

LAND COMPENSATION BOARD
FOR THE PROVINCE OF ALBERTA

ORDER NO. 453

FILE NO. 10965.0

September 22, 2008

An Application to Determine Compensation filed with the Land Compensation Board, pursuant to the Expropriation Act, R.S.A. 2000, Chapter E-13.

BETWEEN:

RICHARD CIPHERY, CARMEN D. CIPHERY
and
CATHERINE CIPHERY

Claimants

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA
AS REPRESENTED BY THE MINISTER OF TRANSPORTATION

Respondent

BEFORE:

THE LAND COMPENSATION BOARD FOR THE PROVINCE OF ALBERTA

SITTING MEMBER: - John Mah, Presiding Member

**Land Compensation Board
Order No. 453**

APPEARANCES:

For the Claimants: - Donald P. Mallon, Q.C., Counsel

Witnesses:

- Brian S. Gettel, AACI
- Richard Arnold Ciphery
- Marc Norman Lallier

For the Respondent: - Christopher D. Holmes, Esq., Counsel

Witnesses:

- Bruce R. Simpson, AACI
- Lowell Wattie
- Glen Tjostheim

PLACE: Held in the City of Edmonton in the Province of Alberta on October 10, October 11, October 12 and October 13, 2006.

INTRODUCTION:

Richard Ciphery, Carmen D. Ciphery and Catherine Ciphery (“the Claimants”) made application to the Land Compensation Board (“the Board”) pursuant to the *Expropriation Act*, R.S.A. 2000 Chapter E-13 (“the Act”) for an Order fixing compensation to be paid by Her Majesty The Queen, in right of the Province of Alberta, as represented by the Minister of Transportation as a result of the expropriation of a portion of the Claimants lands described as follows:

**Land Compensation Board
Order No. 453**

THE NORTH WEST QUARTER OF SECTION ONE (1)
TOWNSHIP FIFTY SEVEN (57)
RANGE SEVEN (7)
WEST OF THE FIFTH MERIDIAN
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS
EXCEPTING THEREOUT: HECTARES ACRES (MORE OR LESS)

(A) PLAN 2297JY – ROAD	1.42	3.52 (HIGHWAY)
(B) ALL THAT PORTION BOUNDED AS FOLLOWS: ON THE EAST BY THE EAST BOUNDARY OF THE SAID QUARTER SECTION ON THE SOUTH BY THE NORTH LIMIT OF ROAD PLAN D 2297JY AND ON THE NORTH WEST BY THE SOUTH EAST LIMIT OF THE BRANCH ROAD (NOW ABANDONED) AS SHOWN ON THE SAID PLAN CONTAINING		
	0.866	2.14
(C) PLAN 464RS – ROAD	0.632	1.56
(D) PLAN 8722443 – ROAD	0.146	0.36

EXCEPTING THEREOUT ALL MINES AND MINERALS

The Claimants request compensation for the following:

- (i) Market Value of the expropriated lands as at August 22, 2003, in the amount of \$31,047.00
- (ii) Costs to establish a new agri-business site \$677,564.00
- (iii) Moving expenses \$11,452.00
- (iv) Loss on sale of apiary business \$100,000.00
- (v) Disturbance to the Claimants in respect of noise, dust, inconvenience and the other consequences of the construction of a major roadway adjacent to their home \$10,000.00
- (vi) Loss of Claimants' time from business to deal with expropriation issues \$20,000.00
- (vii) Injurious affection to the remaining lands \$12,358.00
- (viii) Leasing costs that are a natural and reasonable consequence of the expropriation \$1,605.00

**Land Compensation Board
Order No. 453**

- (ix) Interest and penalty interest and costs to be determined

The Respondent has agreed to liability for the following: moving costs of \$11,452.00; injurious affection to the remaining lands of \$12,358.00 and leasing costs of \$1,605.00.

