

EXPROPRIATION COSTS IN ALBERTA

Cases and Commentary

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CASES REFERRED TO IN PAPER:
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I. INTRODUCTION

In 1991 Justice John D. Rooke presented a paper to the Alberta Expropriation Association entitled “Land Compensation Board Costs Under the Expropriation Act of Alberta: A Case Synopsis with Comments”.

In his paper, Justice Rooke provided a synopsis of all reported expropriation cases in Alberta, to that time, dealing with costs issues. It was his stated intention to create a valuable resource for the expropriation practitioner – a trail guide – and to stimulate discussion about the then current law of costs with the aim of improving practice and procedure.

I believe the paper was successful on both fronts. I have found it an excellent source of information in my own practice, and many of Justice Rooke’s stated views have since been reflected in subsequent Land Compensation Board and Court decisions.

The law of costs has evolved in the ten years since that paper. Also, the wrinkle of GST has been added. The purpose of this presentation is identical to the original.¹ Using a similar method of organization, I have attempted to provide an up-to-date synopsis of all reported Alberta expropriation cases in which the issue of costs has been substantially addressed. In addition, I have included some relevant higher court decisions from other jurisdictions. I have, with Justice Rooke’s kind permission, simply reproduced his case synopses for those cases between 1974 and 1991 (LCR 45/102). I take responsibility (or blame, as the case may be) for the case summaries between Vol.

¹ For a more general discussion on the subject of costs, you may see: Todd, *The Law of Expropriation and Compensation in Canada* Second Edition (Carswell,1992) at pp. 500-530); Price, *The Costs of Expropriating in Alberta and Manitoba* (1976), 14 Alta. Law Review 289; Boyd, *Expropriation in Canada, A Practitioner’s Guide* (Canada Law Book, 1988); Coates & Waque, *New Law of Expropriation* (DeBoo, Looseleaf) at p. 15-29 and 15-37 to 49. Also, Orkin, *The Law of Costs*, Second Edition (Looseleaf) (Canada Law Book, 1991), Section 232.

45/102 through Vol. 69/320. With a couple of small exceptions, I have relied almost entirely on the LCR's as a resource for this paper.²

In twenty-two years of expropriation practice, I have encountered many of the costs issues dealt with by these cases and have seen the law of costs evolve to its current state. I hope the commentary herein stimulates some discussion on where the law should progress from here.

II. COST PROVISIONS OF THE EXPROPRIATION ACT

The main provisions of the *Expropriation Act* relevant to costs are set out below:

15(10) The expropriating authority shall pay the reasonable costs in connection with the inquiry

- (a) of the inquiry officer, and
- (b) of the owner unless the inquiry officer determines that special circumstances exist to justify the reduction or denial of costs.

24(3) If an expropriation has been abandoned the expropriating authority shall pay to the owner any actual loss sustained by him and the reasonable legal, appraisal and other costs incurred by him up to the time of abandonment, as a consequence of the initiation of the expropriation proceedings.

(4) Compensation payable under this section, including costs, shall be fixed by the Board.

29(2) The Board shall also determine any other matter required by this or any other Act to be determined by the Board.

33(1) To assist the expropriating authority in making its appraisal, the owner shall furnish on request to the expropriating authority any information relevant to the valuation of his interest.

(2) Any owner who withholds any relevant information may be penalized in

² Cases are, for the most part, set out in chronological order in each section. Volume and page numbers with respect to the LCR references are expressed as volume #/page #, for example "69/320". References are made to the members of the Board and, in a few cases, to the Court of Appeal in parentheses following the citation.

- (a) costs, and
- (b) interest that he would otherwise be entitled to under section 66.

35(1) The owner may obtain an independent appraisal of his interest that has been expropriated and the expropriating authority shall pay the reasonable cost of the appraisal.

(2) The owner may obtain advice from any solicitor of his choice as to whether to accept the proposed payment in full settlement of compensation, and the expropriating authority shall pay the owner's reasonable legal costs therein.

39(1) The reasonable legal, appraisal and other costs actually incurred by the owner for the purpose of determining the compensation payable shall be paid by the expropriating authority, unless the Board determines that special circumstances exist to justify the reduction or denial of costs.

(2) The Board may order by whom the costs are to be taxed and allowed.

(3) When settlement has been made without a hearing and the owner and the expropriating authority are unable to agree on the costs payable by the expropriating authority, the Board may determine the costs payable to the owner and subsection (1) and (2) apply.

(4) On appeal by the expropriating authority, costs of the appeal shall be paid on the same basis as they are payable under subsection (1) and on appeal by the owner, the owner is entitled to his costs when the appeal is successful and, when unsuccessful, the costs are in the discretion of the Court of Appeal.

50 The expropriating authority shall pay to an owner other than a tenant, in respect of disturbance, such reasonable costs and expenses as are the natural and reasonable consequences of the expropriation, including,

...

(c) relocation costs, to the extent that they are not covered in clause (a) or (b), including

...

- (ii) legal and survey costs and other non-recoverable expenditures incurred in acquiring other premises.³

³ While ss. 50 and 51 are not really "costs" sections, but rather "disturbance compensation" sections, s. 50(c)(ii) brought into s. 51 by s. 51(1) appears to bring costs into the disturbance compensation package.

51(1) The expropriating authority shall pay to a tenant occupying expropriated land in respect of disturbance so much of the cost referred to in section 50 as is appropriate having regard to

- (a) the length of the term,
- (b) the portion of the term remaining,
- (c) any rights to renew the tenancy or the reasonable prospects of renewal,
- (d) in the case of a business, the nature of the business, and
- (e) the extent of the tenant's investment in the land.

66(1) An expropriating authority shall pay interest at a rate the Board considers just

- (a) with respect to
 - (i) compensation for the land, and
 - (ii) severance damages on a partial taking from the date of acquisition of the title until payment in full;
- (b) on damages for disturbance from the date of the award of the damages until payment in full.

