EXPROPRIATION CASE LAW REVIEW
2018 ALBERTA EXPROPRIATION ASSOCIATION CONFERENCE

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Themes that emerged from decisions of the Alberta Land Compensation Board ("LCB" or "Board") this year include: interlocutory decisions; pre-expropriation damages; relocation; mitigation; and application of s. 43 of the *Expropriation Act*, RSA 2000, c E-13 ("*Expropriation Act*"). Decisions also came from the Alberta Court of Queen's Bench and Court of Appeal, dealing with issues of jurisdiction and standard of review for decisions of the LCB as well as standard of review for decisions of City Council in the context of an expropriation.

I. Decisions of the Alberta Land Compensation Board

The "Airco" Trilogy

There were three interlocutory decisions of note this year in relation to the expropriation by the City of Edmonton of Airco Aircraft Charters' ("Airco") interest in lands located at the former Edmonton City Centre Airport (ECCA). These are procedural decisions and in relation to costs issues arising from the applications themselves.

***Edmonton (City) v Airco Aircraft Charters Ltd.*, 2017 ABLCB 12 ("*Airco #1*")(LCB ORDER 544)**

This was a procedural application by the City in respect of the timing of steps prior to an impending compensation hearing. Most of the issues were resolved immediately prior to the hearing excepting an application for a sealing order which resolved during the hearing. The Board issued an order setting down agreed timelines for litigation steps and a direction to address costs of the application at a subsequent hearing based on written submissions.

***Edmonton (City) v Airco Aircraft Charters Ltd.*, 2018 ABLCB 2 ("*Airco #2*")(LCB ORDER 546)**

This was a costs hearing based on written submissions from the parties. The City argued that the claimant should be denied all its costs of *Airco #1* due to special circumstances - assertions that Airco took unreasonable positions, amounting to an exception under s. 39 of the *Expropriation Act*.

One of the issues in *Airco #1* was the Board's jurisdiction to alter a 2013 agreement between the parties on procedural issues regarding the timing of expert reports. Another issue was the jurisdiction of the Board to grant a sealing order. Also, the City had sought a finding of unreasonableness in respect of a proposed and subsequently withdrawn request to examine the City's affiant on her affidavit.

The Board found there was no improper purpose behind the claimant's positions, therefore no special circumstances justifying a denial of costs.

However, some reductions were made to Airco's costs for reasonableness of fees. A reduction was made for duplication of effort by senior and junior lawyers and for the fees of two lawyers to attend at *Airco #1* when, following an 11th hour settlement of most issues, only one was required.

***Edmonton (City) v Airco Aircraft Charters Ltd.*, 2018 ABLCB 6 ("*Airco #3*")(LCB ORDER 550)**

This decision resolves two issues put to the Board by letter from the claimant requesting an amendment to the Costs Order from *Airco #2* and provision of additional reasons. This led to consideration of two points of administrative law.

The Board applied *Gimbel v Alberta (Public Works, Supply & Services)*, 2014 ABLCB 7, where the Board found that tribunals can amend judgments that have been drawn up and entered in two cases: where there is a slip in drawing it up and where there is an error in expressing the manifest intention of the decision maker. Airco submitted that the Costs Order in A*irco #2* should be amended to add an additional name to the appearances of counsel for the City. The Board found that there was nothing on the record to indicate that this person was involved in crafting the written submissions upon which *Airco #2* was based, therefore there was no error here and no need to correct.

Airco also took the position that a portion of the Costs Order in *Airco #2* did not provide sufficient reasons for one of its findings. Airco relied on a provision of the *Administrative Procedures and Jurisdiction Act* RSA 2000 c. A-3 which requires that reasons be provided for a decision adversely affecting a party. The City submitted that reasons were provided and the Board did not have jurisdiction to provide additional reasons as it is *functus officio*. The Board agreed with the City that while there are some circumstances in which a Court can provide additional reasons, the *Expropriation Ac*t does not authorize the Board to reconsider its decisions. Other than adding a counsel name and correcting a date reference, the Board chose not to issue further reasons.

***Tessier v Edmonton (City)*, 2018 ABLCB 1(LCB ORDER 545)**

This decision relates to claims for legal costs of three different legal counsel retained by the claimant at various points in time and in relation to a number of proceedings before the LCB and Court of Appeal. The long history and numerous proceedings related to a settlement negotiated by the lawyer initially retained by the claimants (Lawyer #1) to which the claimants denied they were bound. In this costs hearing the claimants had their current legal counsel, Lawyer #3, submit some of the costs claims and advanced many more on their own. The claimants also attempted to relitigate the settled compensation claim one more time.

LCB Proceedings Related to the Disputed Settlement

Notwithstanding the claimants failed at all Court and Board levels to set aside the settlement, the Board found that the costs of all of the proceedings before it were compensable costs under s. 39 of the *Expropriation Act* as they were pursued "*for the purpose of determining compensation payable for the expropriation*."