BACKGROUND:

1. Richard Ciphery, Carmen Ciphery and Catherine Ciphery were prior to August 22, 2003, registered owners of the following lands:

All that portion of NW 1-57-7-W5M containing 6.224 hectares (15.38 acres), more or less as shown on a Plan of Survey on record in the Land Titles Office of the North Alberta Land Registration District as Plan Number 0324353.

Excepting thereout all mines and minerals.

2. Richard Ciphery and Catherine Ciphery carried on a beekeeping business on the expropriated lands. That business was carried on through Ciphery Apiaries Ltd.
3. Richard Ciphery and Catherine Ciphery are the beneficial owners of Ciphery Apiaries Ltd. and entitled to any damages to that business caused by the expropriation of the expropriated lands.
4. The date for valuation of the market value of the expropriated lands is August 22, 2003.
5. The Cipherys were first approached to commence negotiations by Mr. Don Jensen, an agent on behalf of the Respondent, on April 7, 1998.
6. One or more of the Cipherys attended upon open houses relative to the project for which the land was expropriated in December 1996 and in April 1997.
7. The Respondent took possession of the expropriated lands on or about December 1, 2003, and leased back those same lands to Carmen Ciphery, Richard Ciphery and Catherine Ciphery for a period of five months ending May 1, 2004, at which time vacant possession was returned to the Respondent.

**Land Compensation Board
Order No. 453**

8. Construction grading of the right of way project for which the expropriated lands were acquired commenced in August 2004.

ISSUES TO BE DETERMINED BY THE BOARD:

1. What is the Market Value of the expropriated lands as at August 22, 2003?

Both parties submitted appraisal evidence of the Market Value of the expropriated lands. Mr. Brian Gettel of Gettel Appraisals Ltd., appraiser for the Claimants estimated the Market Value of the 15.38 acres at \$31,047.00. Mr. B.R. Simpson of Serecon Valuation & Agricultural Consulting Inc. estimated the value of the taking at \$625.00 per acre or \$9,587.50 based on an area of 15.34 acres. The Board notes that there is a difference between the area used by Mr. Gettel and that of Mr. Simpson. As the Agreed Statement of Facts used 15.38 acres we shall use that. Accordingly, the value of the taking using \$625.00 per acre is \$9,612.50.

The reason for each appraiser arriving at different values for the Market Value of the expropriated lands is the difference of approach of each appraiser. Mr. Gettel has used a notional sub-division of the land to determine its best use. Mr. Simpson believes the proper approach to value the expropriated lands is to establish the value of the whole or “en bloc” parcel and allocate that to the taking on a per acre basis. Mr. Simpson used the Comparative Method, comparing the subject property to other properties of the same type and class which have sold, been offered for sale or on which offers have been made in the same or competing area.

**Land Compensation Board
Order No. 453**

The principles to be used in determining compensation payable to the Claimants are contained in Sections 41 to 58 inclusive of the *Act*. Section 41 states:

The market value of land expropriated is the amount the land might be expected to realize if sold in the open market by a willing seller to a willing buyer.

Mr. Gettel and Mr. Simpson's appraisals both quote the Appraisal Institute of Canada's definition of "Highest and Best Use": Mr. Simpson quotes the most recent iteration which is contained in the 1992 edition:

The reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and results in the highest value.

Mr. Simpson's opinion is that the highest and best use of the subject property in the foreseeable future is the existing agricultural, likely a honey/apiary operation and country residential use. He accordingly values the property as a homogenous piece of agricultural land.

Mr. Mallon argued that a "willing seller" would look at the different ways of achieving maximum profitability from the sale of expropriated lands.

Mr. Gettel's opinion of how to maximize return would be to effect a "first parcel out" sub-division of the agri-business building site which would encompass three acres of land plus the buildings. The balance of the property, or 149.92 acres incorporating the

**Land Compensation Board
Order No. 453**

residence could be marketed separately for continued rural residential and agricultural use.