III. JURISDICTION

There are a number of cases that have interpreted the jurisdiction⁴ of the Board, Court or Inquiry Officer respecting costs:

Strynyk v. The Queen 19/356 (Boyd)

- The fact that the Board's final decision on compensation is less than the interim payment of the expropriating authority does not usually mean that it is sufficient grounds to deny costs under s. 37 (now s. 39).

⁴ Some of the cases noted are purely jurisdictional and others imply jurisdiction based on standards of application of review. Undoubtedly, there are many other cases that similarly impliedly interpret jurisdiction. The ones cited here are those that appear most obvious to the writer.

Kerr v. Minister of Transportation (No. 2) 20/107 (Boyd)

- The Board should tax and determine costs notwithstanding that the substance of the Board's order on compensation has been appealed to the Court of Appeal – even though the Board's order on costs may be later appealed.

Petryga v. The Queen 22/26 (C.A.)

- The Court of Appeal noted certain anomalies between the jurisdiction given to the Board on interest and costs, but apparently not the Court. Making reference to *the Queen v. Madison Development Corporation Ltd. 22/11 (C.A.)*, the Court reiterated its interpretation of s. 37 (now s. 39) of the *Expropriation Act* that “all reasonable appraisal and solicitor-and-client costs shall be paid by the authority” – and that the word “shall” makes the application of the section mandatory.

Aiello et al v. City of Calgary (No. 2) 26/310 (Boyd, Chapman & Anderson)

- The expropriating authority asked the Board to deny costs after the date of an offer for settlement equal to the Board's ultimate award, but the Board rejected the position on the basis that its previous decision “as to entitlement” (not quantum) made the Board *functus* on this point.

Town of Grand Centre v. Dalbar Feeders Ltd. et al 31/255 (Boyd)

- The Board held against an argument by the claimant that all it had to demonstrate was that it was reasonable for the claimant to incur costs through the hiring of a specific counsel or expert, and, once hired, all the costs incurred must be borne by the expropriating authority. Instead, the Board reconfirmed that:

The board must determine whether or not it was reasonable to ... engage the solicitor, appraiser or other expert. The board must also determine whether the quantum of the costs so claimed is reasonable. In the board's opinion the decision of the Court of Appeal in the *Nissen* case clearly supports that principle.

Price v. Town of Hanna 36/323 (Alta. C.A.)

- The Alberta Court of Appeal has given the Board a quite wide scope in relying on its own experience and expertise in awarding costs:

In its order fixing the costs of the owner for the expropriation proceeding, the board carefully weighed the time charged by counsel and by the witnesses in the light of its own expert knowledge of land hearings. The board has, of course, a very considerable expertise in assessing the degree of complexity of land cases after having heard many hundreds of them. In the light of many assessments of costs, it can also assess with considerable accuracy, the amount of time required to prepare for this type of proceeding. The board heard evidence of the parties as to the amount of time required. We are unable to see any error in the board's disposition and would not interfere with it.

Ravvin Holdings Ltd. v. Calgary (City) 44/198 (Archibald)

- The Board held that:

... with respect to the legal and appraisal costs incurred by the owner leading up to the "proposed payment" stage under the *Expropriation Act*, s. 35 of the Act applies. The Board considers that s. 39 applies after that stage even if settlement has been reached without a hearing and the parties are unable to agree on the costs payable by the expropriation authority. . . .

Slemko v. Red Deer 45/102 (Lloyd)

- The normal rule is that once the Act is "triggered" by the filing and service of a Notice of Intention to Expropriate "the owner of the affected land is protected, as to reasonable costs, which the expropriation process may occasion by ss. 15(10), 35 and 39 of the Act".⁵

⁵ Subsequent cases have redefined the triggering event: *Lam v. City of Edmonton (No. 2)* 47/55; *Ravvin Holdings Ltd. v. Calgary* 48/81; and *Dell Holdings Ltd. v. Toronto Transit Authority* 60/81.

Lafarge Canada Inc. v. City of Calgary 52/235 (Lloyd)

- The Board may determine costs, notwithstanding that the compensatory Board order is under appeal, unless a stay of the costs proceedings exists.

Costello v. City of Calgary 62/161 (Picard ACJ)

- The standard of appellate review in costs awards is not to interfere unless there is clear, palpable and overriding error.⁶

Re Bogi and The Queen 52/307 (Scragg, Purves and MacKenzie)

- An agreement which settled a dispute over a prior Section 30 Agreement was deemed also to be a Section 30 Agreement although not titled as such. Therefore, the Board had jurisdiction to deal with costs.

Tarani Rebuilders v. City of Edmonton 69/146 (Miller, McEvoy, Weber)

- The Claimant was granted double costs for preparation for a scheduled hearing and attendance at an adjournment application. The Board has the right to impose a costs penalty as part of the terms of an adjournment.⁷

⁶ In reviewing this issue, the court quoted with favour *Jackson v. Trimac Industries Ltd.* (1993) 138 A.R. 161 (Q.B.) at 166: “The trial judge enjoys “a very wide discretion when awarding costs provided such costs are awarded judicially””. Although the instant case was an appeal from the Court of Queen’s Bench, the Land Compensation Board decisions have been given the same deference. See *Bartle & Gibson v. City of Edmonton* 58/36. But, has the S.C.C. restated the test as being one of correctness? (*Dell Holdings Ltd. v. Toronto Transit Authority* (60/81)).

⁷ Presumably the Board was referring to its authority granted under A.R. 15/55 - The Expropriation Act Board Procedure Regulations, section 13: The Board may, on any conditions it considers proper, enlarge or abridge the time appointed by the Rules for doing anything or taking any proceedings; Section 16: The Board may adjourn any proceedings before it; and Section 17: Subject to these Rules, any proceedings before the Board shall be held in accordance with the procedures directed by the Board. Presumably this is a two-way street and the Board can similarly impose such conditions on landowners.

