

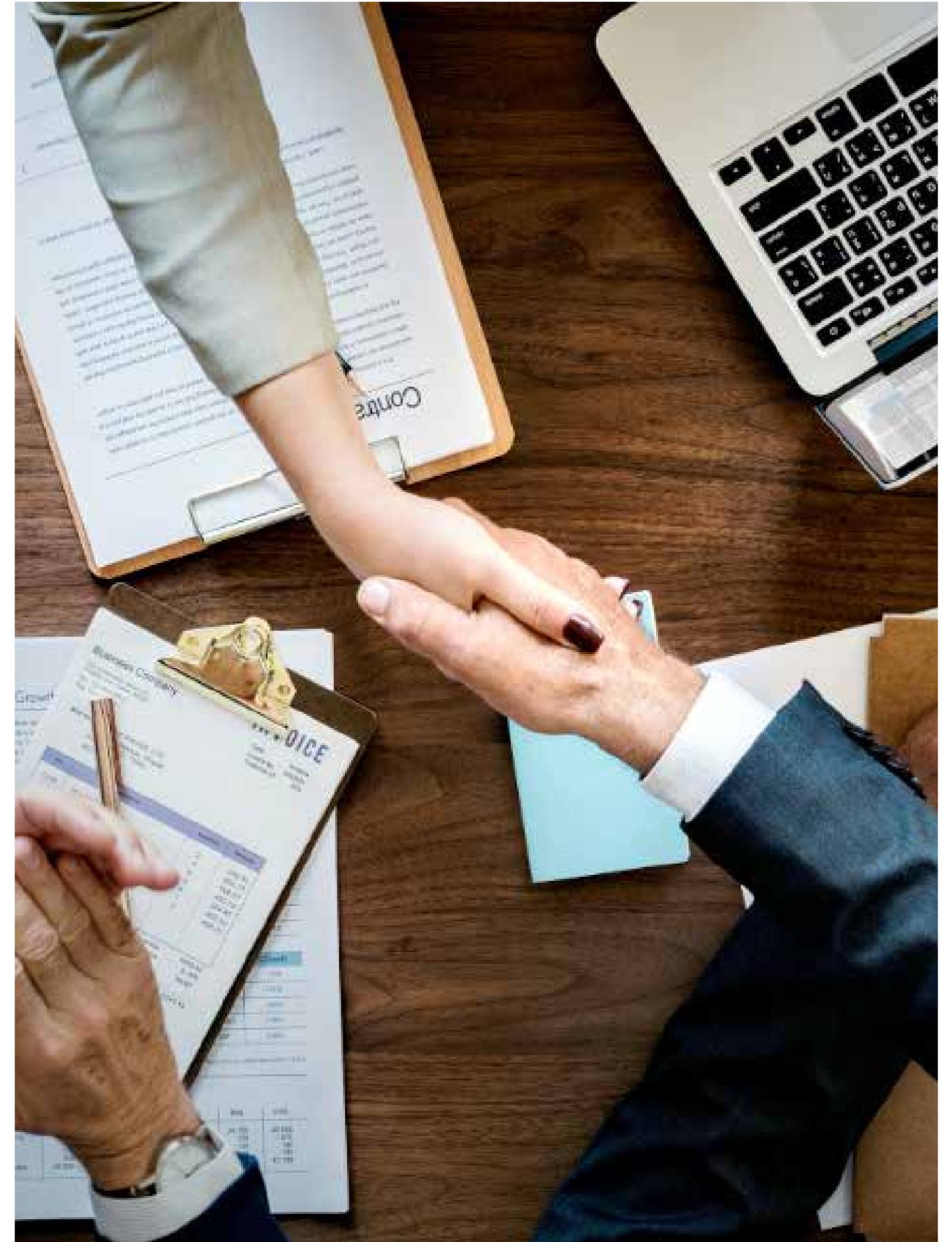
Managing Expectations: Claiming Executive Time Under the Ontario *Expropriations Act*

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Running a business comes with its own set of challenges – juggling staffing needs, meeting customers’ expectations, balancing cash flows, planning for future growth, and so on. Now, throw an expropriation into the mix and business owners can find themselves inundated with expropriation related activities and proceedings, which can divert their attention away from running their business.

