In the Court of Appeal of Alberta

Citation: Marks v. Westlock (Town of), 2006 ABCA 159

Date: 20060518
Docket: 0503-0232-AC
Registry: Edmonton

Between:

Marvin D. Marks

Respondent
(Claimant)

- and -

The Town of Westlock

Appellant
(Respondent)

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Mr. Justice Clifton O'Brien
The Honourable Mr. Justice Peter Martin

Memorandum of Judgment

Appeal from the Order of the
Land Compensation Board for the Province of Alberta
Dated the 18th day of July, 2005

Memorandum of Judgment

The Court:

A. Introduction

[1] The issue on this appeal is whether the Land Compensation Board erred in determining the value of land formerly owned by the respondent (hereinafter called "Marks") and expropriated by the appellant, the Town of Westlock (hereinafter called the "Town") and in determining damages to Mark arising out of the expropriation of a portion of his lands.

B. Facts

[2] On August 27, 2001, the Town expropriated an undeveloped parcel of 79.99 acres located within its boundaries. The land taken fronts Highway 18 which constitutes the main east-west thoroughfare in Westlock.

[3] The expropriated lands were a part of the lands on which Marks operated a mixed farming operation. At the time of the expropriation, the land was used for an airstrip, a cattle-feeding pad; a portion leased to a third party for equipment storage; a water reservoir for stock watering and other agricultural purposes, pasture and as a conduit for collecting spring run off water for storage in the reservoir.

[4] The expropriated lands had mixed zoning, including urban reserve, highway commercial, restricted and general industrial as well as agricultural. There was a mixed tax assessment, some being Highway Commercial and the remainder Agricultural.

[5] The Municipal Development Plan, adopted in 1998, showed a future land use of commercial and industrial. The front portion of the land running parallel to Highway 18 was designated as commercial and the back portion was industrial.

[6] The purpose of the expropriation was to facilitate commercial and industrial development within the Town. The land is now the site of a large John Deere farm equipment outlet and a Real Canadian Superstore.

[7] Following the expropriation, the Town made payment to Marks of $481,507.00 allocated as being $400,000.00 for the market value of the expropriated lands and the remaining $81,507.00 characterized as disturbance damages.

[8] By an Application for Determination of Compensation dated July 29, 2002, Marks applied to the Land Compensation Board of the Province of Alberta (hereinafter called "the Board") to determine the amount of compensation payable to him as a result of the expropriation.

[9] The Board conducted a hearing in May 2004, and on July 18, 2005, issued Board Order No. 440 awarding compensation in the total amount of $862,487.00 plus interest thereon from the date of the expropriation less the amount already paid to Marks.

[10] The award of compensation was broken down as follows:

(a) $660,000.00 for the market value of the land, being $12,000.00 an acre for the approximate northerly 40 acres of the parcel and $4,500.00 an acre for the approximate southerly 40 acres of the land;

(b) $157,485.00 damages for water issues;

(c) $16,425.00 damages for reduced herd of cattle, under the heading new pasture transition; and

(d) $28,577.00 damages for airstrip replacement.

C. Grounds of Appeal

[11] The Town brings its appeal on the following grounds:

(i) with respect to the market value of the land, it is argued that the Board failed to observe s. 45 of the *Expropriation Act*, R.S.A. 2000, c. E-13, (hereinafter referred to as "the *Act*") and that the Board misconstrued material evidence resulting in an erroneous and unreasonable award of compensation;

(ii) with respect to the damages, it is argued that the Board likewise misconstrued the evidence; and

(iii) with respect to the award of interest, it is argued that the Town was prejudiced because the Board's order was issued 417 days after the conclusion of the hearing.

D. Standard of Review

[12] An appeal may be taken from any determination or order of the Board on questions of law or fact, or both, pursuant to s. 37 of the *Act*.