Koziol v. City of Edmonton L.C.B. Docket #10866.0 and Koebernick v. City of Edmonton L.C.B. Docket #10864.0

- With the consent of the Respondent, the Board ordered payment of \$500.00, representing thrown away costs of Claimants, in addition to any other costs to which the Claimants might be entitled.

A. NEGOTIATIONS

City of Calgary v. Spoletini et al (No. 2) 32/277 (Boyd)

- The Board held that, in respect of a compensation hearing before the Board relating to damages of work on adjoining land (s. 137 of the *Municipal Government Act*, R.S.A. 1980, c. M-26), that costs of negotiation of acquisition of lands by the expropriating authority were allowable (even though there was not, strictly speaking, an expropriation) because:

The evidence was clear that the City had participated in such discussions and had not discouraged or rejected this approach to settling the matter. If such negotiations had been successful there would have been no need to proceed with the damage claim. The board finds that costs incurred for such negotiations are directly related to the claim for damages and shall be considered as part of the costs being taxed herein.

- However, for an action for nuisance commenced in the Court of Queen's Bench, subsequently abandoned, the claimant was not entitled to costs. (See also: 31/347)

Tessier et al v. Town of Millet (No. 2) 37/157 (Chapman)

- While they would appear to have arisen after service of a Notice of Intention to Expropriate, full costs claimed for negotiations were allowed, because they shortened the compensation hearing considerably and simplified the issues – in other words, were helpful in determining the compensation payable. This was notwithstanding that the Board held the amount claimed excessive, because it “did

not lie in the mouth of [the expropriating authority] to object to this since [it] made the negotiations necessary”.

Ravvin Holdings Ltd. v. Calgary (City) 44/198 (Archibald)

- The Board held that costs relating to negotiations prior to service of the Notice of Intention to Expropriate were not within its jurisdiction and the Board went on to state:

The Board considers that if an owner is expecting the expropriation authority to pay the appraisal costs incurred by him, he should reasonably postpone incurring such costs until after the Notice of Intention to Expropriate (pursuant to s. 8 of the *Expropriation Act*). He will have time between that date and the date he receives the notice of proposed payment and is required to act upon the same, within which to obtain his appraisal report or reports and to carry on any negotiations with respect to settlement which he may wish to carry on. Any serious negotiations with respect to settlement does not usually take place until after the receipt by the owner of the Notice of Proposed Payment.⁸

Lam v. Edmonton (City) (No. 2) 47/55 (Lloyd, Nelson, Scragg)

- Reasonable legal costs of negotiations pre-expropriation were allowed.

Raavin Holdings Ltd. v. Calgary (City) 48/81 (Alta. C.A.)

- The Court found nothing in the Act to restrict the obligation to pay professional costs pre-expropriation. The policy of the law is to favour compromise and consensual sales. To disallow owner’s costs for good advice is to frustrate the negotiation process.

⁸ This portion of the *Ravvin* decision was overturned on appeal so that the statements made respecting the jurisdiction of the Act are in error. Many practitioners would also question the statement that serious negotiations do not usually take place until after the Notice of Proposed Payment.

Dell Holdings v. Toronto Transit Authority 60/81 (S.C.C.)

- Expropriation is the process of taking the property, not a single event. Damages should be awarded for the losses occasioned as a result of the process.
- The Act is a remedial statute enacted for the purpose of adequately compensating persons whose lands are taken by the state. Since it is a remedial statute, it should be interpreted broadly and liberally, consistent with its purpose.⁹

Tarani Rebuilders Inc. v. City of Edmonton (No. 3) Board Order No. 395
(Weber, McAvoy and Nelson)

- 73 hours of negotiations by counsel over a 12 month period in relation to a complex matter was deemed reasonable.

B. INQUIRY

Slemko v. Red Deer 45/102; *Ravvin Holdings Ltd. v. Calgary (City)* 44/198; and *Schwindt v. Minister of Transportation (No. 2)* 27/205.

- It is clear from s. 15 of the *Expropriation Act*, and the Board has held, that it has no jurisdiction to deal with inquiry costs, unless the Board is the Inquiry Officer.

Portair Holdings Ltd. v. Minister of Transportation 14/133 (Boyd)

- Notwithstanding the aforementioned “rule”, where the inquiry never gets under way, the Board has jurisdiction to deal with costs relating to preparation for an aborted inquiry.

⁹ There is no reason to believe the cost provisions of the Act should be interpreted any differently from the substantive provisions. Therefore, one would expect the Board and Court decisions on costs to be ruled by a purposive as opposed to literal approach to ss. 35 and 39 of the Act.

McNaughton et al v. Cardston Municipal Hospital District No. 5 (No. 2) 19/180 (Boyd)

- In this case the Board was the inquiry officer and held counsel fees reasonable and awarded costs based thereon.

Higdon v. Smoky Lake General and Auxiliary Hospital and Nursing Home District No. 73 27/213 (Boyd)

- the Board awarded costs in its position as an inquiry officer, and stated that:
 - The board finds that in taxation of costs pursuant to s. 15 of the Act the same general principles must be applied as have been established for taxation of costs pursuant to s. 39 of the Act.
- The Board went on to indicate that, in the case in question, a three day hearing was too lengthy, and that counsel hours in the neighbourhood of 40 to 50 were all that would normally be reasonable.

Lam v. Edmonton (City) (No. 2) 47/55 (Lloyd, Nelson, Scragg)

- The Board does not have jurisdiction to deal with inquiry costs. However, the Board should accept jurisdiction where both parties agree to take the issue before it (obiter)¹⁰.

C. ABANDONMENT

Portair Holdings Ltd. v. Minister of Transportation 14/133 (Boyd)

- In this case the Board examined s. 23 (now s. 24) of the *Expropriation Act* and held that the words “up to the time of abandonment” should be given a liberal, not restrictive interpretation, the test being that the costs must have been incurred as a direct consequence of the initiation of expropriation proceedings and the subsequent abandonment.

