

Costs in Expropriation Proceedings: Review of the Law and Some Helpful Hints

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Agenda

- Refresher on the law of costs
- Update on recent costs decisions
- Interim costs claims - review of the law
- Interim costs claims - the expropriating authority's perspective
- Helpful hints, tips and tricks
- Questions / discussion

The Law of Costs - A Refresher

- Costs are governed by s. 35 and s. 39 of the *Expropriation Act*.
- *Sands Motor Hotel Ltd. v. Edmonton*, 2005 ABCA 402:
“With respect to solicitor and client costs, such an award is common in expropriation cases on the basis that the landowner should be provided with full indemnity.”

The Law of Costs - A Refresher

- The costs provisions in the Act were interpreted in *Thoreson v. Alberta*, 2017 ABCA 272:

"In an expropriation, a landowner is being forced from his home, or relieved of his property, by an expropriating authority, and he has no choice but to accept reasonable compensation for his loss. He cannot prevent the loss of his property. Because of this, the Legislature has provided that the expropriating authority should have to pay the landowner the legal, appraisal and other costs incurred for the purpose of determining the compensation payable. Payment of these costs is mandatory, subject only to a determination that the costs are reasonable, or that special circumstances exist to justify their reduction or denial."

The Law of Costs - A Refresher

- Two key criteria from *Thoreson*:
 - Costs claims must be reasonable
 - No special circumstances exist to justify denial of costs
- *Rawlin Holdings v. Calgary* (1990), 44 LCR 198 (Alta LCB):

“...the onus of proof is on the owner to establish that such costs are compensable under the provisions of the Act and to satisfy the Board (on a preponderance of evidence) that such costs are reasonable and should not be reduced or denied.”

The Law of Costs - A Refresher

- What sort of proof is required?
- *Amdue Holdings v. Calgary (No. 2)* (1976), 11 LCR 370 (Alta LCB):
 - Bills of costs should be sufficiently itemized and contain sufficient detail to permit application of the following principles:
 - Number of hours spent and rates charged
 - Detailed costs incurred for expert reports
 - Costs incurred for attendance of experts at hearing
 - Itemize correspondence, phone calls, attendances
 - Itemize and verify other disbursements

The Law of Costs - A Refresher

- What about solicitor-client privilege?
- Where the determination of costs is a final order, no privilege can be asserted with respect to work performed by counsel: *Prowse Chowne LLP v. Northey* (2002), 38 CPC (5th) 370 (ABQB).
- This principle applies in situations where party seeking to review counsel's account is not a party to the privilege but is obliged to pay the account: *Mintz v. Mintz* (1983), 43 OR (2d) 789 (HCJ) - cited in *Northey*.

The Law of Costs - A Refresher

- How to assess “reasonableness”?
- *Brese v. Edmonton*, 2006 ABCA 27:
 - *“Reasonable costs are those costs necessary for the proper presentation of a case which a solicitor could tax against a resisting client.”*
 - *“The bill of costs must only include services necessary for the proper interpretation of the case - i.e. falling within the four corners of the litigation.”*
 - *“The taxing authority will take into account the result or degree of success achieved...It follows that the taxing authority will consider the relationship between the fee and the amount in issue and the amount of recovery (the principle of proportionality).”*

The Law of Costs - A Refresher

- Board or Court is “entitled to reduce claims which were duplicative, excessive, unnecessary [or] undocumented.” - *Thoreson v. Alberta*, 2014 ABCA 31.
- “Reasonableness” should be determined with regard to the criteria in the former Rule 613 of the Alberta *Rules of Court* (now Rule 10.2) - *Nissen v. Calgary* (1983), 28 LCR 321 (ABCA).
- Necessarily a fact-specific exercise.