[13] The parties agreed that the appropriate standard of review for the issues raised on this appeal is reasonableness *simpliciter*. In its recent decision in ***Larsen v. Calgary (City of)*** (2003), 330 A.R. 189, 2003 ABCA 197, which also dealt with an appeal from the same Board, the Court stated at paras. 3 and 4:

> [3] In determining the appropriate standard of review, the court is to engage in the functional and pragmatic approach by considering the factors discussed in ***Pushpanathan* v. *Canada (Minister of Citizenship and Immigration),*** [1998] 1 S.C.R. 982. Having reviewed the factors, we conclude the appropriate standard of review for the issues raised on this appeal is reasonableness *simpliciter*. The statutory right of appeal on "questions of law or fact, or both" in s. 37 of the *Expropriation Act*, R.S.A. 2000, c. E-13, and the fact the board adjudicated a dispute between two parties point to a low degree of deference. However, the board's expertise and the factual questions raised on appeal support a higher degree of deference. The combination of these competing factors leads us to the reasonableness *simpliciter* standard.
>
> [4] In earlier appeals from board decisions, this court indicated that its function is not to substitute its judgment for that of the board. "Rather, it is to determine whether the Board proceeded on some incorrect principle or overlooked or misapprehended some material evidence": ***Malmberg* v. *Cardston (Municipal District) No. 6*** (1997), 63 L.C.R. 8 at 12 (Alta. C.A.), leave to appeal to S.C.C. refused, [1998] 1 S.C.R. xi, citing ***Larsen* v. *Edmonton (City)*** (1982), 24 L.C.R. 364 at 367 (Alta. C.A.). These principles are consistent with the reasonableness *simpliciter* standard of review.

[14] The analysis of the standard of review in ***Larsen*** is applicable to the issues raised in this appeal.

E. Analysis

(i) Land Value

[15] The Town complains that the Board considered the anticipated and actual use of the land after the expropriation and thereby failed to observe s. 45 of the ***Act*** which provides, in part, as

follows:

> 45 In determining the value of the land, no account may be taken of
>
> (a) any anticipated or actual use of the land by the expropriating authority at any time after the expropriation;
>
> ...
>
> (c) any increase or decrease in the value of the land resulting from the development or the imminence of the development in respect of which the expropriation is made or from any expropriation or imminent prospect of expropriation;

[16] While the Board at the outset of its award notes the purpose and present use of expropriated land, there is nothing within the body of the decision which indicates that the Board was influenced by the use of the land by the expropriating authority at any time after the expropriation. The Town, however, relies upon certain questions placed by members of the Board to the appraiser called by the Town during his oral examination.

[17] Quite apart from the fact that the questions constitute no part of the decision, a reading of the witness's testimony taken in context demonstrates that the Board members were simply probing the valuation technique used by the appraiser.

[18] The Board was correct in taking into account that the land was ripe for development, a fact conceded by counsel for the Town in the course of the appeal. The municipal plan adopted in 1998 recognized the potential for highway commercial development some time before the expropriation occurred. Had the Town not expropriated here, the commercial development would have been just as foreseeable.

[19] In ***Guaranty Properties Limited v. Edmonton (City of)***, (2005), 363 A.R. 139, 2005 ABCA 91, the central issue was the interpretation to be given to s. 45 of the ***Act***. The court in that case made it clear that the Board was entitled to take into account circumstances that were already in place at the time of the expropriation including expansion plans and the probability of such things as a change to road access.

[20] Here, the Board quite properly took into account the development potential of the land at the time of the taking as distinct from any increase in value that resulted from the specific development in respect of which the expropriation was made. If a municipality expropriates for a non-governmental non-utility and ordinary commercial development, it cannot require the Board to ignore the highest and best use of the land and value it as a hay meadow. Section 45 was never

intended to do that. The land at the time of its expropriation was destined for commercial use and the value reflects that potential and is not attributable to the use intended by the Town as the expropriating authority.

