2019

Expropriation Case Law Review

ALBERTA EXPRORIATION ASSOCIATION

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CASE REVIEW

INTRODUCTION

While there are no compensation cases coming out of the Alberta Land Compensation Board this year, we still have plenty to discuss. What follows includes: two inquiry reports, three cases in which the LCB acted as approving authority, three interesting costs decisions, updates from the Alberta Court of Appeal and the Supreme Court of Canada on one of last year's decisions, a Queen's Bench Master's decision on the weighty topic of *"in pari materia"* and some hints about arguments that have been made for which decisions are pending.

EXPROPRIATION ACT INQUIRIES

672884 Alberta Ltd. v. Edmonton

The City proposed to expropriate several downtown lots owned by a local developer as part of a land assembly to develop a major park in the Warehouse Campus Neighbourhood of downtown Edmonton in order to achieve the development vision described in the Capital City Downtown Area Redevelopment Plan. One of the objectives set out in the City's planning documents was to develop a single, contiguous well-designed public park. The land assembled for the park included properties on both sides of 107 Street. The routing of a future LRT line down 107 Street had recently been approved by City Council. The owner's lands were currently used for surface parking but zoned for future high-rise development.

The owners objected to the expropriation on the basis that much of the detailed design work described in Edmonton's planning documents had not yet been done and the taking was therefore premature. They also objected on the basis that the taking did not assist the City to meet the objective of creating a single contiguous park. Finally, they argued that in the years since the selection of their lands the developer owner of properties which were contiguous to the other City assembled properties (i.e. not across 107 Street) had abandoned his project and therefore better options were now available to the City.

The Inquiry Officer found the proposed taking was incongruous with the City's desire for a single, contiguous park as set out in its selection criteria and planning documents and therefore neither sound nor necessary. Notwithstanding the Inquiry Officer's decision, Edmonton City Council later approved the expropriation at a council meeting in which the owners and adjacent land owners were given opportunity to express their viewpoints.

The Inquiry Officer's decision contains a number of interesting discussions on the following points:

- Whether the "reasonably defensible" test applied in Ontario applicable as a surrogate for "fair, sound and reasonably necessary".

- The application and definition of the “fair, sound and reasonably necessary” test and the extent to which a balancing of the community’s interests verses the owner’s interests is required.
- The admission of expert evidence.

RVB managements Inc. v. Rocky Mountain House

The Town of Rocky Mountain House sought to expropriate a fee simple interest of an additional 4 meters alongside an existing road right of way, plus 8 meters of utility right of way and 12 meters of temporary working space easement for construction of new road, utility and enhanced boulevard infrastructure. The Town's stated objective was to widen an existing road plan for construction of an extension of a road and to run utilities alongside it and argued that an enhanced treed boulevard was consistent with municipal plans and good planning principles. A secondary consideration was that the proposed roadway would function as a catalyst to promote development for the landowners adjacent to the road plan right of way. The Owner objected on the basis that the stated objective of the Town was not its true objective - that the true objective was to connect northern and southern developments - and for that purpose the additional land was not required. The Owner did not consent to the temporary right of way but led no evidence in respect of that taking. The Inquiry Officer found the expropriation was for the Town's stated objective and that the objective was, on the whole, consistent with policy and planning documents. The inquiry officer therefore determined the taking was fair sound and reasonably necessary in order for the objective to be achieved.

ALBERTA LAND COMPENSATION BOARD

Order 554

Taber Irrigation District v Van Dyk[1]

An application by the Expropriating Authority, the Taber Irrigation District, was put before the Alberta Land Compensation Board ("LCB") as Approving Authority for a Certificate of Approval of the expropriation of 2.34 hectares plus temporary rights of way to expand and transition some of its open canal system into a system of settling ponds and pipelines.

The Issue before the LCB was to approve or disapprove the expropriation or approve it with modifications.[2]

In the case of expropriations by bodies other than the Province or municipalities, the LCB is the Approving Authority pursuant to section 7(c) of the *Expropriation Act*.[3]

In this case, the Owners had objected to the proposed taking and subsequently participated in an Inquiry hearing. They were self-represented and did not provide evidence to support their concerns. The Inquiry Officer in her report found the taking fair, sound and reasonably necessary.