Alberta Court of Appeal Proceedings Related to the Disputed Settlement

However, the Board denied the costs of the failed appeal to the Alberta Court of Appeal wherein that Court was silent on the issue of costs. Under s. 39(4) the costs of an appeal "*are in the discretion of the Court of Appeal.*" Therefore, the Board found it had no jurisdiction to deal with those costs.

Taxing Officer Proceedings

Lawyer #1 had previously applied for taxation of his accounts to the Taxing Officer of the Court of Queen's Bench. The accounts were allowed in full. The claimants engaged a second lawyer (Lawyer #2) to commence an appeal of the Taxing Officer's decision. The Board found that the services related to the appeal of the Taxing Officer's decision were unrelated to determining the compensation payable by the City and therefore not compensable as s. 39 costs.

Lawyer #2's Costs for Attending the Costs Hearing

Lawyer #2's accounts were the subject of a portion of the costs hearing. He had also represented the claimants at the Alberta Court of Appeal with respect to the disputed settlement proceedings. Lawyer #2 was awarded his costs for preparing and attending the costs hearing at his hourly rate for provision of legal services. The Board likened the role he played at the hearing to that of an expert witness.

What are Reasonable Disbursements?

With respect to what qualifies as reasonable reimbursable disbursements under s. 39, the Board found:

- The lawyer-represented-litigant is only entitled to recover the actual "cost" to the lawyer of in-house photocopying, and that cost cannot include a "time and effort" or labour component. In absence of evidence of actual costs incurred for faxes, copying, or laser printing in this case, the charges in the *Court of Queen's Bench Costs Manual* are reasonable.
- While the inclusion in a retainer agreement of charges for support and secretarial staff is a factor to be considered under s. 39*,* it is unreasonable to expect an expropriating authority to pay for purely administrative activities undertaken by those staff members. The cost of such activities should be included in the hourly rate utilized by counsel. A distinction was made between "purely administrative" activities and activities such as "summation scanning" by paralegal staff which the Panel accepted would be payable.

Special Circumstances

A claimant's rights to Section 39 costs are limited when "special circumstances" exist that may justify reduction or denial of those costs. The City asserted the egregious conduct of the claimants which included:

- making unsupported allegations against the City, the City's counsel and the claimants' former counsel including allegations of collusion, fraud, dishonesty and tampering by the City or its counsel; and
- continuing to attempt to advance compensation claims after a decision by the Court of Appeal that a valid settlement had been reached

Justified a reduction of the costs otherwise payable. The Board applied a 15% reduction to the award of costs to the claimants.

***Edmonton (City) v Can-West Corporate Air Charters Ltd.*, 2018 ABLCB 3(LCB ORDER 547)**

An application by Notice of Motion was commenced by the City to have the claimant's ADC struck and for an order directing that the City is not liable for costs. The Board dismissed the City's application to strike and reserved on the matter of costs.

The parties proceeded on the basis of an agreed statement of issues and facts. The facts were as follows:

I. The claimant was a lessee and in occupation of the Lands at the time of service of a Notice of Intention to Expropriate;

II. The claimant was no longer a lessee and not in occupation of the Lands at the time of the registration of the Certificate of Approval on title to the Lands; and,
III. A Certificate of Approval was registered against title to the Lands that the claimant had an interest at some point in time.

The issues were whether these facts alone are fatal to any claim by the claimant for compensation in accordance with the *Expropriation Act,* excepting ss. 35 and 39 and if so, whether the claimant was entitled to compensation under ss. 35 and 39 of the *Expropriation Act.*

The City's position was that there was no expropriation as Can-West had no estate or interest in the land when the Certificate of Approval was registered; therefore the Board had no jurisdiction to hear the compensation claim. Can-West argued that expropriation is a process that takes place over time and if an expropriation causes a loss of property rights prior to registration of the Certificate of Approval, compensation under the *Expropriation Act* is payable.

The Board found that in this case the facts presented alone are not fatal to any claim by the claimant for compensation and the Board had jurisdiction to hear a claim. If a party was a lessee and in occupation of the subject land when formal expropriation proceedings were commenced under the *Expropriation Act*, there is no requirement for the claimant to have retained the leasehold interest or be in occupation of the land on the date the Certificate of Approval was registered in order to claim compensation, so long as the claimant can demonstrate that the loss of its interest was "causally connected" to the expropriation.

The Board also made some interesting comments:

- The broad, liberal and purposive approach to interpretation of the Act mandated by the SCC in *Dell* is in respect of the entire Act, not just the assessment of damages;
- It is notable the cases cited which predate *Dell* did not have the guidance provided by the SCC in *Dell*;
- It would be inconsistent and contrary to public policy to provide compensation to a party who does not mitigate losses and yet deny compensation to a party whose actions are "causally connected" to the expropriation and who acts in accordance with its legal obligation to mitigate damages.