From time-to-time, the Ontario Municipal Board (“OMB”)¹, the Ontario Superior Court of Justice and the Ontario Court of Appeal have awarded compensation for lost executive time. The premise for compensating a claimant for lost executive time is that the owner is diverting resources away from the business to manage and attend expropriation related matters. However, as observed in various decisions summarized below, the difference between the compensation claimed and the amount awarded is quite significant.

To assist in understanding the considerations involved in claiming a loss of executive time under the Ontario *Expropriations Act*, we have provided a summary of noteworthy decisions and highlighted the various factors, which were considered in determining a successful or denied award. Please note that this summary is not a comprehensive list of all relevant case law and/or exhaustive list of the various factors considered in the following decisions.



CASE NAME	BRIEF SUMMARY OF CASE	LOSS OF EXECUTIVE TIME	
		CLAIM	AWARD
<i>Naidal Incorporated v. Owen Sound (City) 2017 CarswellOnt 15626</i>	In the absence of time dockets, logs or any exact hours to quantify this claim, the OMB allowed compensation given the length and duration of the expropriation proceedings (approximately 4 years). We note that while there were no details provided to identify how the claim was determined, the Board's decision to award this amount appears to be tied to the unique circumstance of this expropriation, triggered by the City's pre-expropriation trespass onto the Subject Property.	\$15,000	\$6,000
<i>D.D.S. Investments Ltd. v. Toronto (City) 2012 CarswellOnt 10991, 107 L.C.R. 164, 222 A.C.W.S. (3d) 962</i>	The Ontario Superior Court of Justice (Assessment of Costs Hearing) allowed the compensation of executive time of a fair and reasonable amount for attending to matters at the OMB. It is notable that executive time was provided as a cost rather than a disturbance damage and the assessment officer awarded costs less than seven times the total amounts assessed and allowed for Market Value, Injurious Affection and Disturbance Damages (\$86,000.00 vs. \$620,776.02). Had this cost been awarded as Disturbance Damage, it would have represented roughly one-fifth of the total awarded quantum. There were no details provided to identify how the claim and amounts awarded were determined.	\$50,000	\$20,000
<i>Paciorka Leaseholds Ltd. v. Windsor (City) 2009 CarswellOnt 7738, 99 L.C.R. 269</i>	The OMB assessed the reasonability of the claim for executive time for 796 hours, over 7 years, at \$100 per hour. This was supported by a time log detailing tasks and activities performed in relation to the expropriation (i.e. meetings with experts, city officials, lawyers, etc.). The OMB found that 1/3 of the time claimed was reasonable and the balance of the time was a duplication of efforts.	\$79,600	Approx. \$26,000
<i>Woodbine Realty Ltd. v. Toronto (Metropolitan) 1994 CarswellOnt 5323, 53 L.C.R. 255</i>	The OMB determined that between 1984 and 1986, 141 hours were spent on expropriation related matters and 236 hours were spent on a redevelopment proposal. Based on the average annual salary for middle management of \$74,836, the claimed value for compensation was prorated on an hourly basis. The OMB took the position that the lost executive time could have "otherwise have gainfully [been] used on the affairs of [the] business".	\$13,563	\$8,000
<i>Captain Developments Ltd. v. Ontario (Ministry of Transportation) 1993 CarswellOnt 5166, 50 L.C.R. 176</i>	The OMB awarded executive compensation on the basis that the amount and number of hours submitted for the claim appeared reasonable as there was "no suggestion that the claim is inflated" and "\$100 per hour seems not unreasonable for a person of his experience and responsibility".	\$26,865	\$26,865
<i>Lauzon v. City of Windsor 1974 CarswellOnt 1284, 7 L.C.R. 11</i>	The OMB granted consideration for the loss of executive time under Section 18(1)(b) of the Act for a period of 1.5 years related to finding new premises, mobilizing and arranging for the move, and promotion of a new location. However, the reasonability of the claim was questioned as the claimant failed to supply records and data to support the basis of his claim; and therefore, the original claim submission was reduced.	\$6,500	\$2,500

