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