***Dawn's Bra-Tique Ltd. v Edmonton (City)*, 2018 ABLCB 4(LCB ORDER 548)**

Application by Notice of Motion by the claimant for:
1. An order compelling answers to certain undertakings; and,
2. An order directing payment of interim costs.

The Board ordered answers to the undertakings, subject to privilege and dismissed the claimant's application for interim costs.

The claimant is a retail store that leased space in a retail complex. As part of the North LRT project, the City expropriated a strip of land along Kingsway Avenue that included a portion of the parking lot and curb/grass but was not part of the premises leased by the claimant. The claimant's lease expired and it had moved prior to the registration of the Certificate of Approval.

The City's position was that it did not expropriate any interest of the claimant and that the claimant suffered no damages or in the alternative failed to mitigate. The claimant argued it moved to mitigate losses it would have suffered as a result of the expropriation and in particular construction activities related to the LRT project - including interruption of access.

Undertakings

The Board ordered the City to answer a number of undertakings relating to construction of the project including access and road closures. Information which may reasonably be used to determine what losses would have been had the business not moved is relevant and material. Whether losses would in fact have been suffered is relevant to the question of whether mitigation actually occurred by moving. The extent of losses that would have suffered but for the move may also be relevant in determining the reasonableness of the expenses incurred to mitigate against them.

The Board also ordered the City to provide available information regarding communications between the City and the owner of the retail complex, including any information relevant to interpreting the lease between the claimant and the owner and any information relating to the rights of the owner's tenant regarding parking areas. The Board applied *Sattva Capital Corp. v Creston Moly Corp.,* 2014 SCC 53, to find that the facts known to the parties to the lease are relevant and material to interpreting the lease between the claimant and landlord.

The foundation for the compelling Order was whether the information sought "may help, directly or indirectly, to establish the extent of the losses which the claimant would have suffered had the business not moved, which is a fact in issue."

Interim Costs

The claimant also sought an order for interim costs. The City's position was that the Board's jurisdiction to award costs only arises when a claimant has been expropriated and it did not expropriate an interest in land from the claimant.

The Board dismissed the claimant's application for interim costs. The Board has the discretion to award interim costs under s. 39 of the *Expropriation Act* in order "to allow a Claimant to advance its case on an equal footing to the expropriating authority." Whether there was an expropriation in this case was a serious issue to be tried. If an order was made directing the City to pay interim costs and it was ultimately determined that there had not been an

expropriation and the Board did not have the jurisdiction to award costs, the Board would have proceeded outside its jurisdiction making an order for interim costs. Moreover, there is no mechanism in place to require the claimant to repay such a payment.

***E-Z Air Inc. and E-Z Helicopter Training Inc. v Edmonton (City),* 2018 ABLCB 7 (LCB ORDER 551).**

Compensation hearing arising from the City's expropriation of the claimants' interests in a building and hangar at the former Edmonton City Centre Airport ("ECCA").

Background

E-Z Air Inc. ("E-Z Air") and E-Z Air Helicopter Training Inc. ("E-Z Helicopter") operated a business including a helicopter training school, helicopter maintenance and helicopter charter service out of Building 19 and Hangar 20 at the ECCA. E-Z Helicopter was created specifically to take advantage of GST exemption as an educational operation.

E-Z Air had a sublease for office space in Building 19 that ran from April 1, 2009 to March 31, 2013. The sub landlord gave evidence that the sublease was not extended because the City planned to close the airport. E-Z Air had a license for hangar space and ramp parking in Hangar 20 for a term of June 1, 2012 to May 30, 2017 with a 60 day termination clause. The claimants carried on business at the time of the expropriation and gave up possession in November, 2013. The City's Notice of Proposed Payment was for $0.00. Following a dormant period the claimants relocated to Parkland Airport in early 2014.

The claimants sought compensation for:

- the market value of the sublease and license;
- disturbance damages for losses claimed to have arisen from the sale of a helicopter, the sale of helicopter equipment and the acquisition of a helicopter simulator;
- executive time; and,
- business losses suffered before and after the expropriation.

Edmonton City Council passed a motion in July, 2009, approving the phased closure of the ECCA. In May, 2012, City Council adopted the City Centre Area Redevelopment Plan, under which Building 19 and Hangar 20 were zoned to include medium and high density residential development. On September 5, 2012, a Notice of Intention to Expropriate was registered and E-Z Air was served with this document. The expropriation was abandoned then commenced again with a new NOITE served on February 27, 2013 and a Certificate of Approval registered on July 25, 2013.

The claimants submitted that because of the uncertainty about the future of the ECCA, they reduced operating expenses by replacing the director of maintenance (and shareholder) and

selling a Jet Ranger helicopter and associated equipment. E-Z Helicopter leased hangar space at Bon Accord Airport to store the remaining helicopter. In December, 2013, 90% of the shares in both companies were sold to Lonestar Aviation, and the controlling shareholder of Lonestar took over operations management.