As Approving Authority, the Board was required by section 18(1) to "consider" the report before making its required decision.[4] In this case, the Board found the expropriating authority had authority under the *Irrigation Districts Act*[5] to expropriate land, had complied with the procedural requirements of the *Expropriation Act* and had demonstrated the taking was fair, sound and reasonable.[6] The Certificate of Approval was granted.[7]

Note: When an Inquiry Report goes to a municipality for consideration with an administrative request for a Resolution authorizing the expropriation, that process is, at least in part, a public process. The Resolution is made at a municipal council meeting at which there is sometimes the potential for further input by the owners. When the expropriation is by a non-municipal entity (including the Province) the consideration of the Inquiry Report and the approval process is not in the public realm.

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[1] *Taber Irrigation District v Van Dyk,* 2018 ABLCB 11 [*Taber*].
[2] *Ibid* at para 9.
[3] *Expropriation Act,* RSA 2000, c E-13, s 7(c) [*Expropriation Act*].
[4] See *Expropriation Act, ibid*, s 18(1).
[5] *Irrigation Districts Act,* RSA 2000, c I-11, s 9 [*Irrigation Districts Act*].
[6] *Taber, supra* note 1 at para 20.
[7] *Ibid* at para 22.

Order 555

Taber Irrigation District v Van Dyk[8]

The Expropriating Authority, Taber Irrigation District, requested that the Certificate of Approval previously granted in Order 554 by the LCB as Approving Authority be amended as the Plan of Survey attached to the Certificate of Approval intended to be submitted to Land Titles did not match the description in the Notice of Intention to Expropriate ("NOITE").[9] The difference between the NOITE and the registered Plan of Survey resulted in an increased taking of 0.012 hectares.

The Expropriating Authority submitted that the inconsistency was little more than a clerical error, amounted to *de minimus* and created no prejudice to the owners.[10] The owners did not make submissions although they had an opportunity to do so. They were aware of the proposed taking in the NOITE and were at the Inquiry hearing where the Plan of Survey became an exhibit.[11]

The LCB refused to categorize the difference as *de minimus* but did rely upon section 21(1) of the *Expropriation Act*[12] which permitted the approving authority to vary the size of the parcel taking if the variation was minor and caused no prejudice to the owners. The LCB determined the difference was minor (an increase in the taking of less than 0.3%)[13] and given the owners' knowledge of the taking the Approving Authority was of the view no prejudice would be caused by the variation to the owners.[14] The Certificate of Approval was amended as requested.[15]

Order 556

Sylvan Lake Regional Wastewater Commission v Kingswood Crossing (Alberta) Inc.[16]

The LCB in this case was the approving Authority for the expropriation of 0.164 hectares by the Sylvan Lake Regional Wastewater Commission. The Notice of Intention to Expropriate showed the area required as +/- 0.16 hectares,[17] however the Plan of Survey to be submitted to Land Titles detailed an additional .004 hectares.[18] The LCB noted that section 21(1) of the *Expropriation Act* provides the Approving Authority with the jurisdiction to:

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[8] *Taber Irrigation District v Van Dyk*, 2018 ABLCB 11 [*Taber Irrigation District*].
[9] *Ibid* at para 3.
[10] *Ibid* at para 5.
[11] *Ibid at para 15.*
[12] *Expropriation Act, supra* note 3, s 21(1).
[13] *Taber Irrigation District, supra note 8 at para 14*
[14] *Ibid* at para 15.
[15] *Ibid* at para 17.
[16] *Sylvan Lake Regional Wastewater Commission v Kingswood Crossing (Alberta) Inc.,* 2019 ABLCB 1.
[17] *Ibid* at para 2.
[18] *Ibid* at para 3.

> *"vary the size…of the expropriated land within the boundaries of the parcel from which the land was expropriated, if, in the opinion of the approving authority, the variation is minor and can be made without prejudice to the owner."*[19]

The LCB approved the expropriation finding that the detailing of 0.0004 hectares was minor, it did not prejudice the owner, and the Expropriating Authority had otherwise complied with all other requirements of the *Expropriation Act*.

Order 557

Haluszka v Alberta (Infrastructure)[20]

This is an interim legal costs application under s. 39 of the *Expropriation Act*.