His reasoning is as follows:

1. There are two building sites evident within the subject lands: a) residential building site containing the principal residence of the owners with the balance of the agricultural land and b) agri-business building site.
2. The most logical first parcel out sub-division would be of the agri-business building site. This parcel over-looks Highway 43 indicating a high degree of exposure and can be accessed from the adjoining range road. There is already a similar commercial use to the west.
3. Further, Mr. Mallon argues that *Stierle et al. v. The Queen in right of Alberta (Minister of Transportation & Utilities) (1997), 63 L.C.R. 171* supports his position. In that case, in determining the issue of highest and best use the Board had to answer the question: “Does the entirety of the Claimants’ land have one homogenous usage, or alternatively, are such lands composed of areas of identifiable different uses?” The guiding principles to determine the answer were considered:

**Land Compensation Board
Order No. 453**

- a.) Possibility of a sub-division?
- b.) What are the economics of a sub-division?
- c.) What is the value in the market place?
- d.) What are the effects on the farming operations?

4. Similarly in this case, Mr. Gettel goes through a similar analysis and concludes that the possibility of sub-division is high. Mr. Gettel estimates the cost of the sub-division at approximately \$2,500.00. Mr. Gettel further states that because the property is close to a community, with good access and a unique building site, it would be highly saleable. Finally this is a “stand-alone” site and would have no effect on the balance of the farming operations.

5. Mr. Gettel’s appraisal indicates that the subject site would be characterized as a rural commercial or industrial site. He reviews five comparable sales and concludes after analysis that a reasonable value would be \$8,500.00 per acre.

As the “first parcel out” sub-division would notionally only involve three acres, the balance of the expropriated lands would be valued as agricultural land.

Mr. Gettel has estimated the value of the three acres at \$25,500.00. After deducting the expenses of sub-division he arrives at an adjusted value of \$23,000.00.

**Land Compensation Board
Order No. 453**

With regard to the valuation of the 12.38 acres of agricultural land, he reviews six comparable sales and concludes that a value of \$650.00 per acre is realistic.

Mr. Simpson looked at 15 to 20 bare land sales with eight considered to be the best indicators of value. However Mr. Simpson acknowledges that the market area has changed dramatically since 1995 and very significantly over the past one to one and a half years. These market changes are generally because the prices in the past have not been reflective of the productive capacity of the area.

Mr. Simpson's estimated bare land market value of the total parcel is \$625.00 per acre.

After considering the above factors, the Board accepts Mr. Mallon's arguments and the principles outlined in the *Stierle* case and is satisfied that the expropriated lands meet the test of having more than one highest and best use, namely, an agri-business building site with the balance of the lands being a residential building site containing the residence of the owners with the best use as agricultural land.

The Board accepts Mr. Gettel's value of the three acres at \$23,000.00 and also accepts that a value of \$650.00 per acre for the balance is realistic.

**Land Compensation Board
Order No. 453**

Accordingly the Board determines the Market Value of the expropriated lands as follows:

1.	3 acres x \$8500/acre =	\$ 25,500.00
	(less sub-division expenses)	<u>\$ 2,500.00</u>
		\$ 23,000.00
2.	12.38 acres x \$650/acre =	<u>\$ 8,047.00</u>
	TOTAL =	\$ 31,047.00

2. What is the loss, if any, accrued by the Claimants in the sale of the Apiary assets and are they entitled to compensation

Richard Ciphery and his sister Catherine Ciphery through their Company, Ciphery Apiaries Ltd. carried on a bee keeping business. Their father, Carmen Ciphery, started the business and they took over when their father retired from the business in 1993 and moved to Australia. In approximately February of 1998, Richard Ciphery came down with a debilitating kidney disease called Minimal Change Disease which restricted kidney function to below 10%. He had to go to the University of Alberta Renal Clinic in Edmonton for treatment twice a week for approximately two to three months. During this time, he was unable to work so he decided, in late February, 1998 to sell the apiary assets.

It is important to note that he was selling the physical assets of the business but not the business itself as he had the hope to restart the business once he became well again.