Decision

A. Market Value

Is the License Compensable?

The Board found that the *Expropriation Act* does not preclude compensation to licensees as an expropriating authority can "acquire any lesser interest by way of profit, easement, right, privilege or benefit in, over or derived from the land". The term "owner" encompasses those in possession of the land (s.1(k)(iii)) and s. 42 permits compensation payable to an "owner" when land is expropriated.

Market Value of the License and Sublease

The Sublease had expired and the claimants were over holding. Although the evidence suggested that the Sublease would have been renewed but for the expropriation, the renewal would have been at market rent. The License had a 60 day termination clause and a number of clauses that limited its transferability. The Sublease and License were found to have no compensable value under ss. 41 and 42 of the *Expropriation Act*.

Compensation under s. 43 of the Expropriation Act

The claimants argued that s. 43 of the *Expropriation Act* should apply to circumstances where the market value of occupied land does not justly take into account its value. The City argued that the section acts as a cap on damages and prevents double recovery.

The Board confirmed the decision in *Minute Muffler Installations Ltd. v Minister of Housing and Public Works*, 1981 Carswell Alta 547, that s. 43 was in fact a codification of the common law rule against double recovery. Section 43 only addresses a circumstance where the highest and best use is different than the actual use to which occupied-expropriated land is being put at the time of the expropriation.

In this case, there was no difference between the highest and best use of the Sublease and License and their actual use so s. 43 did not apply. Even if it did apply, the claimants did not establish what the loss would have been. The Board comments that in the case of leasehold interests, where the highest and best use and actual use are different and conflicting, the market rental rate and market value of the leasehold interest may be different.

B. Adverse Inference

The City contended that failure to call the current controlling shareholder should draw an adverse inference against the claimants. However the City had earlier questioned that shareholder in pre-hearing proceedings and entered transcripts of portions of that evidence. The Board found no basis to exercise the discretion to make an adverse inference.

C. Disturbance Damages

The Board denied damages to the claimants for losses allegedly suffered by a non-party company used as a flow through entity for tax purposes by the claimant. The Jet Ranger helicopter was owned by #Ltd and E-Z Air was its majority shareholder. #Ltd allegedly sold the Jet Ranger at a loss and E-Z Air claimed this loss on the basis that flow through entities set up for tax purposes should not preclude a determination of damages.

The Board found that a broad and liberal interpretation of the *Expropriation Ac*t does not ground an award of compensation to a corporation that is not a party to the proceedings or held no interest in the expropriated land. #Ltd. was not an "owner" to whom compensation is payable under s. 42 of the *Expropriation Act* and the claim for damages was dismissed.

Claims for losses relating to equipment sold at a loss were dismissed on the basis that they were speculative and without sufficient evidence in support.

The Board did award EZ Helicopter the full replacement price of a flight simulator. EZ Helicopter asserted that Transport Canada would not recertify its flight simulator for use anywhere other than the ECCA. Therefore, the flight simulator could not be moved and a new one had to be purchased. The Board agreed. The City also argued the subsequent sale of the simulator to a related company should result in a reduction of EZ Helicopter's loss. The Board found that how ownership was arranged between related companies was not a factor.

Executive Time

This head of damages includes compensation for time reasonably spent advancing a claim for compensation arising from the expropriation. The Board awarded executive time compensation to the two original shareholders of the claimants over a period of time when they were no longer being paid by the claimant companies, citing the fact that to deny such compensation would be contrary to the intent of the *Expropriation Act*.

Business Losses

This portion of the decision (paras 146-202) contains a detailed analysis of evidence provided by the financial experts of the claimants and the City and is a must read for financial experts providing opinions in this area of law. Specific topics of interest include:

- How many years of financial data should be used to determine business losses - The appropriate time period should cover a full business cycle, if possible.
- An appropriate loss period may include the time during which the expropriation process casts a shadow that negatively impacts the business operations of the claimant.
- Normalizing costs - Is an increased/decreased cost in a given fiscal year an unusual or nonrecurring incident?
- Actual or normalized rates of remuneration for business owners - If actual rates are not representative of market rates or normal operating costs, it may be appropriate to normalize.
- The Board may be unwilling to apply speculative reductions to business losses based on factors other than the expropriation.

The claimants were awarded business losses from the beginning of their 2013 fiscal period to the end of 2014. Business losses were calculated using financial data for the five years preceding the expropriation.

***Celtic Land Development Corp. and Celtic Homes Inc. v Edmonton (City)*, 2018 ABLCB 8(LCB ORDER 552).**

A compensation hearing for a tenant in the former Edmonton City Centre Airport ("ECCA"). This case considers: Pre-expropriation damages; causation and mitigation of damages; relocation under s. 53 of the *Expropriation Act;* and executive time.