2.3 acres of the Claimants' 160-acre parcel west of Breton was expropriated by Alberta in July 2013 after an Inquiry Officer found the taking fair, sound and reasonably necessary.[21] The proposed payment was $3,566.00.[22]

Between 2013 and 2014 the Respondent paid interim costs in respect of the compensation claim in the approximate amount of $28,000 in addition to paying Inquiry costs. The Claimants' counsel issued further accounts in 2017 and 2018 totaling approximately $83,000 in fees and $7,500 in disbursements. The Claimants claimed interim costs of 75% of the fees and 100% of the disbursements. The Respondent, relying on *Edmonton v Airco* and *Nissen v Calgary*,[23] denied the Claimants were entitled to payment of interim legal fees in the circumstances or, in the alternative, that the amount awarded should be 50% of that claimed. The amount of the disbursements claimed was not at issue.

The Claimants relied on *Golfscape International Corporation v Alberta (Transportation)*[24] and *Northey v Red Deer (City)*,[25] arguing that the case was complex given the time taken to get to the current point in the litigation, the number of claims and the number of lay and expert witnesses required for the compensation hearing.[26] They submitted the risk of overpayment was low given the work was not completed and that the claim was only 75% of the fees billed.[27]

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[19] *Ibid* at para 5; citing *Expropriation Act, supra* note 3, s 21(1).
[20] *Haluszka v Alberta (Infrastructure),* 2019 ABLCB 2 [*Haluszka*].
[21] *Ibid* at para 3.
[22] *Ibid* at para 11.
[23] *Haluszka, supra note 18 at para 30; citing Edmonton (City) v Airco Aircraft Charters Ltd. 2018 ABLCB 2 [Airco]; citing Nissen v Calgary (City) 1983 ABCA 307 [Nissen]*
[24] *Golfscape International Corporation v Alberta (Transportation), 2010 CanLII 98393 (AB LCB) [Golfscape].*
[25] *Northey v Red Deer (City), 2016 ABLCB 4 [Northey].*
[26] *Haluszka*, *supra* note 18 at paras 24-25.
[27] *Haluszka*, *supra* note 18 at para 24; citing *Northey*, *ibid*.

The Respondent submitted that the following amounted to special circumstances to deny the Claimants interim costs or, in the alternative, a 50% reduction rate:

- Mr. Haluszka had made an arrangement with his counsel that he did not have to pay his legal accounts until the conclusion of the litigation;
- the accounts contained entries unrelated to the determination of compensation;
- there was involvement of multiple counsel simultaneously working in duplicate;
- time appeared to be charged by assistants or staff;
- excessive time was billed by a student-at-law to review the *Expropriation Act;*
- the time billed was excessive compared to the progress made moving the matter toward a hearing (after five years they had no final expert reports and had only an affidavit of records and an amended ADC to show for the large costs claimed)[28].

The Claimants countered that as per *Northey,* the considerations for interim costs were not "reasonableness" but rather complexity and the risk of overpayment.[29]

Award

The Board confirmed that interim costs provide a mechanism that permits a landowner to mitigate the carrying costs of legal, appraisal and other costs, essentially making the "playing field level." However, the entitlement is not without limitation. The essential consideration is "what amount is reasonable to allow the Claimants to advance their case on an equal footing to the Expropriating Authority in light of the appropriate considerations"[30] The presence of special circumstances or other circumstances may preclude interim costs or militate towards a particular discount rate. The requirement in s. 39 that costs must be "reasonable" indicates that interim costs must be *prima facie* reasonable to be awarded. Thus it is necessary as a "pre-condition" to conduct a "preliminary assessment" of the reasonableness of the costs.[31]

In this case, the evidence did not support a finding of special circumstances sufficient enough to disallow interim costs.[32] However, the issues associated with risk of overpayment raised by the Respondent were not satisfactorily addressed by the information provided by the Claimants. Furthermore, the Claimants had not established the claim was complex as neither the articulation of multiple grounds in a claim, nor the passage of time in and of itself, makes a claim complex. While the frequency of interim costs accounts is not a consideration in assessing the risk of overpayment, consideration of future legal work as a set-off is a relevant concern, and in this case much of the preparatory legal work should have been completed. In all the circumstances, a 50% discount rate of the legal fees claimed was warranted.