**Land Compensation Board
Order No. 453**

He let it be known in the apiary community that he was selling his business assets and in due course, was approached by Marc Lallier in early March, 1998.

They had discussions respecting the sale of the assets and the lease of his apiary buildings for a period of five years. The purchase price of the business assets was \$300,000.00 and the lease of the building was \$1,000.00 per month plus utilities. Once these two matters were agreed, Mr. Lallier moved into the Apiary facilities and started work, to prepare the bees for the up-coming season.

Shortly thereafter, on April 7, 1998, Mr. Ciphery met with Mr. Jensen, representing Alberta Transportation to discuss the twinning of Highway 43 and the sale of part of his land to the province to allow the twinning to proceed. He was advised that the acquisition phase would extend over the next several months with construction proposed to start in 2004 and be completed 2005/2006.

Concerned that he would not be able to provide the five year lease as discussed earlier Mr. Ciphery went back to Mr. Lallier and after discussion ended with a final sale price of \$200,000.00.

The Claimants take the position that, but for the expropriation of the land in question, the sale price would have been \$300,000.00 and not \$200,000.00.

**Land Compensation Board
Order No. 453**

The Claimants rely on *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority*, [1997] 142 D.L.R. (4th) 206 for the proposition that for damages to flow they must be causally connected to the expropriation, not too remote and reasonably incurred. They argue that the meeting with Mr. Jensen in March, 1998 was part of the expropriation process and therefore the \$100,000.00 loss was causally connected to the expropriation, is not too remote and was reasonable incurred.

The Respondent's position is that the twinning of Highway 43 was nothing new and that indeed Mr. Ciphery had attended an information session in 1997. Mr. Ciphery admits that by March, 1998 he was fairly certain that the apiary buildings could be affected. During his meeting with Mr. Jensen he did not definitively state that he had a sale or that he would have a problem if he could not lease his apiary buildings for another five years.

There is no evidence that the price that Mr. Ciphery negotiated of \$300,000.00 was an artificially inflated price. Mr. Lallier indicated in his evidence that the lease of the apiary premises was a major part of the purchase. Should Mr. Ciphery have tried to negotiate for a five year possession date with Mr. Jensen? This is hind-sight. The fact is that Mr. Ciphery had a bona fide sale and the expropriation interfered with it. Accordingly the Board is of the view that as a result of the expropriation the Claimants suffered a loss of \$100,000.00 and they should be compensated

**Land Compensation Board
Order No. 453**

3. Costs to establish a new agri-business site.

The parties agree that the apiary buildings need to be re-established and rebuilt. The buildings which were taken comprised a 7,176 sq. ft. apiary facility, an older 295 sq. ft. wood frame storage shed and an older 2,280 sq. ft. metal frame Quonset storage facility.

The Claimants estimate the cost to establish this new site to be \$456,644.00 as outlined on Page 46 of Mr. Gettel's appraisal as of August 22, 2003. From that date to September 21, 2006 it is estimated by Mr. Gettel that costs have increased 60% for construction of a new apiary building ($\$325,790.00 + \$195,474.00$ (increase) = $\$521,264.00$).

Costs for the other items necessary to develop the agri-business site have also escalated but not to the same rate as construction costs. Mr. Gettel estimates a 30% increase to be realistic.

The Respondent argues that the apiary building could be constructed at lower cost by reducing the square footage size by 1,000 sq. ft. and re-designing the building and making the building taller. This was refuted by the Claimants who claim that stacking

**Land Compensation Board
Order No. 453**

honey barrels that high would be unsafe. Further the quotations obtained by the Respondent for a new apiary building were verbal via a telephone call, making it difficult to determine what was included in the quote. The Claimants provided drawings, photographs and explanatory letters to their Builder who provided a written quotation of the costs to build.