¹⁰ In this case the Board referred positively to the suggestion made by Justice Rooke in his paper that the Board accept jurisdiction where both parties were agreed. The question is why would anybody prefer the Board who had not been through the Inquiry and not seen the evidence as opposed to the Inquiry Officer. The answer to that question may be that where the Inquiry Officer finds himself in a similar position to the owner looking for the payment of costs from the expropriating authority (s. 15(10)), he or she may not be the most appropriate person to gauge a fellow inquiry participant’s costs.

D. RELATED ACTIONS**1. MUNICIPAL GOVERNMENT ACT****a. SECTION 126**

Alberta Giftwares Ltd. v. City of Calgary (No. 2) 18/150 (Boyd, Molaro and Faulknor)

- The Board determined that it had authority under s. 28(2) (now s. 29(2)) of the *Expropriation Act* to determine costs in relation to an application under s. 127 (now s. 126) of the *Municipal Government Act* (relating to an application to the Board to require an expropriating authority to take the whole of a parcel for which they merely wish to take a part). The Board further held that, as the matter was directly related to expropriation, it had jurisdiction under s. 37 (now s. 39).

b. SECTION 137

Spoletini et al v. City of Calgary 31/347 (Boyd, Rusnell and Anderson)

- The Board held that where compensation is awarded for injurious affection, pursuant to s. 137(4) of the *Municipal Government Act*, costs may be (but are not bound to be) awarded on the same basis as provided by s. 39 of the *Expropriation Act*, but each case must be considered on its merits. In the instant case the claimant was held entitled to reasonable legal, appraisal and other costs on a solicitor-and-client basis.

City of Calgary v. Spoletini et al (No. 2) 32/277 (Boyd)

- The Board held that the owners were entitled to costs on a solicitor-and-client basis arising out of the determination of damages under s. 137 of the *Municipal Government Act* (damages due to work on adjoining lands), but not for an aborted action in the Court of Queen's Bench.

Nomar Construction Ltd. v. City of Calgary (No. 2) 35/188 (Boyd, Rusnell and Faulknor)

- The Board considered costs under s. 137 of the *Municipal Government Act* (relating to damages which may have arisen to the owners lands as a result of works carried out by the municipality on adjoining lands) and relied upon its

previous decision on costs in the case of *City of Calgary v. Spoletini et al (No. 2) 32/277* to apply to its normal cost procedures and considerations, but here denied costs.

2. OTHER RELATED ACTIONS

Slemko v. Red Deer 45/102 (Lloyd)

- The Claimant admitted that costs associated with challenges to the expropriation in court and by application to National Transportation Agency were not recoverable under the *Expropriation Act*.

Costello v. City of Calgary 55/161 (Rooke, J.)(confirmed on Appeal, 62/161)

- In the circumstance of trespass arising from failed expropriation, costs should *prima facie* flow to plaintiffs on a reasonable solicitor/client basis.

E. COMPENSATION OR COSTS

Ravvin Holdings Ltd. v. Calgary (City) 44/198 (Archibald)

- The expenses and costs relating to “disturbance” under s. 50 are not costs, but rather are a matter of compensation.

Bartle & Gibson v. City of Edmonton 58/36 (C.A.)

- Although it may be technically correct that an owner’s executive time does not fall squarely under s. 39, it is compensable under the Act. The Board should have added the sum claimed to the other awards.¹¹

¹¹ The approach taken by the Board in *Ravvin* and subsequent decisions was criticized by several authors and the Court of Appeal has provided a remedy to ensure that a corporate owner is not out-of-pocket. Although Kerans J. did not state specifically that corporate executive time is to be handled as a damage as opposed to a costs issue, that conclusion does seem to be implied in this decision. This produces a practical problem, namely that until the end of the compensation hearing, one does not have a real handle on the amount of lost corporate executive time. If one waits for a costs hearing to make a claim, the Board may be functus. The result is that until the last day of the compensation hearing, the amount of this item will likely remain undefined.

Tarani Rebuilders Inc. v. City of Edmonton (No. 3) Board Order No. 395
(Weber, McAvoy and Nelson)

- The Board reviewed the *Bartle & Gibson* decisions and determined to treat the claim for executive's time as a disturbance damage. In the ADC hearing, it directed the claims for executive time to be dealt with at the costs hearing.¹²

F. ENTITLEMENT – OWNER OR COUNSEL

Christie et al v. Cardston Municipal Hospital District No. 5 19/305 (Boyd, Molaro and Faulknor)

- Executors of the claimant were entitled to costs.

Ghitter v. City of Calgary 33/60 (Boyd, Faulknor and Anderson)

- The Board held that its jurisdiction was confined to taxing costs as between the owner and the expropriation authority, and that it had no jurisdiction to entertain an application to tax costs brought by a solicitor or any expert on his or their behalf or to award costs directly to such solicitor or expert.

G. COSTS OF COST APPLICATIONS¹³

Portair Holdings Ltd. v. Minister of Transportation 14/133 (Boyd)

- Legal fees of \$260 and \$400 were awarded for counsel and appraisers respectively in attending a cost hearing, notwithstanding an agreement by counsel to \$400 and \$430.

¹² Recognizing the problem as stated in footnote 11 above, the Board extended its jurisdiction by reserving on this issue until the costs hearing.

¹³ Is there a policy reason why costs of costs hearings should be treated any differently than costs of compensation hearings? If the intent of the Act is that the owner not be "out-of-pocket", then should not the criteria be as stated in *Nissen v. City of Calgary (No. 3)* 28/321, namely the standards delineated in Rule 613 and 635?

Kerr v. Minister of Transportation (No. 2) 20/107 (Boyd); *Badach v. Town of Spruce Grove* 36/379 (Chapman, Rusnell and Faulkner); *Semeniuk et al v. Saint Mary River Irrigation District* 37/152 (Boyd); and *Gustafson v. The Queen in Right of Alberta* 38/180 (Boyd).

