Expropriation Case Summary 2017

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2017 Expropriation Conference Case Briefs

1. *The Calgary John Howard Society v. Calgary (City)*, 2017 ABLCB 10 per Chapman, Thomas and Zenko

- **Facts:** JHS, a not-for-profit purchased 3 story, 10 suite building in 1985 and began to operate an 'independent living model' halfway house there, 'Bedford House'.
    i. 2005 Calgary expropriated it to expand stampede grounds (JHS could remain there as property not needed immediately);
    ii. Proposed payment of $750,000 ($587,517.56 after mortgage paid out);
    iii. 2008 interim payment of $50,000
    iv. 2013 interim payment of $712,388.62 to cover legal fees, survey costs, interest costs and other expenses
    v. October 1, 2013; JHS entered into a lease with Stampede to stay on property until January 31, 2015, subsequently extended to August 31, 2015 and then to Feb. 29, 2016.
    vi. In 2015, JHS and City entered into agreement where JHS was able to lease a building in another community for 3 years with an option to extend the term for an additional 2 years.

- **Decision:**
    i. Cost of a reasonable alternative interest in land (s. 46(1)(b)(i)): $1,241,000;
    ii. Cost of re-establishment on alternative premises (s. 46(1)(b)(ii)): $3,555,389.51
    iii. Credit for sale of Sunalta Property ($397,800.74)
    iv. Credit for rental revenue on Manchester Property ($128,000)
    v. TOTAL AWARD: $4,270,588.77

    vi. Reserved on costs and interest

- **Reasons:**

    i. <u>Section 46: 4 part test:</u>

        1. **That there must be a building or other structure erected on the expropriated land that was 'specially designed for use' for one of the listed or similar purposes;**

            a. City conceded JHS is similar to, or of a like class with, charitable institutions

b. Finds a building or structure need not to have been originally designed for a special purpose, but can be altered into a special purpose structure.

c. JHS undertook two rounds of renovations to modify the structure to suit its use as a halfway house.

d. JHS did not pay property taxes to the City (even the City distinguished Bedford House from apartment buildings);

e. Distinguishes Ontario jurisprudence on whether a structure is 'devoted' to a purpose. The Alberta wording is 'specially designed for use' to which the *Dell Holdings* broad and liberal interpretation ought to be applied.

f. Does not matter that the house retained value as an apartment building, s. 46(1) speaks to situations where there is 'no general demand or market for the building or structure to be used <u>for that purpose</u>'.

g. Agrees with Gettel that the HBU was as a halfway house.

h. House was modified to have single point of entry and exit that can be continuously monitored by JHS staff. It was further modified to allow for presence of 24 hours staff who can easily access suites and monitor residents. Also incorporated elements essential to a halfway house, but not to three-story apartment buildings such as office/meeting space and classrooms. Outside parking spaces were enclosed into office spaces. Kitchens removed from all but one office space, doors removed, walls torn down and erected on main floor.

i. Noted a halfway house is meant to blend in with the surrounding area.

j. Also considered location and zoning in whether building was 'specially designed for use for a purpose'

    i. Location was of particular benefit: public transit, acquiescence of surrounding

community. Province designated it as a correctional facility.

k. To use the property other than as a halfway house would require modifications.

2. **That the landowner can no longer as a result of the expropriation, use the building for that purpose;**

a. This was a complete taking

3. **That, but for the expropriation, the landowner would have continued to use the building for that purpose; and**

a. City conceded this point.

4. **That at the time of the taking, there was 'no general demand or market for the building or structure to be used for that purpose'**

a. a prerequisite is that no general demand or market exists *for that purpose*. The board finds no market exists for a halfway house.

ii. A reasonable alternative interest in land: Onus was on City to prove failure to mitigate on balance of probabilities. JHS's actions in acquiring the Manchester location were reasonable.

iii. Date of construction costs: 2015 – JHS could not have begun construction until this date.

iv. Was JHS improved: Yes. A 15 % provision for improvements is appropriate.

v. Site development costs: $120,000 of $711,000 claim awarded (p. 34). Minimum land requirement for 8,900 square foot Bedford house was 8,900 square feet; rather than its current approval to build $33,475 square foot facility.

vi. Sunalta site: this was a failed relocation attempt. The associated costs were reasonably incurred (including on advice by City planning). They are awarded under s. 46(1)(b)(ii)

Editors' Notes:

We understand this case has not been appealed.