[21] The Town further contends that the Board misapprehended material evidence when it preferred the evidence of the appraiser called by Marks. The thrust of this complaint relates to a "comparable" relied upon by that appraiser and accepted by the Board. The Town argues with respect to the comparable in question that the appraiser made the elementary error of confusing gross acres (before sub-division dedications) with net acres (after). Marks' appraiser was closely cross-examined on this point by counsel for the Town and the appraiser explained why he treated the transaction as he did and why he considered that no downward adjustment was necessary in the circumstances.

[22] The valuation of land lies at the heart of the Board's expertise and mandate. Here the appraisers for both parties utilized the direct comparison approach which involves gathering sale prices for similar properties. Adjustments were made to compensate for differences between the subject land and the comparable land with respect to such factors as time, location, zoning, physical characteristics, size, timing of development, etc.

[23] It follows that judgment must be exercised in determining what adjustments are required and the extent to which adjustments will be made. Both experts explained their comparables at length. It is evident from the discussion in its decision with respect to the disputed comparable that the Board accepted the treatment of Marks' appraiser of that transaction and did not agree that any fundamental error had been made in confusing the price of gross versus net acres such as to require a large downward adjustment. The Board preferred the approach taken by Marks' appraiser, it explained why and there is evidence to support that decision. The decision was not unreasonable. In consequence, appellate intervention is not warranted. The standard of review precludes it in these circumstances.

(ii) Damages

(a) Water Issues

[24] The Board awarded damages of $157,485.00 for so-called "water issues". As explained by the Board in its decision, the award related to the cost of replacing a 1.5 to two million gallon dugout, waterlines and electrical lines for filling and delivering water from the dugout and providing for an alternate source of water to make up for water that had drained from the subject land which was collected and pumped to the dugout.

[25] The claim of Marks in this regard was calculated by reference to the best price obtained from

invitations given to six contractors of which Standard General was the lowest. The Board found that the estimate submitted by Marks was more accurate than that submitted by the Town. However, the Town argues that the Board made a "miscalculation" in fixing the damages at $157,485.00.

[26] In its award, the Board noted that Marks' claim "was reduced . . . *by* $13,000.00" (emphasis added). The reduction in the claim related to the cost of filters which was included in the claim twice. Counsel for Marks upon identifying this duplication advised the Board that the claim was reduced by $4,900.00 to $13,000.00. In other words, the reduction was not *by* $13,000.00 but *to* $13,000.00. The Board's award accurately states the amount of $13,000.00. Upon an examination of the complaint, it is apparent that the Board has inadvertently misstated the amount of the reduction but that there is no miscalculation in the award itself.

[27] The Town also objects to the time frame for the calculation of the present value of the damages for water. The Board accepted 15 years was an appropriate time frame for this purpose while other time frames were accepted in other instances for the calculation of damages. The Board's decision in this regard was based on the evidence before it and it was not unreasonable to accept different time frames for different operations conducted upon the subject lands.

(b) Cattle

[28] Marks claimed $16,425.00 as the cost of boarding 25 cows with calves at the feed lot for two years. In the alternative, he claimed that he was entitled to compensation for reducing his herd.

[29] The Board rejected the claim for boarding. However, the evidence was that Marks reduced the size of his herd to accommodate for lost pasture during transition. The Board accepted that compensation was warranted. The evidence demonstrated a loss of $30,550.00 of gross income. However, the Board pointed out that the evidence was not clear as to what costs should be deduced from the gross loss to measure the net loss. The Board then referred to an alternative approach to the calculation which took into account that Marks had reduced the herd in July 2002, by 59 sets or pairs which was more than double the 25 pairs that was used as the basis for estimating the loss. The Board, however, capped the loss to the amount claimed.

[30] There was ample evidence before the Board to demonstrate that a loss was sustained such that Marks was entitled to compensation. While the measure lacks precision, the Board was entitled to apply its expertise to the assessment of damages and having regard to the quantum at issue, this court will not interfere with this component of the award.