- Costs of the costs application in the sum of \$350 - \$375 have been frequently allowed.

In other cases the amounts have been more specific to the case:

Abasand Holdings Ltd. et al v. Minister of Transportation (No. 2) 17/207 (Boyd) - \$430; *Western Estates Ltd. v. City of Calgary (No. 2)* 18/35 (Boyd) - \$250; *McNaughton et al v. Cardston Municipal Hospital District No. 5 (No. 2)* 19/180 (Boyd) - \$330; *Minute Muffler Installations Ltd. v. The Queen in Right of Alberta (No. 2)* (Boyd) - \$500; *Servold et al v. City of Camrose (No. 2)* 26/316 (Boyd, Faulkner and Anderson) - \$600; *Lorenz et al v. City of Lloydminster (No. 2)* 26/326 (Boyd, Faulkner and Chapman) - \$600; *Schwindt v. Minister of Transportation (No. 2)* 27/205 (Boyd) - \$500 costs to counsel and \$100 to owner; *Higdon v. Smoky Lake General and Auxiliary Hospital and Nursing Home District No. 73* 27/213 (Boyd) - \$500 for counsel and \$50 for each owner; *Smith v. The Queen (No. 2)* 31/172 (Boyd) - \$6,125; *City of Calgary v. Spoletini et al (No. 2)* 32/277 - \$500; *Price v. Town of Hanna* 34/80 (Rusnell, Faulkner and Anderson) - \$760; *Groten v. Minister of Environment* 37/377 (Boyd, Rusnell and Faulkner) – fees of \$1,100 and disbursements of \$250; and *Indevco Management Ltd. v. City of Medicine Hat (No. 2)* 38/280 (Boyd) - \$750.

Nissen v. City of Calgary (No. 3) 20/60 (Boyd)

- Cutting legal costs in half was sufficient justification to deny costs of the costs application.

Southland Canada Inc. v. Calgary (City) 44/27 (Ackroyd)

- Costs of experts in testifying at a costs hearing were limited to 5 hours and costs of counsel limited to approximately 15 hours.

Ravvin Holdings Ltd. v. Calgary 44/198 (Archibald)

- Costs of the costs application were allowed, except for the owner's time which was not found to be an "out-of-pocket" cost.

Slemko v. Red Deer 45/102 (Lloyd)

- Fees associated with sorting out counsel's costs were disallowed.

Lam v. City of Edmonton (No. 2) (Lloyd, Nelson, Scragg)

- Reasonable costs were allowed and fixed at \$850.

Shell Canada Ltd. v. Minister of Transportation and Utilities (No. 2) 47/202 (McManus, Hetherington and Lloyd)

- Costs were fixed, for sake of certainty, at \$1,500.

Bartle & Gibson Co. Ltd. v. City of Edmonton (No. 2) 48/112 (Archibald)

- Costs were reduced where there was delay in production of materials to Respondent and poor job done in summarizing and collecting costs.
- Costs hearing costs were denied in respect of a main hearing witness whose evidence was ignored.

H. ADJOURNMENTS

Bonaventure Sales Ltd. v. The Queen 17/161 (Boyd, Molaro and Faulknor)

- When an adjournment was required by the expropriating authority because the claimant showed up for hearing with a new appraisal report for the first time (in non-compliance with the Board's Rules), costs of the preparation for that hearing were denied the claimant, because the Board had no jurisdiction to grant costs against the claimant.

Re Inland Holdings (Western) Ltd. and City of Edmonton 29/318 (Rusnell, Anderson and Faulknor)

- When the Board granted the claimant an adjournment of a hearing scheduled for 11 months, so that the claimant could amend its claim and the authority prepare for the amended claim, the Board denied the owner costs of the preparation for, and attendance at, the adjourned hearing, noting that "Under s. 39 of the Act, the board does not have authority to award costs against an owner." See also: *Semrau et al v. Minister of Transportation* 24/128 (Boyd).

Tarani Rebuilders v. City of Edmonton 69/146 (Miller, McEvoy, Weber)

- The Claimant was granted double costs for preparation for a scheduled hearing and attendance at an adjournment application. The Board has a right to impose a costs penalty as part of the terms of an adjournment.

Koziol v. City of Edmonton L.C.B. Docket #10866.0 *Koebernick v. City of Edmonton* L.C.B. Docket # 10864.0

- With the consent of the Respondent, the Board ordered payment of \$500.00 representing the thrown away costs of the Claimants, in addition to any other costs to which the Claimants might be entitled.

IV. “REASONABLENESS”

McAdoo v. City of Calgary 19/250 (Boyd)

- Although, a few weeks before the compensation hearing in this case, the Board made an award in almost identical circumstances to this case, and the expropriating authority offered to settle this case on that basis, the Board held that, while the special circumstances “board upon” justification for a reduction or denial of costs, they (when all factors were weighed) did not constitute a clear and compelling justification for the Board to exercise its discretion to deny costs.

Nissen v. City of Calgary (No. 3) 28/321 (C.A.)

- The Alberta Court of Appeal sounded a caution about costs under the *Expropriation Act* when Justice Kerans said:

There is but one unique consideration that must be brought to bear in the taxation of accounts in such circumstances. The client, because he knows he need never pay the bill, might not act reasonably.

- The principles and criteria to be applied to determining reasonable legal and appraisal costs under s. 39 of the *Act* are the same as those contained and applied

in determining the reasonable amount a barrister and solicitor would be entitled to under the application of Rules 613 and 635 of the *Alberta Rules of Court* – in other words, a solicitor can only charge a client on the standard of Rule 613, and accordingly, the client/claimant can only claim costs on that basis – over-ruling the Board in *Amdue Holdings Ltd. et al v. City of Calgary (No. 2)* 11/370 and *Abasand Holdings Ltd. et al v. Minister of transportation (No. 2)* 17/207.