DM

a) Others at this conference will provide a full review of the facts and substantive findings in this case. For this writer, an important ruling on the law is that the onus of proof in respect of mitigation is upon the party claiming failure to mitigate. To my mind this makes perfect sense.

DP

a) My comments are based solely from the reported decision without any knowledge of the evidence adduced. This ruling appears to be practical and I am struck by the volume of detail described in the decision. I also note that 22 months elapsed between the hearing and the decision though I note the parties provided written submissions well after the hearing itself.

2. *Klemke v. The City of Edmonton*, 2017 ABLCB 9 (Klemke #1)

- **Facts:** This matter is one of the expropriations of leasehold and other interests in land for the Blatchford redevelopment in Edmonton in 2013. Claimants (in Hangar 30) brought Notice of Motion (NoM) under Rule 10 to compel answers to undertakings in accordance with Rule 15(1) and Part 5 of the Rules of Court. City brought a similar NoM.

- **Decision:**

Claimant's Requests:

i. City's lease with WCB in Hangar 25: Ordered produced. It may go to the existence of a verbal agreement and could assist in determining if there were reasonable prospects of renewal which is relevant to section 51 damages (pp. 8-9).

1. *Statute of Frauds* does not mean a verbal agreement would be doomed to fail because there is at least some evidence of part performance.

ii. Other leases at the City: City not required to produce. Claimants failed to establish any factual foundation for their claim of relevance. Cannot go on fishing expedition (pp. 9-10).

The valuation of the expropriated lands to 2052, if calculated: City to produce. This not protected by litigation privilege.

1. *Litigation privilege*: That the City may have performed a a market valuation of a lease that was eventually taken 2 years laterdoes not mean it was in contemplation of litigation unless sufficient evidence is adduced to support that assertion

iii. Payments made by the City to other leaseholders (Mifaco, Edmonton Flying Club, Spar, Stars Edmonton and Canadian Helicopters): City must produce. Information not protected by settlement privilege on settled claims. City not required to produce information on ongoing claims and negotiations or counteroffers between the City and Zeebest, Airco, Hamilton. These all protected by settlement privilege and reports, opinions or working notes in connection are protected by litigation privilege.

1. The sales agreements themselves of Gettel's comparables could be relevant and material to determination of market value and disturbance.

2. Claimant cited *Dickson v. Nova Scotia*, 1971 CarswellNS 124: "…the evidence of settlements subsequent to expropriation of neighbouring properties, is admissible and relevant with the weight of such evidence depending upon the surrounding circumstances" (p. 13). The Panel accepts the position in *Dickson* as the most clearly articulated statement of the law on the relevance of settlement agreements in expropriation proceedings (p. 15).

3. *Settlement privilege*: Applying *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, the Panel found that settlement privilege is applicable (p. 16).

4. *Jurisdiction of the Panel over Settlement Privilege*: Panel finds it has jurisdiction to order production of materials over which settlement privilege is claimed. The *Sable* decision did not intend it to be inviolate as like solicitor-client and litigation privilege in *Lizotte* (2016 SCC 52) (p. 17).

5. *When production should be excepted from settlement privilege*: Prima facie it is presumed that settlements are not admissible but the exception, citing *Sable*, is 'when the justice of the case requires it'. The Panel finds the

settlements might be helpful in determining market value and because of the limited number of comparables available, withholding these from the Claimants deprives them of the opportunity to know and present their case" (p. 17).

Cites *Dell Holdings*: "In the *Sable* case, each litigant might be presumed to be acting to maximize its own interests. Conversely, one would expect that the City in the present case would be seeking, not to maximize its own interests, but to balance its broad obligations to its constituents and taxpayers with its duty to treat fairly and equitably those parties particularly affected by the expropriation" (p. 18).

Mifaco and Edmonton Flying Club, each provided consent to disclosure of their settlements. In the absence of consent to disclosure other settlement agreements, the exception to settlement privilege is not applicable.

City's Requests:

iv. Financial statements, tax returns, corporate returns, banking statements, credit facility information and investment activities from 2008 to present: Claimants had to produce information on actual investments and rates of return; not financial statements, tax returns, etc.

Editors' Notes:

This matter is under appeal by the City and the Court of Appeal has granted a stay of the LCB order.