Background

Celtic Land Development Corp ("Celtic Land") was a tenant of Hangar 8, a repurposed hangar at the former City Centre Airport. Celtic Homes Inc. ("Celtic Homes") operated a modular home manufacturing business out of the hangar. The decision refers to Celtic Land and Celtic Homes collectively as "Celtic".

Celtic Land acquired the lease for Hangar 8 in 2008 and exercised the first option to renew in 2010, which provided for continued tenancy at below market rents until 2028. The lease also contained a second option to renew for an additional 15 years with rent to be set by agreement of the parties or through arbitration.

Some relevant steps in respect of the City's development of the airport into a residential and business community (Blatchford) were:

- July 8, 2009: City passed a motion detailing a two-phase closure of City Centre Airport;
- August 2010: ERAA surrendered the portion of the Head Lease that included Hangar 8 to the City;
- May 16, 2012, City Council passed a bylaw approving the City Centre Area Redevelopment Plan which repurposed the entire Airport Lands.

As the timing of steps in the expropriation process is important to the issue of pre-expropriation damages, below is the expropriation timeline produced in para. 26 of the decision:

The Original Expropriation

- September 4, 2012: City notifies Celtic Homes of intention to proceed with expropriation.
- October 5, 2012: NOITE executed and received by Celtic.
- February 4, 2013: City informs Celtic Homes of procedural difficulties with the expropriation, but expresses a continuing intention to expropriate.
- February 27, 2013: City abandons the original expropriation.

The Expropriation

- February 27, 2013: The City executes and delivers a new NOITE.
- July 25, 2013: The Certificate of Approval is filed at Land Titles, transferring Celtic's interest to the City ("Effective Date").
- August 6, 2013: City executes a Notice of Expropriation and a Notice of Possession, requiring Celtic to give up possession on or before November 15, 2013.
- October 11, 2013: The City paid $2,880,000 to Celtic in accordance with s. 31 of the *Act* ("Proposed Payment").
- November 15, 2013: The parties execute a Right of Entry agreement, allowing Celtic to access Hangar 8 to store, disassemble and remove equipment until December 14, 2013.
- December 14, 2013: Celtic relinquishes possession of Hangar 8.

Celtic used the Proposed Payment to purchase and renovate a commercial building containing approximately 1,600 sq ft of storage space and some additional office space. This new property could not house Celtic's manufacturing operations nor much of its equipment. Accordingly, Celtic sold pieces of its large equipment and materials. As at the date of the hearing, Celtic had not re-established its manufacturing operations.

Decision

A. Preliminary Issue - Paneling Lay Witnesses

Celtic proposed to have its two owners provide testimony as a panel on the basis that the evidence should reflect the equal partnership of the two owners and this was not ruled out by the *Expropriation Act Rules of Procedure and Practice*. The City objected to the paneling on the following basis:

- The City only questioned one of the owners on the understanding that he spoke for the companies as the corporate representative.
- Paneling would prejudice the City by hampering its ability to impeach.
- Paneling factual witnesses is different that paneling expert witnesses as experts do not have questioning transcripts.

The Board determined the two owners could be paneled as there would be no prejudice to the City. The witness who had been previously questioned by the City could still be impeached based on transcripts. The City preceded by Notice of Motion to have the Board's decision proceed as a stated case to the Alberta Court of Appeal. Rather than have the compensation hearing adjourned pending the stated case decision, Celtic agreed to have the two owners present separately.

B. Market Value

Utilizing primarily a direct comparison and cost approach and choosing portions of the evidence from both appraisers, the Board concluded a market value of the Celtic lease of $4,330,500. This included a component for "Leasehold advantage" of $970,000 due to the fact the lease to 2028 was at below market rent.

C. Pre-Expropriation Damages

Celtic made a claim for pre-expropriation losses extending back to February 1, 2012, approximately two years prior to vacating Hangar 8. The City argued that expropriation was not certain at that date and continued to be uncertain even after the second NOITE was filed in February, 2013. There were significant controversies around the expropriation including objections and an inquiry that led to this uncertainty.

The Board considered *Toronto Area Transit Operating Authority v Dell Holdings Ltd.*, [1997] SCR 32 (*Dell*), the leading case on pre-expropriation damages. In *Dell*, the Supreme Court found that "[t]he approach to damages flowing from expropriation should not be a temporal one; rather it should be based upon causation. It is not uncommon that damages which occurred before the expropriation can in fact be caused by that very expropriation."

The Board found that the existence of an inquiry and objections are not enough on their own to call into question the likelihood of an expropriation, as the *Expropriation Act* does not bind an expropriating authority to the findings of an inquiry report. The Board accepted Celtic's argument that the expropriation process extended back to at least February 1, 2012. In doing so the Board referenced the 2009 City Council motion detailing the airport closure and directing the City Manager position the City as developer and the 2010 partial surrender of the Head lease from ERAA to the City. As the City's 2009 plans were unlikely to include Celtic's manufacturing business, the Board noted the City's evidence that the only realistic options to acquire the lands were to negotiate or expropriate.