Law of Costs - A Refresher

- Nature, importance and urgency of the matters involved
- Circumstances and interest of the person by whom costs are payable
- The fund out of which they are payable
- The general conduct and costs of the proceedings
- The skill, labour and responsibility involved
- “Other circumstances”

The Law of Costs - A Refresher

- Can a claimant claim costs for more than one counsel?
- Maybe - it's fact dependent.
- *Thoreson v. Alberta*, 2012 ABQB 361, quoting Coates and Waque's *New Law of Expropriation*:
 - *"Where two counsel appeared on behalf the claimant, the board disallowed the time of the second lawyer on the basis of duplication of effort. The Board noted that both counsel were qualified expropriation lawyers and reduced the fee claimed by 30 percent presumably on the theory that only one counsel was needed and a second counsel represented duplication."*

The Law of Costs - A Refresher

- The LCB has reduced accounts of two lawyers due to duplication and overlapping work in one case (*Lorenz v. Lloydminster (No. 2)*, (1982) 26 LCR 326) and has taken issue with a “team approach” involving multiple counsel in another case (*Bartle & Gibson Co. v. Edmonton* (1996), 58 LCR 36 (ABCA)).
- BUT a claim for two lawyers’ time was allowed in *Golfscape International Corp. v. Alberta*, 2013 ABLCB 7:
 - “In the circumstances of this case, and with particular reference to the applications in question, such as the novel application for interim costs ... the use of two lawyers for the steps in question is beneficial and reasonable.”

The Law of Costs - A Refresher

- What constitutes “special circumstances” justifying a reduction or denial of costs?
- Criteria set out in former Rule 635 (now Rules 10.33 and 10.41) of the Alberta *Rules of Court - Nissen v. Alberta*:
 - Taxing officer may refuse to allow costs which are excessive having regard to circumstances of the matter, including its nature and interest and amounts involved.
 - Taxing officer may refuse to allow costs of all or any part of proceeding that were:
 - improper, vexatious, prolix or unnecessary
 - taken through over-caution, negligence or mistake

The Law of Costs - A Refresher

- Court in *Nissen* further commented that in expropriation cases:
“There is but one unique consideration that must be brought to bear in the taxation of accounts in such circumstances. The client, because he knows he never need pay the bill, might not act reasonably ... ”
- LCB has the power to regulate such unreasonable conduct through reduction or denial of costs due to the “special circumstances” mechanism in s. 39(1) of the Act.

The Law of Costs - A Refresher

- “Special circumstances” cases are rare.
- *Zahmol Properties Ltd. v. Calgary*, 2012 ABCA 89
 - City was successful in raising a limitation defence before the Board, but decision reversed on appeal
 - With respect to costs, O’Ferrall JA found no special circumstances existed to justify reduction of costs:
“The landowner did nothing wrong here. The expropriating authority challenged the landowner’s entitlement to a Board determination of compensation. It did so in circumstances where there was no prejudice to it. Therefore, it ought to bear the costs of that challenge.”

Recent Costs Decisions

Edmonton v. Airco Aircraft Charters Ltd., 2018 ABLCB 2

- Costs hearing based on written submissions
- City took the position that Airco should be denied costs of an interlocutory application or alternatively costs should be substantially reduced
- Airco took position that it was entitled to costs of the interlocutory motion as claimed in full
- Board found no special circumstances to justify denial of costs
 - no improper purpose behind claimant's positions

Recent Costs Decisions

- Some reductions made based on reasonableness - duplication of effort by senior and junior lawyer and attendance of both at hearing when Board considered only one required.
- Airco asked Board to re-consider this last aspect of the Order on the basis of an error regarding counsel appearances and insufficient reasons.
- Board found no error, and further declined to re-consider on the basis that it was *functus officio*.

Recent Costs Decisions

Tessier v. Edmonton, 2018 ABLCB 1

- Board found special circumstances in this case due to unsupported allegations against City, its counsel and claimants' former counsel including allegations of fraud, collusion, dishonesty, witness tampering as well as continued attempt to advance compensation claims that were *res judicata*
- Board applied a 15% reduction to costs claims
- Board disallowed claims relating to appeal regarding disputed settlement and appeal of taxation of original lawyer's account

Recent Costs Decisions

- Board did allow attendance fees for counsel whose account was being taxed at normal hourly rate - akin to an expert.
- Board provided guidance on disbursements:
 - expropriating authority is not bound by terms of a retainer agreement requiring client to pay for support and secretarial staff charges - properly part of overhead
 - distinction between “purely administrative” charges and things like document management tasks which would be allowable
 - in absence of evidence of actual costs incurred for disbursements such as faxes, copying, laser printing, etc it is appropriate to pay based on Court of Queens’ Bench Costs Manual