DM

a) The key here is the balancing of the rights of the Claimant to information within the control of the City to assist it to have a full and fair hearing verses the right of the City to confidentiality which in turn promotes settlements. This writer is of the view the Panel got that balance right in these circumstances but acknowledges that weighing of interests must occur in every case.

DP

a) The Board attempted to balance the rights of the parties but, overstepped in this writers opinion, its jurisdiction in ordering production of privileged documents. The practical effect, should this decision stand, will be to stifle settlement which I submit is contrary to the public interest.

3. *Klemke v. The City of Edmonton*, 2017 ABLCB 12 (Klemke #2)

- **Facts:** Board's order in 2017 ABLCB 9 ordered production of undertakings within 60 days of decision. City appealed order seeking fast track appeal. The appeal will not be heard prior to the deadline in the order.

  City is seeking stay at the Court of Appeal and applied for the LCB to amend its order to demand production within 120 days. The Board had selected the original 60 day deadline on its own, not at the behest of either party.

  The parties consented to the extension, cites Rules 11 and 13 and pointed to previous circumstances where the Board has amended its orders.

- **Decision:** The Board is without jurisdiction to amend its order.

- **Reasons:** The Board has no inherent jurisdiction like a superior court.

  i. Rule 13: gives Board the authority to enlarge or abridge times 'appointed by these Rules'. The present deadline is in an Order rather than the rules.

  ii. The previous cases referred to were where an amendment was necessary due to a calculation error or some other technical error and were examples of the Board applying its implied authority to remedy technical slips as described by the SCC in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848 (S.C.C.) – limited to drafting errors or where 'there has been error in expressing the manifest intention' of the Board'.

Editors' Notes:

This ruling was not appealed as the Court of Appeal granted a stay which had the same effect practical effect as revising the deadline for compliance.

DM

a) It seems to this writer that the Order initial granted in Klemke #1 is a procedural Order. Rule 17 allows the Board to direct its own procedures. Why can it not then create a new amended procedural Order at the behest and consent of both parties?

DP

a) It appears the Board cannot grant a stay nor can it amend its own order. In effect the Board forces parties to seek remedies from the courts which surely the Board should be able to provide, especially when it is procedural and both parties consent.

4. *Northey v. Red Deer (City)*, 2016 ABLCB 4

- **Facts:** Claimants apply for interim cost payment.

- **Decision:** 75% of interim costs requested for legal fees, with the amount already paid at 100% reduced to 75%. Without prejudice to Respondent's right to apply for taxation under s. 39(2) and have amount credit to whatever amount ultimately allowed by the Board. Claimants entitled to costs of the application.

- **Reasons:**

  i. Red Deer did not challenge the Board's jurisdiction to award interim costs and indicated a willingness to pay reasonable interim costs, but is arguing over quantum (at paras. 21-22).

  ii. "When applying a costs analysis, the starting point in an expropriation case is recognizing the near mandatory nature of the expropriation and the requirement for payment by the expropriating authority." Cites *Diggon-Hibben Ltd. v. The King* – no landowner should be victimized in loss because of the accident that his land rather than his neighbour's should be required for public purposes (at para. 30).

  iii. "Due to the uncertainty as to whether these claims will be successful, the Board is hesitant to award the parties full interim costs at the risk of overpayment" (at para. 32).

Editors' Notes:

DM

a) This case was really not about the principle of interim funding as much as the quantum involved. Nevertheless the principle was affirmed.

DP

a) The Board did sever costs which may not have been related to the expropriation from the award and "parked" these for later consideration.

5. *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32

- **Facts:** T was a wood products company engaged in timber harvesting and processing and had three of its forest tenures reduced as a result of the province's Forestry Revitalization Act, which contained a provision for compensation.

  Parties entered into a Settlement Framework Agreement, but were unable to settle the issue of compensation under the Act for improvements made by T to the land. Arbitration held in accordance with the Act.

  Arbitrator found on:

  i. the statutory interpretation issue that the proper valuation method was the depreciation replacement cost method.

  ii. The contractual interpretation issue: that the agreement reached by the parties did not exclude interest from the province's payment of compensation to T for the improvements.

  Appeal court concluded arbitrator erred on the statutory interpretation and contractual interpretation issues.

- **Decision:** Appeal allowed in part.