The Board found that where a pre-expropriation loss claim falls within the shadow of the expropriation, the claimant must prove that the losses incurred in this time frame were caused by the expropriation rather than an external, unrelated factor. The Board accepted Celtic's evidence that customers were hesitant to deal with Celtic in light of the very public attention to the airport redevelopment plans.

Through forensic evidence which tied Celtic's past growth to CMHS housing starts, Celtic proved to the Board's satisfaction the number of housing units Celtic would have built but for the expropriation and was successful in respect of that claim. On the other hand, Celtic was not successful in proving the loss of a particularly lucrative contract as the Board found that the parties had yet to enter into serious discussions regarding the essential contractual terms - Celtic provided a quote that was preliminary and incomplete and there was no contract.

One criticism by the City of Celtic's forensic business loss report was that the proposed payment was not deducted from the loss calculations. The Board found the proposed payment was not a normal day-to-day transaction and ought not to be a factor in the loss calculations.

D. Relocation and Post-Expropriation Business Losses

The determination of post-expropriation business losses was complicated by the fact that at the time of the hearing Celtic had not resumed manufacturing operations.

Did Celtic relocate within the meaning of s. 53?

Relocation within the meaning of s. 53 implies that the business operate in the same manner in a new location, though the new operation need not be identical. It is logical that a company may have to alter its operations to reasonably accommodate the new circumstances in which it finds itself. This in and of itself should not preclude recovery. However, when new operations no longer resemble old ones, the business has not relocated.

Celtic did not relocate within the meaning of s. 53 and this section does not apply for the purpose of determining business losses. Celtic cannot operate a manufacturing facility out of the replacement property and had not constructed a unit since giving up possession of Hangar 8. Most of Celtic's staff left. Most of the equipment was disposed of and Celtic's manufacturing operations stopped. Office administration and warranty work is not sufficient to constitute a relocation of Celtic's manufacturing business.

Celtic argued that it not been able to repurchase suitable replacement lands because the proposed payment of 2.88 million was insufficient. The Board did not accept this argument.

Does s. 54 apply?

This section did not apply as both parties' position was that it was feasible for Celtic to relocate and neither party applied for a termination allowance.

Is Celtic entitled to post-expropriation business loss damages under s. 42?

Where ss. 53 and 54 do not apply, claimants may still get disturbance damages for post-expropriation business losses under ss. 50 and 42(2)(b). Both sections require the claimant to

establish that losses were a natural and reasonable consequence of the expropriation (causation) and damages could not have been avoided by taking reasonable steps (mitigation).

The Board found that 'but for' the expropriation, Celtic would have continued manufacturing modular homes out of Hangar 8. However, Celtic failed to mitigate damages resulting from the expropriation by conducting a reasonable search for a replacement property. Few properties were seriously considered or visited and those considered were either unsuitable or acquisition was not feasible due to financing issues. Several were well beyond what Celtic would require for its manufacturing business. There was a lack of evidence regarding suitable replacement leasehold options explored and geographic limitations to Celtic's search for lease options were found to be "self-imposed". The fact that Celtic sold off much of the equipment it required to continue its manufacturing business at a loss, further weakened their assertion that they were making reasonable efforts to relocate. The Board at various points in the decision also pointed to the use of the proposed payment for purposes other than offsetting a potential rent increase and also the purchase of a building unsuitable for the manufacturing process as evidence of lack of mitigation effort.

Notwithstanding Celtic's failure to mitigate, the Board found that there were unavoidable post-expropriation business losses compensable under s 42. An expropriated owner is entitled to compensation for disturbance damages where it could have relocated but did not. The Board determined that if Celtic had acted reasonably it would have relocated to a leased facility and ramped up operations. The hypothetical time period from relocation to pre-expropriation operational levels was found to be the loss period and the growth rates from Celtic's financial expert were used to estimate losses.

E. <u>Replacement facility or the cost of capital to relocate</u>

Celtic claimed $9,507,500 to replace Hangar 8, including construction of a new building, in addition to the market value of the expropriated interest or financing for the same. The City argued that a replacement remedy would amount to equivalent reinstatement which is not available under the legislation in the situation at hand.

The Board declined to make such an award on the basis that Celtic did not prove that it would be relocating. Even if Celtic did establish that it would relocate and replacement as a remedy was available under the *Expropriation Act*, the claimant would be entitled to replacement cost or market value but not both as that would amount to double recovery.

F. <u>Damages for equipment and materials sold</u>

Celtic sought the replacement cost of equipment and materials sold at a loss, alleging they were forced to sell equipment in a rush. The City argued that Celtic did not relocate so the equipment was redundant and any losses were a result of Celtic's failure to mitigate.