[28] *Ibid* at para 33.
[29] *Ibid* at para 43.
[30] *Ibid* at para 50.
[31] *Ibid at para 47.*
[32] *Ibid at para 48.*

Order 558

Instant Storage (Edmonton) Inc. v Edmonton[33]

This was an application by Instant Storage for interim costs to pay its business valuation expert's costs invoiced to date pursuant to sections 35 and 39 of the *Expropriation Act*.[34]

Instant Storage is a company that had an interest as a tenant in a building expropriated by the City of Edmonton for redevelopment of the City Centre Airport. The City paid $0 dollars as a proposed payment as it assessed there was no market value.

Instant Storage claimed (among other things) damages due to business disturbance and engaged an accounting firm MNP LLP (MNP) to calculate that disturbance and assist with answering undertakings. Invoicing to date from MNP was approximately $100K. MNP provided an affidavit in support of the application including report details and invoicing details. MNP also advised they would perform no further work for the applicant without payment of past invoices.

Instant Storage relied on *Golfscape*[35] and *Thoreson v Alberta*[36] for interim costs principles which include the following:

> *"To allow the expropriating authority to wait until all the issues have been determined before paying would put the claimant at an unfair disadvantage which cannot be the intent of the legislation."*[37]

The City argued that these expert costs, as they are not appraisal costs but business valuation costs, are not payable under section 35 of the *Expropriation Act*.[38] It agreed the principles for interim costs payments are those found in *Golfscape* and relied on the finding in *Ravvin Holdings Ltd v. Calgary*[39] that the onus is on the applicant to prove its costs are reasonable, taking the position the applicant did not discharge that onus. The City argued that any claim for costs should be exclusive of GST as the applicant is a GST registrant and entitled to claim an input tax credit for any GST invoiced by MNP (which was agreed to by the Claimant). The City also took the position that there was no evidence before the panel that MNP's services were required for the applicant to answer remaining outstanding undertakings.[40]

The City relied on *Golfscape* for the proposition that interim costs are not to be awarded on the full amount but rather based on a percentage which should not exceed 75% of the reasonable amount

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[33] *Instant Storage (Edmonton) Inc. v Edmonton (City),* 2019 ABCLB 3 [*Instant Storage*].
[34] *Expropriation Act, supra* note 3, ss 35,39.
[35] *Golfscape*, *supra* note 21.
[36] *Thoreson v Alberta,* 2007 ABCA 272 at para 22 [*Thoreson*].
[37] *Instant Storage*, *supra* note 30 at para 7.
[38] *Expropriation Act, supra* note 3, s 35.
[39] *Ravvin Holdings Ltd. v Calgary (City),* (1990) 44 LCR 198 (ABLCB); appeal partially dismissed (1992) 48 LCR 81 (ABCA).
[40] *Instant Storage*, *supra* note 30 at paras 11-17.

claimed. Focusing on the reasonableness of the costs and the 75% award in *Golfscape*, the City submitted that an appropriate interim award would be 50% of the claimed costs or, alternatively, 75%.

Award

The Board declined to rule on the restrictive interpretation of s 35 proposed by the City as it found it had jurisdiction to award interim costs under s 39.[41]

In determining the quantum of costs to be awarded, the panel relied on its own decision *Haluszka v. Alberta (Infrastructure)*[42] for guidance on the reasonability test:

> *"The requirement in section 39 that costs must be reasonable indicates that the interim costs must be prima facie reasonable to be awarded."*[43]

The Board then referred to the general costs principles found in the Court of Appeal case of *Nissen* and found the MNP costs *prima facie* reasonable as the extensive work appeared necessary and there was no evidence that the costs of the MNP report were the result of any misconduct, omission or neglect of the Claimant.[44]

Once the Board determined the cost of the MNP report to be *prima facie* reasonable, it went on to indicate that "the factors set out in *Golfscape* must still be considered before awarding interim costs"[45]

The Board acknowledged that it must be mindful of the risk of overpayment but ruled that *Golfscape* does not imply interim costs should be limited to 75% emphasizing there were specific reasons the LCB in *Golfscape* determined the applicant's costs in that case should be limited. The Board found that in the subject case there were some invoice entries that left open a question as to whether MNP's services were exclusively in respect of this claim, and a lack of evidence regarding the future work MNP would do. As the risk of overpayment therefore existed, the Board awarded only 75% of the fees charged net of GST. Additionally, the Board refused to award the expenses charged by MNP as there were no details, invoices or receipts regarding the expenses charged.