CASE NAME	BRIEF SUMMARY OF CASE	LOSS OF EXECUTIVE TIME	
		CLAIM	AWARD
<i>Gray Coach Lines Ltd. v. Hamilton (City) 1971 CarswellOnt 698, [1971] 2 O.R. 689, 19 D.L.R. (3d) 13, 1 L.C.R. 181</i>	The Ontario Court of Appeal affirmed the compensation awarded by the OMB for executive time spent by in-house legal staff involved in settling the claim.	\$708	\$708
<i>Moto-Match Centres Ltd. v. Toronto (Metropolitan) 1984 CarswellOnt 1869, 30 L.C.R. 326</i>	The OMB granted consideration for executive time based on 727 hours of executive time expended on relocation efforts and establishing the business. However, the reasonability of the hourly rate and number of hours claimed was determined to be inflated. The original claim was based on an hourly rate of \$25 per hour and the OMB found that historically the individuals were paid a rate of \$8.50 per hour and compensation was awarded for only 350 of the 727 hours claimed.	\$18,177	\$2,975
CLAIMS REJECTED UNDER THE ONTARIO EXPROPRIATIONS ACT			
<i>Foisy et al. v. City of Gloucester 1985 CarswellOnt 2158, 34 L.C.R. 350</i>	The OMB ruled that the evidence in this claim "falls short of supporting the claim". Much of the work claimed was determined by the OMB to be unrelated to the expropriation as the work was either performed on weekends or while the owner was on sick leave.	\$12,430	Nil
<i>Bernard Homes Ltd. v. York Catholic District School Board 2004 CarswellOnt 3008, [2004] O.J. No. 2650, 132 A.C.W.S. (3d) 277, 188 O.A.C. 115, 26 R.P.R. (4th) 240, 83 L.C.R. 176</i>	The Divisional Court dismissed the claimants cross-appeal, seeking \$21,000 in disturbance damages for executive time, thereby affirming the OMB's decision to reject this claim on the basis that there was no proof that time was lost. In this case, Bernard submitted a claim for its principals' time spent on redevelopment efforts between the expiry of an Option Agreement in 1997 and the expropriation in July 1998.	\$21,000	Nil
<i>Pitblado v. Oakville (Town) 2005 CarswellOnt 6382, 88 L.C.R. 121</i>	The OMB denied the wage claim for 3 Pitblado sons for "work done around the plaza over a number of years" on the basis that there was no evidence to support that wages were ever paid and the claim did not meet the definition of "executive time".	\$380,000	Nil
<i>Pitblado v. Oakville (Town) 2006 CarswellOnt 3950, 90 L.C.R. 316</i>	The OMB ruled that although the time spent attending the 80 day proceedings was "helpful in sorting out a particular detail", the OMB found that given the jurisprudence, claimants should not be compensated for time expended in pursuit of their claims. While the Board used its discretion to award the claimant \$5,000 for its claim, this number was determined, at least in part by Counsel for the Town of Oakville conceding that the Town could support cost award anywhere between \$0 and \$4,000.	\$50,640	\$5,000

As noted in the above decisions, claims for executive time have been awarded pursuant to a number of sections of the *Expropriations Act*,

- 13(2)(b) Damages attributable to disturbance;
- 18(1)(b) Owner's costs of finding premises to replace those expropriated; and
- 32 (1) Costs;

and for a variety of tasks undertaken by executives and in-house legal staff, such as:

- Finding new premises;
- Making arrangement for relocation;
- Promotion of new location;
- Dealing with problems arising from the construction works related to expropriation; and
- Preparations for hearings and discoveries, including meeting with lawyers and experts.

It is important to note that the relevant facts and circumstances of each case play a crucial role in determining and seeking compensation for executive time under the Act.