Saint Mary's Russian Orthodox Greek Catholic Church v. The Queen in Right of Alberta (No. 2) 24/379; and *Grotten v. Minister of Environment* 37/377.

- The Board has held that there are two aspects to the question of reasonableness of costs: (1) whether it was reasonable to incur the costs in the first place; and (2) if the answer to (1) is “yes”, is the amount claimed therefor reasonable.

Kostiuk Holdings Ltd. v. Lloydminster (City) (No. 2) 43/173 (Lloyd)

- The Board expressed the view that each case involving costs must really be decided on its own facts with due regard being given to *Nissen v. City of Calgary (No. 3)* 28/321 (C.A.).

Southland Canada Inc. v. Calgary 44/27 (Ackroyd)

- The Board, in referencing *Town of Grand Centre v. Dalbar Feeders Ltd. et al* 31/255, confirmed that the principle in *Nissen v. City of Calgary (No. 3)* 28/321 (C.A.), applies to all experts.

Ravvin Holdings Ltd. v. Calgary (City) 44/198 (Archibald)

- The Board expressed a quare whether under the wording of s. 35 of the *Act* there was entitlement to only one solicitor and one appraiser. However, it noted that, while the Court of Appeal, in *Nissen v. City of Calgary (No. 3)* 28/321, set out a standard for reasonableness different than in *Amdue Holdings Ltd. et al v. City of Calgary (No. 2)* 11/370 and *Abasand Holdings Ltd. et al v. Minister of Transportation (No. 2)* 17/207, it also approved the statement in *Abasand* (and

confirmed in *Mannix v. The Queen in right of Alberta* 31/299, approving *Amdue* in this regard), that “the purpose of the Legislature was to grant the owner complete compensation for his [reasonable?] out-of-pocket expenses” and that “the owner is made economically whole”. “Reasonable” in s. 39 is to be determined following the principles set out in *Nissen v. City of Calgary (No. 3)* 28/321 (C.A.). “And other costs” in section 39 was defined to include “a sum expended, charged or paid or a loss sustained”, and, considering the *ejusdem generis* rule, would include “the costs of the service of experts in the field of expropriation of lands such as planning, market and engineering experts”, but not “the cost of expense of the time spent by an owner”. “Actually incurred” was interpreted to mean those “when the owner has received a bill, statement of account or invoice ... even though they have not been paid”. “For the purpose of determining the compensation payable” has been “quite liberally” interpreted by the Board, and would appear to include negotiations (whether only after a Notice of Intention to Expropriate was not stated), all steps toward compensation, including to the end of appeal periods, and for taxation of costs. As to the “special circumstances that exist to justify the reduction or denial of costs” in section 39, the Board made it clear that it had no jurisdiction to determine what an owner had to pay an expert (a matter of contract between them), but, rather, only, the costs to be paid an owner by the expropriation authority.

Slemko v. Red Deer 45/102 (Lloyd)

- The Board applied the Court of Appeal reasoning in *Nissen v. City of Calgary (No. 3)* (supra) to state:

... counsel, as agent for the client, who knows that his bills will be paid and who therefore is tempted to provide excess legal services to that client

and the board went on to hold that the solicitor in that case “behaved ... in just such a manner”.

Raavin Holdings Ltd. v. Calgary (City) 48/81 (Alta. C.A.)

- The Appeal Court would “not endorse so wide a provision”, as stated by the Board, that an owner can never get compensation for his time spent in the expropriation proceedings.

Malmberg v. Municipal District of Cardston No. 6 (57/86) (Purves, MacKenzie, Scragg)

- The Board can only adjudge the reasonableness of the costs incurred in light of what service was reasonably *required* and rendered.

V. COUNSEL COSTS

A. REASONABLENESS¹⁴

Amdue Holdings Ltd. et al v. City of Calgary (No. 2) 11/370 (Boyd)

- This case is to be read with *Abasand Holdings Ltd. et al v. Minister of Transportation (No. 2)* 17/207 (Boyd), but in light of *Nissen v. City of Calgary (No. 3)* 28/321 (C.A., which interprets (and varies) both;
- The Board made comments about the distinctions between “solicitor-and-client” and “party-and-party”, and the use of a tariff not being helpful, but went on to define “reasonable” as follows:

... the *Expropriation Act* specifically provides that the owner shall be awarded his “reasonable costs” for exercising such rights and remedies. The Board finds that the general principles to be followed in determining such reasonable costs may be summarized as follows:

1. Full costs of and incidental to an application properly made pursuant to the Act by the owner should be paid by the expropriating authority. The costs should however reflect such reasonable, economical and straightforward preparation and presentation as is necessary to properly present the owner’s case to the Board.

¹⁴ Quaere whether in the event a landowner was to tax the accounts of counsel before the taxing officer of the Court of Queen’s Bench, the Board would be justified in re-examining the issue of reasonableness or would be restricted to determination of whether “special circumstances” existed to justify denial or reduction of fees.

2. The owner should not be allowed the cost of unnecessary work or other expenses or costs incurred through over-caution or over preparation.
3. The owner should not be allowed costs which are the result of misconduct, omission or neglect by the owner.

Abasand Holdings Ltd. et al v. Minister of Transportation (No. 2) 17/207 (Boyd)

- While the Board discusses the impracticality of the distinction between “solicitor-and-client” and “party-and-party” costs in the context of the *Expropriation Act*, and makes some comments about the inapplicability of a “tariff of costs” and “customary” or “usual” ranges of counsel hourly rates, the decision must be read in light of the later case of *Nissen v. City of Calgary (No. 3) 28/321 (C.A.)*.

Syrnyk v. The Queen 19/356 (Boyd)

- Where the final award of the Board was less than the interim payment tendered, the Board did not find this to be “special circumstances ... to justify the reduction or denial of costs”, especially where the actions of the expropriating authority may have confused the claimant and there was a dearth of comparable sales and conflicting signals from existing data.