Order 599

Carr v Edmonton[46]

Mr. & Mrs. Carr brought an application for interim costs relating to an ADC they filed in 2006 pursuant to Section 534 of the MGA. The ADC claimed that as a consequence of the City undertaking construction, the Claimants suffered a permanent lessening of their interest in the lands. In the subject

[41] *Expropriation Act, supra* note 3, s 29.
[42] *Haluszka*, *supra* note 18.
[43] *Instant Storage*, *supra* note 30 at para 22; citing *Haluszka ibid* at paras 46,47.
[44] *Instant Storage*, *supra* note 30 at para 31; citing *Nissen, supra* note 25.
[45] *Ibid at para 33.*
[46] *Carr v Edmonton (City) 2019 ABLCB 4*

application, the Claimants were seeking the sum of $16,000, plus disbursements and GST, to pay for a Business Valuation Report and Business Interruption and Income Loss Report (Expert Report) as well as solicitor-client costs.

The Claimants submitted they lacked the financial means necessary to obtain the Expert Report even though since serving their ADC they had sold their lands for over one million dollars. They argued:

- the Board has jurisdiction to compel the Respondent to pay interim costs under Section 534 of the MGA because it has the jurisdiction to award compensation;
- the procedure to follow and principles governing a Section 534 MGA claim should be that as under the *Expropriation Act;*
- the doctrines of natural justice and procedural fairness dictate that the landowner be given a level playing field and, due to their impecunious position and resultant inability to obtain the Expert Report, a level playing field cannot occur unless interim costs are awarded.

The City requested the application be denied, arguing:

- The Board does not have jurisdiction to award the requested costs under Section 534 of the MGA as the authority is not awarded in the Board's enabling statute either expressly or by necessary implication;
- The MGA in effect as of the date of the filing of the ADC did not contain any reference to costs or the *Expropriation Act*, or the *Expropriation Act Rules of Procedure and Practice*;
- None of the Claimants' land was expropriated and as a result the *Expropriation Act* does not apply;
- Even if the *Expropriation Act Rules of Procedure and Practice* are incorporated by reference and apply, they do not contain provision for costs;
- When the Board is in doubt about whether it has jurisdiction to make an award of interim costs, even in an expropriation matter (which this is not), it should decline to do so;
- In the alternative, the City should not be obliged to pay for a report of no evidentiary value as compensation is limited under Section 534 of the MGA to permanent reduction in market value;
- Financial hardship ought not to be considered as it is not a valid ground under the MGA or even the *Expropriation Act*;
- Even if the test of impecuniosity applied to the within matter (which is denied), the Claimants have not shown they are unable to proceed with their claim;
- The Claimants could have used a small portion of their land sale proceeds to pay for the Expert Report.

Award

The Board determined that the remedy sought should be more properly framed as "advance costs" or "advance funding" for steps to be taken rather than "interim costs" as the parties had not provided particulars on any costs incurred to date.

The Board confirmed it has no inherent jurisdiction and that the starting point of its analysis was the enabling statute. The current Section 534 provides that, except in exceptional circumstances, the LCB may not award legal costs on a solicitor-client basis. Prior to its amendment in 2007, there was no reference to costs in Section 534 of the MGA although legal and expert costs that had been incurred in a Section 534 proceeding had been awarded prior to 2007.[47] Thus while the Board found it may have authority to award costs that have been incurred under Section 534, it did not have the authority in the enabling statute to award advance costs and had not been granted the implicit power to do so.

The application was dismissed. The issue of the costs payable for the application was ordered to be included in the determination of costs payable in the Application for Determination of Compensation.

Pending

April 8 Developments Inc. v. City of Edmonton

This matter involves a claim for additional compensation arising out of an expropriation for the Southeast Valley Line LRT in Edmonton. The Claimant brought an application to compel further and better answers to undertakings. The City brought a cross-application which was adjourned to allow the parties to work on resolving the issues. The Claimant narrowed the scope of its application to only certain undertakings which had been refused on the basis of relevance or which had been answered in a manner the Claimant considered inadequate. The motion was argued in April 2019 and the decision was reserved.