Although the actual amount of the award, if any, will be determined by the trier of fact, based on the decisions noted above, the following factors were often considered when evaluating the reasonableness of a claim for loss of executive time:

1. The reasonability of the number of executive hours being claimed;
2. The selection of an appropriate hourly rate to apply to the number of executive hours being claimed;
3. The supporting documentation available for the hours spent (*i.e.* time sheets, agenda, calendar entries, phone records, emails, etc.);
4. Whether the executive time claimed was a natural and reasonable consequence of the expropriation;
5. If the executive time was in whole or in part related to matters not directly associated with the expropriation;
6. If the loss of executive time has already been incorporated into another head of damage (*i.e.* business loss claim); and

7. If the executive time claimed relates to unpaid wages to a non-arms length party which does not fit the definition of executive time (*i.e.* unpaid relatives performing tasks for the business²).

DETERMINATION OF AN APPROPRIATE HOURLY RATE

We have observed that the technical application and approach to the determination of an appropriate hourly rate has varied considerably. In *Woodbine Realty Ltd. v. Toronto (Metropolitan)* (1994) a fair value for services approach was used where the average annual salary of middle management was prorated to an hourly rate. In *Moto-Match Centres Ltd. v. Toronto (Metropolitan)* (1984) the historical actual hourly rate paid to the individual was used to set the hourly rate. Finally, in *Captain Developments Ltd. v. Ontario (Ministry of Transportation)* (1993) an arbitrary rate of \$100 per hour was used as it was deemed reasonable given the individuals' experience.

There has been a lack of consistency in the determination of an appropriate hourly rate applicable to the hours claimed for lost executive time; however, the three general approaches used were:

- Fair value for services based on market statistics;
- Historical actual hourly rate; and
- Other reasonable rates based on the experience of the individual.

Below we have provided an example of each approach, which highlights the potentially significant variance in the quantum awarded based on the methodology adopted.

CASE BACKGROUND

Mr. Taylor is the owner and operator of JJ's Distribution ("JJ's") and has been in business for over 20 years. JJ's property was expropriated for the construction of a new public facility. During the period from October 2016 to April 2017, Mr. Taylor spent 200 hours directly related to the expropriation proceedings, which is fully supported by time sheets, emails and attendance records. Mr. Taylor's annual salary at JJ's is \$200,000 and he works approximately

2,000 hours per year. His role and duties in the business were consistent with those of a retail distribution manager. Mr. Taylor's claim for executive time was based on a rate of \$300 per hour, which he felt was appropriate for someone with his level of experience.

Scenario 1 – Fair value for services

Mr. Taylor is awarded damages for his loss of executive time based on the median hourly wage if a Sales and Distribution Manager (NOC 0601) in Ontario.

Median Hourly Wage (1)	\$	45		
Number of Hours			200	
Total	\$	9,000		

(1) For a Sales and Distribution Manger (NOC 0601).

Scenario 2 – Historical actual hourly rate

Mr. Taylor is awarded damages for his executive time based on his actual annual historical earnings, prorated for the applicable number of hours.

Actual Wage (1)	\$	100		
Number of Hours			200	
Total	\$	20,000		

(1) Calculated as: \$200,000 per annum / 2,000 hours = \$100 per hour.

Scenario 3 – Other reasonable rate based on experience

Mr. Taylor is awarded damages for his executive time based on an hourly estimate, given his level of experience and responsibility within the company.

Reasonable Rate	\$	300		
Number of Hours			200	
Total	\$	60,000		

SUMMARY

The selection of an appropriate hourly rate creates a significant variance between each scenario despite the number of hours being claimed remaining consistent across all three scenarios. Although these scenarios are hypothetical and the actual variance may be less significant, it raises an issue that will likely become the subject of future decisions.

	Fair Value for Services	Historical Actual Hourly Rate	Other Reasonable Rate
Hourly Rate	\$ 45	\$ 100	\$ 300
Number of Hours	200	200	200
Total	\$ 9,000	\$ 20,000	\$ 60,000

In conclusion, when advancing a claim for loss of executive time, it is important to take a step back and consider the various factors identified in the case law and make a supportable and reasonable determination of the appropriate quantum for the claim.

END NOTES

¹ *Now Local Planning Appeal Tribunal*

² *Pitblado v. Oakville (Town)* (2005)

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