Kerr v. Minister of Transportation (No. 2) 20/107 (Boyd)

- The Board discussed reasonableness under a number of criteria: normal hourly rate of counsel; billing rates of people of equal seniority; and the skill and competency of the counsel whose bill is being taxed.

Price v. Town of Hanna 34/80 (Rusnell, Faulknor and Anderson)

- The Board found that
 - ... legal counsel had claimed costs for expenditure of time that represented a considerable amount of unnecessary work incurred

through over-caution, over-preparation and in the pursuit and development of issues which clearly should not have been pursued.

and reduced counsel's fees by one half – down to about 65 hours.

Gustafson v. The Queen in Right of Alberta 38/180 (Boyd)

- The Board held that where a lawyer's rate is high (\$237 in this case) "the lawyer charging such rate must bring to the case a high standard of experience, expertise and efficiency in conducting the case".

Slemko v. Red Deer 45/102 (Lloyd)

- The Board applied the criteria in Rule 613 of the *Alberta Rules of Court* as to reasonableness.

Stefanik v. County of Thorhild No. 7 (No. 2) 47/96 (Scragg, Miller and Nelson)

- Costs were increased due to circumstances beyond control of claimant and claimant's counsel:
 - illness of prior counsel
 - postponement of hearing
 - view of property at respondent's request.

Shell Canada Ltd. v. Minister of Transportation and Utilities (No. 2) 47/202 (McManus, Hetherington and Lloyd)

- An overall reasonableness approach was used to reduce the total accounts, any one of which viewed in isolation might be held reasonable.¹⁵

Bartle & Gibson Co. Ltd. v. City of Edmonton (No. 2) 48/112 (Archibald)

- Costs were reduced or disallowed on the grounds that the services rendered were unnecessary or rendered through over-caution.

¹⁵ In taking this approach, is the Board not acting in an arbitrary fashion? If the determination is that all of the accounts in and of themselves were reasonable, then is not the Board restricted to reducing the reimbursement of those accounts only in cases where special circumstances exist to justify the denial or reduction? In other words, whether they were "unnecessary, vexatious, prolix or improper, or taken through over-caution, negligence or mistake"?

Melin v. Municipal District of Provost No. 52 49/276 (Scragg, Nelson and Stevens)

- Reduced when unexplained change in counsel resulted in duplication of time.

Mau-Shar Enterprises Ltd. v. Alberta (No. 2) 51/200 (Scragg)

- Legal account reduced by 30% when two experienced counsel used in case that was confusing but not complex.

252792 Alberta Ltd. v. Alberta (No. 2) 52/65 (Hetherington)

- While accounts “robust”, no special circumstances existed to justify reduction or denial.
- A team approach was justified in circumstances of this case.
- The test is not how the accounts stack up having regard to accounts in other cases but whether they were “... unnecessary, vexatious, prolix or improper...” or that they were “... taken through over-caution, negligence or mistake...” in the words of Rule 635.

Malmberg v. Municipal District of Cardston No. 6 57/86 (Purves, MacKenzie and Scragg)

- The fact that counsel’s arguments failed ought not to be a material consideration in assessing costs.

Bartle & Gibson Co. Ltd. v. City of Edmonton 58/36 (C.A.: Kerans, McFadyen and Russell)

- A phrase used to determine whether the cost award was appropriate was whether the reductions were “substantial and unreasonable”;
- There is very limited scope for appeal on costs awards;
- It would be very wrong to punish a loser for advancing claims that were not pursued.

1. APPROACH/PROCESS

Portair Holdings Ltd. v. Minister of Transportation 14/134 (Boyd)

- A junior or second counsel fee for an inquiry was denied, relying upon *Amdue Holding Ltd. v. City of Calgary* 11/370.

Community Shopping Developments Ltd. et al v. City of Edmonton 19/59 (Boyd, Molaro and Faulknor)

- With respect to the “land residual method of valuation”, or the “development approach”, or the “subdivision residual approach” (commonly referred to as the “development approach”), the Board adopted the position taken in *Eddy v. Minister of Transportation & Communications* 7/120 (Ont.), at 140:

“In the future it may well be that if counsel for the respondent takes a well-advised objection to the admissibility of evidence of the development method as inappropriate on the facts of an arbitration, that the Board might rule that counsel for the claimant would proceed at his own peril as to costs, in the event that subsequently the approach was found to be completely irrelevant.”

Nissen v. City of Calgary (No. 3) 20/60 (Boyd)

- The fact that the owner, at the outset, turned the entire matter of negotiations over to the lawyer was indicated not to be a factor to be considered in assessing the legal costs.

Higdon v. Smoky Lake General and Auxiliary Hospital and Nursing Home District No. 73 27/213 (Boyd)

- Costs of a student-at-law for an inquiry were summarily denied, on the authority of *Portair Holdings Ltd. v. Minister of Transportation* 14/133.

Dansereau v. Town of Leduc et al 29/207 (Boyd)

- In looking at criteria set out for determining the reasonableness of counsel fees, the Board referred to criteria set out in *Nissen v. City of Calgary (No. 3)* 28/321 (C.A.) and elsewhere, and concluded:

The board is of the opinion that in taxation of legal costs under the *Expropriation Act* while some regard must be had to each of the ... factors set out ..., primary emphasis must be placed on the time expended by the solicitor having regard to the complexity of the matters dealt with and the hourly billing rate of the solicitor.

Merkl v. Municipal District of Taber No. 14 31/360 (Boyd)

- Legal costs of claimant's first counsel were denied due to inordinate and inexcusable delay (6 years) in processing a claim and the replacement counsel's costs were substantially reduced due to time spent on a matter over which the Board clearly had no jurisdiction.