Recent Costs Decision

Dawn's Bra-tique Ltd. v. Edmonton, 2018 ABLCB 4

- City took the position that it did not expropriate the claimant and brought preliminary application to strike.
- Claimant brought interlocutory application to compel responses to undertakings and for interim costs.
- Claimant successful on compelling responses but Board declined to order interim costs.
- Board found that question of City's liability for costs (i.e. whether it expropriated) was a live issue and it would be inappropriate to order interim costs before that issue was decided as it went to the Board's jurisdiction.

Interim Costs Claims: The Law

- The leading case is *Golfscope International Ltd. v. Alberta*:
 - Board has discretion to award interim costs under s. 39 in order “to allow a Claimant to advance its case on an equal footing to the expropriating authority”.
 - Board ordered interim payment of legal fees at 75% and expert fees at 100%, noting it was a “virtual certainty” that costs would be payable at the conclusion of the proceedings.
 - However, Board found it was not in a position to closely tax the interim accounts.
 - Appropriate time to do so is at conclusion of proceedings where overall reasonableness can be assessed.

Interim Costs Claims: The Expropriating Authority's Perspective

- Following *Golfscope*, the City of Edmonton has developed a practice where it will consider and issue payments against interim costs claims.
- City has developed this practice as a practical means to avoid interim costs applications.
- Typically at the rate of 75% claimed but depends on the circumstances of each case.
- City always reserves the right to later challenge or tax any costs payments made, and recover any overpayment or set off against any damages awarded.

Interim Costs Claims: The Expropriating Authority's Perspective

- Speaking ONLY for the City of Edmonton - other expropriating authorities may deal with costs differently.
- Some general guidelines:
 - City is not a party to the retainer agreement, therefore not bound by the retainer agreement but only the caselaw and Board direction
 - City will not pay for more than one senior lawyer on a file
 - Disbursements will be paid in accordance with the Queen's' Bench Costs Manual unless otherwise ordered

Interim Costs Claims: The Expropriating Authority's Perspective

- City will undertake a high-level assessment of reasonableness of costs claimed at the interim stage
- Bills of costs must be sufficiently detailed to allow high-level assessment of reasonableness
- City will not pay for purely administrative charges or administrative staff time that are properly overhead

Interim Costs Claims - The Expropriating Authority's Perspective

- The process at the City of Edmonton:
 - a. Initial review by paralegal
 - ensuring time entries are related to the matter
 - review disbursements and adjust according to QB Costs Manual
 - review for instances of duplication, multiple lawyers, administrative charges, etc
 - b. Review by legal counsel
 - consider paralegal review findings
 - high-level review for reasonableness

Interim Costs Claims - The Expropriating Authority's Perspective

- recommendation to pay costs on an interim basis based on review
- c. Law Branch management
 - review and approve recommendation
- If approved, a cheque is requisitioned from Finance and sent to claimant's counsel with a letter explaining the amount arrived at and any deductions, and reserving the right to challenge costs at the conclusion of proceedings
- City's aim is to pay interim costs on a quarterly basis

Helpful Hints, Tips and Tricks

- Ensure bills of costs are sufficiently detailed to allow assessment of reasonableness - claimant's counsel can reserve solicitor-client privilege until costs are taxed.
- Submit interim costs claims on a timely basis and as they are incurred - much easier for Law Branch to review two or three invoices than forty.
- Ask experts to provide detailed invoices with time entries for submission to the City.

Helpful Hints, Tips and Tricks

- If counsel is not claiming disbursements in accordance with the QB Costs Manual, provide a breakdown of the charges and rates (eg. rate per page and number of pages for copying, printing etc).
- Provide copies of invoices for large disbursements (eg external printing, copying or scanning services).
- Helpful for claimant's counsel to track what has been invoiced and what has been paid in case of discrepancy.

Conclusion

- Questions?
- Comments?
- Concerns?

Thank you!

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