The Board found that Celtic failed to mitigate this loss. While the short time frame precluded an exhaustive search of alternatives, it did not prevent a reasonable one. Celtic failed to adequately explore the possibility of storage, instead opting to sell the equipment in informal sales. Hundreds of thousands of dollars' worth of equipment was sold without valuation, a professional opinion or even an advertisement. Thus the Board awarded compensation for liquidation of the equipment at only 50% of the amount claimed by Celtic, indicating that half of the loss incurred was directly attributable to Celtic's failure to take reasonable steps to mitigate its losses.

Executive time

Executive time is compensable under s. 50 of the *Expropriation Act* for time spent dealing with the expropriation that would have otherwise been spent on the business. Executive time was found not to be compensable for the period of time after the move when Celtic's manufacturing business was not operational. The Board awarded compensation based on owner's estimates of time spent dealing with the expropriation prior to Celtic's move. The Board found that a reasonable rate for an officer/executive in this case was double the wage of a typical employee.

***Calgary (City) v Lee*, 2018 ABLCB 5 (LCB ORDER549)**

This was an application by Notice of Motion to strike the Respondent's (Claimant's) Application for Determination of Compensation (ADC) on the basis that it was filed outside the limitation period pursuant to s. 36(2) of the *Expropriation Act* and for costs. The Board found that that the time limit for serving ADCs in s. 36(2) of the *Expropriation Act* does not apply to claims under s. 534 of the *Municipal Government Act*, RSA 2000, c M-26 (MGA).

If the intention was to provide a statutory limitation period, express language doing so would have been included in s. 534 of the MGA. Section 534(11) is permissive not mandatory - the LCB "may" follow the practices and procedures used in the *Expropriation Act*. The triggering event for the time limit under s. 36(2) is written notice of expropriation and the proposed payment, none of which are contemplated in s. 534 of the MGA.

The Board relies on the decision of the Alberta Court of Appeal in *Calgary (City) v Lafarge Canada Inc.*, 1995 ABCA 313, noting that the City can protect itself from having to wait indefinitely for potential claims under s. 534 of the MGA by applying to the LCB for a determination of the compensation.

Taber Irrigation District v. Van Dyk, 2018 ABLCB 9 (LCB ORDER 553)

Prior to setting a date for an Inquiry, the Board was asked, as the appointed Inquiry Officer, to determine whether service upon particular dominant easement interests was sufficient for the purposes of the Act. Affidavits evidencing consents of some interest holders and service of the remaining were deemed to demonstrate sufficient service.

II. Queen's Bench - Judicial Review

***Robert Woodward and Lorraine Woodward v Cardston County,* 2018 ABQB 260**

This was an application for judicial review of a decision of Cardston County to expropriate an area of road on the applicants' lands for a public road to provide public access to recreational land. The purpose of the expropriation was grounded in s. 3(b) of the MGA - "to develop and maintain safe and viable communities." The applicants initially objected to the expropriation and an Inquiry was held. The Inquiry Officer's report concluded that the expropriation was fair, sound, and reasonably necessary to achieve the County's objective.

The following issues were raised:

1. Was there a breach of procedural fairness arising from the failure of one Councilor to recuse himself from an initial meeting about potential expropriation?
2. Was the expropriation made for a proper purpose?
3. Did the County err in relying on the Inquiry report, which was alleged to contain errors of fact and law?

Standard of Review

After reviewing the decision of Justice Veit in *Northland Material Handling Inc v Parkland (County)*, 2012 ABQB 407, with respect to the deference accorded to elected municipal councils, Justice Kubik determined that the appropriate standard of review was one of reasonableness, requiring the court to assess whether the County's decision making was reasonable in terms of both outcome and reasoning, and when viewed as a whole, was justified, transparent, and intelligible; falling with a range of acceptable outcomes, having regard to both the facts and the law (*Dunsmuir v New Brunswick,* 2008 SCC 9*).*

Issues on Review

1. Breach of procedural fairness due to bias - There was no breach. Although the Councilor in question attended a preliminary meeting, he recused himself from the vote to approve the expropriation.
2. Was the expropriation made for a proper purpose? - The purpose of the expropriation was properly grounded in s. 3(b) of the MGA. The County considered the Inquiry report and considered the public interest, cost, and the absence of other viable options, as such their decision met the reasonableness standard.
3. Did the County err in relying on the Inquiry report? - The Inquiry report was not the subject of review. The use of Affidavits or fresh evidence on judicial review cannot be for the purpose of supplementing the factual record used by the tribunal to decide the issue on the merits (*White v Alberta (Workers' Compensation Board, Appeals Commission),* 2006 ABQB 359). The County was statutorily required to consider the inquiry report and reliance on it was reasonable in the approval of the expropriation.