Edmonton v. Instant Storage et al[48]

An application was brought by the City of Edmonton to strike the Claimants' Application for Determination of Compensation for delay in prosecution. The application was argued before the LCB on July 10, 2019. A central issue was whether the LCB has jurisdiction to grant the remedy sought. The decision has not yet been rendered.

[47] *Sands Motor Hotel Ltd. v Edmonton (City), 2005 ABCA 402.*

[48] *Edmonton v Instant Storage,* 2019 ABLCB decision pending.

ALBERTA COURT OF QUEEN'S BENCH

ATCO Electric Ltd v. Pratch[49]

This is a *Surface Rights Act* case but centers on the issue of injurious affection. It is helpful in the expropriation context in that the Court provides an extensive review of the case law and discussion about the evidence required to prove injurious affection. See paragraph 96 and beyond.

City of Edmonton v. Business Care Corp., et al.[50]

This was an application by the City of Edmonton pursuant to s. 69 of the *Expropriation Act* for the Court of Queen's Bench to make a determination respecting the state of title of the City Centre Airport Lands ("Lands") immediately before the expropriation of the City Centre Airport. The City sought a declaration pursuant to s. 69 that the four respondent companies ("Respondents") did not hold title to any estate or interest in the Lands immediately before the expropriation, and a further declaration that the City did not expropriate any interests belonging to the Respondents within the meaning of the *Expropriation Act*.

Section 69(1) is as follows:

After the expropriating authority has acquired title, if the expropriating authority or the Board is in doubt as to the persons who had any interest in the land or the nature or extent of the interest, the expropriating authority may apply . . . to the court to make a determination respecting the state of the title of the land immediately before the expropriation, and the court shall determine that issue.

The Respondents were unregistered subtenants of Hangar 11 Corporation. Hangar 11 had its leasehold interest registered on title; the Respondents did not. The City argued that the *Expropriation Act* and the *Land Titles Act* were *in pari materia* as they relate to the same subject or purpose and thus should be interpreted consistently. Although "title" is not defined in the *Expropriation Act*, "land" is and is defined as "any estate or interest in land". The City argued that in order for the Respondents to have any estate or interest in the Lands at the time of expropriation, they had to have registered an instrument on title as is required by Section 53 of the *Land Titles Act*. As the purported interests were not registered on title, they could not bind title, and thus could not be expropriated. The Respondents argued that the broad definition of "owner" under the *Expropriation Act* includes "any other person who is in possession or occupation of the land" and "any other person who is known by the expropriating authority to have an interest in the land" and that there is no requirement under the *Land Titles Act* to register a lease with a duration shorter than three years.

The Court found the City's interpretation would put the expropriating authority in the position of a person using expropriation powers to defeat a known but unregistered interest and further that the two statutes are not *in pari materia*. The purposes of the *Land Titles Act* and the *Expropriation Act* are

[49] *ATCO Electric Ltd v Pratch*, 2019 ABQB 466.
[50] *City of Edmonton v. Business Care Corp., et al.*, 2019 ABQB 724

different. The purpose of the *Land Titles Act* is to give certainty of title and interest; the purpose of the *Expropriation Act* is to compensate "owners" as defined. While there were pragmatic considerations in favour of the interpretation sought by the City, the Court was not willing to limit what appeared to be the plain meaning of the definition of "owner" for the sake of convenience of the expropriating authority.

SUPREME COURT OF CANADA

City of Edmonton v 689799 Alberta Ltd., The Daniel Klemke Foundation, Daniel Klemke and KMC Mining Corporation [51]

The Owners successfully brought an interlocutory application to the LCB for production of settlement agreements made between the City of Edmonton and other airport Owners. The City appealed the order to the Alberta Court of Appeal.[52] In a split decision the Court of Appeal upheld the LCB order. The City applied to the SCC for leave to further appeal and pending that hearing applied to the ABCA for an interim stay of the order.[53] The stay was granted for a limited time. The SCC agreed to hear the leave application on an expedited basis but ultimately denied leave to appeal.

[51] *City of Edmonton v. 689799 Alberta Ltd., et al*., 2018 CanLII 105398 (SCC) [*689799 Alberta Ltd.*].

[52] *689799 Alberta Ltd v Edmonton (City),* 2018 ABCA 315.

[53] *689799 Alberta Ltd., supra* note 44.