- **Reasons (per Gacon J. (McLachlin C.J.C. and Abella, Karakatsanis, Wagner JJ concurring):**

  i. Court of Appeal erroneously held that the standard of review should be correctness for the statutory interpretation issue. While the nature of the question (legal, mixed or fact) is dispositive of the standard of review in the civil litigation context, it is not in the arbitration context with its two central aims of efficiency and finality (at paras. 1 & 46) (*Sattva Capital Corp.*).

  ii. Statutory interpretation:

  1. application of the valuation methodology to a license was a mixed question. Court's jurisdiction was limited to the statutory interpretation issue of identifying a pool of methodologies consistent with the Act (at para. 52).
  2. The standard of review is reasonableness because this is a commercial arbitration and through application of the *Dunsmuir* factors (at paras. 79-83).
  3. The depreciation replacement cost method as consistent with the Act was reasonable.

a. BC argued that compensation must be limited to Teal Cedar's actual financial loss based on interpreting the word 'compensation' in the section in isolation. However the complete version of the provision sets the value of the compensation at 'an amount equal to the value of improvements made to Crown land'… "If that amount exceeds Teal Cedar's actual loss, such reasoning falls far short of indefensible, especially in so far as the arbitrator's chosen methodology is: (1) consistent with the common law principles informing the liberal interpretation of remedial expropriation legislation (*Dell Holdings*…)… (at para. 91).

iii. Contractual interpretation: courts had no jurisdiction to review as arbitrator was best situated to weigh the factual matrix in his interpretation of the parties' agreement (at para. 65).

- **Reasons (per Moldaver and Cote JJ. (dissenting in part) (Browne and Rowe JJ. concurring))**: appeal allowed on contractual interpretation, but not on statutory interpretation. The section was construed too narrowly in concluding that the distinction drawn by the provision between the value of the improvements and the value of the harvesting rights meant that the market value of the tenure as a whole could not be considered when determining the value of the improvements.

    i. Considered the modern principle of statutory interpretation (at paras. 111-112). Uses the Shorter Oxford English Dictionary on definition of 'compensation' and considers that Teal gets under the section, not the 'value of improvements' but 'value of improvements *made to Crown* land' and therefore the value of the use of those improvements since the ownership right in them remains vested in the Crown.

Editors' Notes:

DM

a) This is another example of the difficulty of application of what is supposed to be a simple concept – Standard of Review.
b) It is the most recent re-affirmation by the Supreme Court of Canada of the Dell Holdings principle of liberal interpretation of remedial statutes. Contrary to what others might say *Dell Holdings* is alive and well and continues to be the law of this country.

DP

a) Judicial efforts to simplify the standard of review continue to evolve. This is not over yet.
b) Dell Holdings is alive and well but does not stand for what others seem to think it does. It is not the only law in this country.

6. *Lynch v. St. John's (City)*, 2016 NLCA 35; leave to appeal refused [2016] S.C.C.A. No. 390 (S.C.C.):

    - **Facts:** City denied application for residential development for the sake of maintaining a continuous flow of uncontaminated groundwater from the Lynch property. Action commenced by declaration the property had been constructively expropriated (at para. 24).

    - **Decision:** found there was a de facto expropriation. Declares Lynches have a right pursuant the *Expropriation Act* to file a claim for compensation as though a notice of expropriation had been served (at para. 71).

    - **Reasons:**

        i. Was there an acquisition by the City: There was – "it is sufficient to conclude… the City purported to take away the Lynches' right to appropriate the groundwater on their land and to give the City a beneficial interest in the Lynch Property, consisting of the right to a continuous flow of uncontaminated groundwater downstream".

        ii. Were all reasonable uses of the property removed? "Having the property rights flowing from a Crown grant, with virtually unrestricted rights to build and to appropriate and use groundwater, transformed to merely a right to keep the land 'unused in its natural state,' results in virtually all of the aggregated incidents of ownership being taken away" (at para. 63).

Editors' Notes:

DM

a) The interesting thing about this case is the Court found that by prohibiting one use – the right to groundwater – a common law expropriation was made out. The loss of the right to groundwater incidentally eliminated all other reasonable uses.

DP

a) Land use regulation can result in de facto expropriation but typically this does not attract liability. The majority of the court applied a contextual interpretation to the *City Act* to find a right to compensation. The Chief Justice and another Justice, agreed with the result, but disagreed with the interpretation of legislative intent. In this writer's opinion, the court sought to balance the rights of the public against the cost to a few and determined that the owner's loss was too great to bear alone.