With respect to the cost for the Quonset hut, there is a written, comprehensive quote of Mid-West Design & Construction Ltd. of Medicine Hat. The first quote dated July 11, 2001, is in the amount of \$42,479.00. The second quote identified as Exhibit 10 dated September 16, 2003, is in the amount of \$46,438.00. Included in the quote is the delivery of the building package to the site and erection of the building. It is preferred over the quotation of Superior Building & Design Ltd., which outlines in very general terms the services provided.

However, Mr. Mallon also argued that as a result of the construction cost increases of 60% and development cost increases of 30%, as of September, 2006, the cost to replace the agri-business site increased by a total of \$218,920.00 bringing Mr. Ciphery's costs to relocate in 2006 at \$677,564.00. In trying to replicate Mr. Mallon's calculations, as Mr. Mallon has not given a break down as contained on page 46 of Mr. Gettel's appraisal, the Board has arrived at a different number.

**Land Compensation Board
Order No. 453**

The Quonset cost estimate contained in Mr. Gettel's report at page 46 is \$60,944.00 and if we subtract the estimate of Mid-West Design, of \$46,438.00 the difference is \$14,506.00. If we increase this number by 30% the amount becomes \$18,857.80. This is then the difference between the two estimates as of September 2006.

Mr. Ciphery is claiming the cost of replacement of the agri-business site in 2006 of \$677,564.00, and as the Board prefers the Mid –West estimate to the Superior estimate the amount that Mr. Ciphery is awarded is therefore \$677,564.00 less \$18,857.80 or \$658,706.20.

4. Incidental Damages

The Claimants claim an amount of \$10,000.00 relating to disturbance to them in respect of noise, dust, inconvenience and the other consequences of the construction of a major roadway adjacent to their home. The Respondent made no submissions respecting the claim and the Board accordingly awards the Claimants the sum claimed.

5. Loss of Claimants time to deal with expropriation issues.

The Claimants claim \$20,000.00 for time spent on expropriation issues. The Claimants have not kept track of the amount of time spent to deal with expropriation issues and also anticipate time will be spent on construction supervision. Mr. Ciphery

**Land Compensation Board
Order No. 453**

estimates he spent 50 hours per year over an eight year period. With a claim of 400 hours, this works out to be \$50.00 per hour. The Respondent acknowledges that there may be construction consultation once the Claimants begin the process of replacing the agri-business site.

The Respondent suggests \$15.00 per hour for Mr. Ciphery's time or \$6,000.00 in total.

The Board believes that such an amount is low and hereby awards Mr. Ciphery \$10,000.00 or \$25.00 per hour for the estimated time spent.

To Summarize:

The Board awards the following:

1. Market Value of the expropriated lands as at August 22, 2003, in the amount of \$31,047.00.
2. Costs to establish a new agri-business site of \$658,706.20 as at September, 2006.
3. Moving Expenses of \$11,452.00.
4. Loss on sale of Apiary assets at \$100,000.00.
5. Disturbance damages relating to noise inconvenience and other consequences of construction of a major roadway adjacent to their home of \$10,000.00.

**Land Compensation Board
Order No. 453**

6. Loss of Claimants time to deal with expropriation issues of \$10,000.00.
7. Injurious affection to the remaining lands of \$12,358.00.
8. Leasing costs of \$1,605.00.
9. Costs to be resolved between the parties. If the parties are unable to agree on costs either party may apply to the Board to speak to costs.

Subsequent to the Board hearing, with the consent of the Board and the Respondent, Mr. Mallon filed an affidavit of Mr. Gettel indicating that inflation respecting the construction industry in 2006 was 2% per month and in 2007 was 1% per month. The Board has accepted that costs of construction of the apiary premises had increased 60% from August 22, 2003 to September 21, 2006. The Board in considering the cost of construction of the Apiary premises will add 2% per month to the end of December, 2007. From January, 2007 to the end of September, 2007 it will be 1% per month. Thereafter, the Board accepts Mr. Mallon's proposal respecting interest using annual average 90 day Bank of Canada T-Bill rates computed annually.

LAND COMPENSATION BOARD

John Mah, Presiding Member