(c) Airstrip

[31] The Board awarded $28,577.00 for the cost of replacing the airstrip. In its award, the Board stated that "the airstrip was used for the convenience . . . of the claimant who used it as a means of surveying his summer pastures twice a week during the months of June to October each year". The Board noted that the Town questioned the utility of the airstrip. However, it accepted that the airstrip was an established amenity that Marks was entitled to be compensated for.

[32] The Town argues that the Board's finding was contrary to the evidence before the Board. The Town raised the point that no flights were recorded in the log book. However, the absence of the record keeping was explained in the evidence adduced before the Board and the Board was entitled to accept this explanation.

[33] The Town also submits that the Board's award resulted in a betterment to Marks and relies, in part, in making this submission upon the inclusion of a drainage swale in the damages. In its award, the Board does not explain its reason for including the drainage swale. However, the evidence discloses that a swale was not required at the original location because the ground sloped toward the south to the natural water run. In the new location, a drainage swale is needed because little water runs go across the airstrip site.

[34] In short, there was evidence before the Board which permitted it to make the findings that it did with respect to the airstrip. Its findings were not contrary to the evidence, as submitted by the Town, nor is there any indication that the Board misapprehended the evidence. Rather, the Board, as it was entitled to do, determined what evidence it preferred and made its determination on the basis of the evidence accepted by it.

(iii) Interest

[35] The Board awarded interest to Marks on the amount of the award, less the initial payment identified in para. 7 above. The Town expressed its concern that its interest obligation includes a period of 417 days from the conclusion of the hearing on May 27, 2004 until the award was delivered on July 18, 2005. The Town submits that it has sustained significant prejudice for what it characterizes as "a monetary penalty of interest for the 417-day period of delay".

[36] Without condoning the length of time taken to deliver the award, it is difficult to recognize that any prejudice was suffered by the Town. The interest rate utilized by the Board is based on the average annual interest paid on 90 day Treasury Bills, compounded annually. The Town had the benefit of and use of the funds during the period of time.

[37] A similar complaint was raised in ***Sands Motor Hotel Ltd. v. Edmonton (City)*** (2005), 376 A.R. 365, 2005 ABCA 402. The response made by this Court at para. 32 in that case is equally applicable to the subject case:

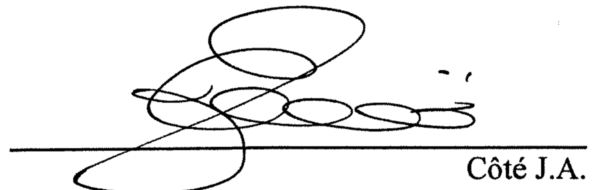
> This submission overlooks the fact that the City had the benefit of or use of the funds during that period of time. The compound interest awarded is at a modest interest rate. We find no error in the award of pre-judgment or compound interest by the Board.

F. Conclusion

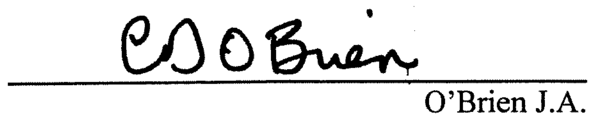
[38] The appeal is dismissed.

Appeal heard on April 7, 2006

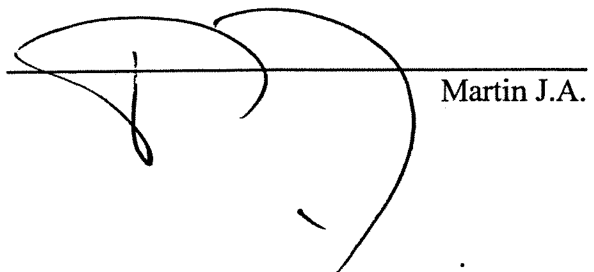
Memorandum filed at Edmonton, Alberta
this 18th day of May, 2006



Côté J.A.



O'Brien J.A.



Martin J.A.

Appearances:

D.W. Moroz
for the Appellant

D.P. Mallon, Q.C.
for the Respondents