III. Alberta Court of Appeal

***689799 Alberta Ltd v. Edmonton (City)*, 2018 ABCA 212**

This was an appeal by the City of an order of the LCB (*689799 Alberta Ltd. v Edmonton (City)*, 2017 ABLCB 9), for answers to undertakings and production of documents in the context of a claim for compensation arising from the expropriation of their leasehold interest in the former Edmonton City Centre Airport (ECCA).

The City objected to production of information relating to leasehold agreements with a neighbouring tenant, copies of internal valuations of the claimant's leasehold, and certain sales and settlement agreements entered into by the City in relation to the other ECCA leaseholds. It objected to disclosure of sales agreements and settlement agreements on the grounds of litigation and settlement privilege, respectively. The LCB ordered the City to produce the documents sought by the claimant and ordered the claimant to produce some of the financial documents the City sought by cross-application. The City appealed all orders of the LCB under s.37 of the *Expropriation Ac*t.

In a split decision, the Majority declined to hear the appeal on the basis of the rule against appeals from interlocutory orders, which was found to apply to the LCB and upheld the order of the Board. Dissenting Justice McDonald found that the circumstances in this case favoured hearing the appeal regarding the issue of the settlement agreements because it addresses an important issue of law, namely the issue of settlement privilege. Justice McDonald held that the LCB has no jurisdiction to set aside settlement privilege and he would have set aside the terms of the Board order requiring the disclosure of settlement agreements. Notwithstanding the Majority's ruling to not hear the appeal, they considered the issue of settlement privilege after having read a draft of the Dissent and saw no reviewable error in the Board's decision to order

production of the settlement agreements. The City has applied for leave to appeal to the Supreme Court of Canada on the settlement privilege issue.

Standard of Review

The Majority and Dissent agreed on the applicable standards of review:

- Correctness on questions of law, and reasonableness of questions on fact [*Gimbel v Alberta (Public Works, Supply & Services)*, 2008 ABCA 262 (*Gimbel*)].
- Whether a particular document is relevant and material, and whether it is privileged are questions of mixed fact and law engaging a standard of palpable and overriding error. [*The Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 (*Blood Tribe*)].
- Board decisions regarding the evidence to be put before it are exercises of discretion engaging the standard of reasonableness (*Gimbel*).

Preliminary Issue - Is the Appeal Premature?

Both the Majority and Dissent found that as a general rule, the Court of Appeal does not hear appeals from interlocutory orders unless there are exceptional circumstances [*Robertson v Wasylyshen,* 2003 ABCA 279 ("Robertson")]. They disagreed as to whether this rule applied in the circumstances and if it did, whether exceptional circumstances existed to allow the Court to hear the appeal.

The Majority found that the rule against appeals from interlocutory orders applies to appeals from the LCB. The legislative intent behind the *Expropriation Act* is to facilitate expedient resolutions of expropriation proceedings and therefore not to override the Court of Appeal's practice of limiting appeals. The only ground of appeal that could present an exceptional circumstance is the Board's jurisdiction to rule on claims of settlement privilege.

Justice McDonald, dissenting, questioned the application of any rule against appeals of interlocutory orders in light of the right of appeal provided in s. 37 of the *Expropriation Act* from "any determination or order of the Board". The circumstances in this case favoured hearing the appeal because it addresses an important issue of law - whether the language of the *Expropriation Act* or its regulations are sufficient to vest the LCB with the power to abrogate common law privilege. After considering the policy decisions set out in *Robertson*, Justice McDonald found that the appeal should proceed only in relation to the settlement agreements.

Settlement Privilege

Notwithstanding the majority's ruling above, they considered the issue of settlement privilege after having read a draft of the dissent. The Majority concluded that the LCB exercises a dispute resolution jurisdiction similar to that of a superior court that includes jurisdiction to rule on settlement privilege. Decisions of the Supreme Court denying privacy commissioners' jurisdiction to address claims of solicitor client privilege were distinguished on the basis that they are administrative investigators rather than adjudicative decision makers.

The Majority saw no reviewable error in the Board's decision to order production of the settlement agreements as it applied a well-established exception to the application of settlement privilege following the test set out in *Sable Offshore Energy Inc v Ameron International Corp,* 2013 SCC 37 (*Sable*).

Justice McDonald, dissenting, found that the LCB has no jurisdiction to set aside settlement privilege and would have set aside the terms of the Board order requiring the disclosure of settlement agreements. The LCB erred in finding that it had jurisdiction to compel production of privileged information and that it did not require express statutory authority to abrogate settlement privilege. As such, the Board's determination that the value of maintaining confidentiality was outweighed by prejudice to the claimants becomes moot.

Subsequent proceedings

The City has applied for leave from the Supreme Court of Canada to hear a further appeal on the issue of settlement privilege. On application by the City, the Alberta Court of Appeal granted a temporary stay of this ruling regarding the production of the settlement agreements pending the outcome of the leave application. A temporary stay was granted to February, 28 2019 after which the City must apply to the SCC for any further stay.