City of Calgary v. Spoletini et al (No. 2) 32/277 (Boyd)

- The Board held that counsel, appraiser and consultant ... failed to properly characterize the damage claim until relatively late in the proceedings before the board. In the result the proceedings to determine compensation for damages were unnecessarily complicated and protracted and additional costs were incurred.

Price v. Town of Hanna 34/80 (Rusnell, Faulknor and Anderson)

- Due to duplication between an appraiser and a planning consultant on the determination of highest and best use, the planning consultant's fees were reduced 60%.

Nomar Construction Ltd. v. City of Calgary (No. 2) 35/188 (Boyd, Rusnell & Faulknor)

- The misapprehension by the claimant's counsel and appraiser as to the principles to be applied in claiming compensation pursuant to s. 137 of the *Municipal Government Act* give rise to the hearing before the Board and to the award of nominal damages. In the circumstances each party was directed to bear its own costs throughout.

Badach v. Town of Spruce Grove 36/379 (Chapman, Rusnell and Faulkner)

- A lawyer's fees were reduced from \$18,500 to \$14,000 due to counsel being mistaken in spending much time on an aspect of written argument that had been conclusively determined by the Board in other proceedings¹⁶; in presenting another argument that ought not to have consumed as much time; and in calling the owner only to give evidence on market value when

... it should have been obvious ... that the evidence ... could not be relied on to determine market value and that the considerable time spent briefing the evidence ... was needless.

Semeniuk et al v. Saint Mary River Irrigation District 37/152 (Boyd)

- The costs of counsel and appraiser were reduced by 25% due to the Board's dismissal of a claim for injurious affection, in circumstances where the Board felt both "should have recognized that no injurious affection had occurred".

Indevco Management Ltd. v. City of Medicine Hat (No. 2) 38/28 (Boyd)

- In considering counsel fees of \$21,500 (120 hours) and appraisal fees of \$16,000 (160 hours) for a substantive award of \$5,000 and rejected claims of \$160,000, the Board stated that, in looking at the quantum of costs, it had "regard to such matters as the complexity of the issues involved, the efficacy with which the case was prepared and presented, the number of hours and hourly rate charged and the degree of success achieved", as well as looking at the accounts "as a whole". It considered the legal hours high, but allowed the legal account on the circumstances of the case.

Tessier et al v. Town of Millet (No. 2) 37/157 (Chapman)

- Lawyer's fees based on 50 hours' negotiations, 70 hours' preparation and 30 hours' hearing time were reduced to 50, 35 and 30 respectively on the basis that the total was excessive and one half of the negotiation time was relevant to preparation.

¹⁶ Quare whether this meant the Board considered itself bound by a previous ruling.

Gustafson v. the Queen in Right of Alberta 38/180 (Boyd)

- The Board held that, in considering success of a case, although the evidence given is by expert witnesses,

... that does not entirely relieve the lawyer conducting the case of the responsibility for assessing that evidence to determine its relevance and efficacy and to consider whether it establishes and appropriately quantifies the claim being advanced.

- The Board went on to document three areas where the claim had not been advanced to the Board's satisfaction

...counsel must bear some share in failure to establish the foundation for and quantification of the claim which was made and some responsibility for the decision to pursue the claim notwithstanding such shortcomings.

Tarani Rebuilders Inc. v. City of Edmonton (No. 3) Board Order No. 395 (Weber, McAvoy and Nelson)

- In allowing second counsel fees, the Board referred to *Hetro v. Traff* 1999, A.J. No. 1270 and the following principles in awarding costs to second counsel:

1. the money value involved;
2. the complexity of the trial issues; and
3. all relevant factors as to whether the charge was reasonable and proper.

In the circumstances of this case, the Board found it was reasonable for the claimant to have retained second counsel.

2. RESULTS¹⁷

Neill et al. v. Minister of Transportation (No. 4) 58/5 (B.C.C.A.)

- Counsel claimed a premium over his hourly rate, based on an excellent result and a contingency fee contract with the claimant client. The Expropriation

¹⁷ Rule 613 of the Alberta Rules of Court states that barristers and solicitors are entitled to such compensation as may be reasonable having regard to a number of factors including the nature of the matter, the circumstance and interest of the person paying the costs, conduct during the proceedings, the skill of counsel and all other relevant circumstances. This means that, from time to time, counsel are entitled to an amount in excess of their hourly rates. The question of such an entitlement has not come up in Alberta to this point but has been addressed in New Brunswick, British Columbia and Ontario in the cases noted.

Compensation Board and subsequent appeal courts found that no expert evidence was placed before them as to what would constitute a proper charge on a “quantum meruit” basis. There was no evidence as to why any amount over the lawyer’s hourly rate would be reasonable. Therefore, the premium was denied.

Pischiutta v. New Brunswick 65/299 (N.B.Q.B.)(Landry J.)

- The Court found an arrangement reasonable under which the amount of legal fees was set at 10% of the total sum (including interest and costs) received over a set amount.

Ministry of Transportation v. Tripp et al. 67/161 (O.C.A.)

- The reasonableness of a costs award requires an assessment of the nature and risk undertaken by counsel. Such an assessment must be made in light of the fact that in an expropriation, the award of costs is a question of quantum, and not entitlement. In expropriation cases, a bonus will rarely be subject to reimbursement by the expropriating authority. In this case in particular, although the claimants’ counsel was very competent and a positive result achieved, the Court found that imagination and ingenuity, the launching pad for extraordinary skill, did not have a role to play in achieving the result. Premium denied.

Pratt et al v. City of Camrose (No. 2) L.C.B. Order #393 (McAvoy, Miller and Nelson)

- The Board will not enter without prejudice negotiations as an exhibit to a costs hearing. In the court setting, the parties are on notice that without prejudice negotiations may be with prejudice on the issue of costs. There is no such detailed process under the *Expropriation Act*.¹⁸

¹⁸ Therefore, so long as the without prejudice negotiations are not made an issue at trial where privilege is waived, the results of the hearing as opposed to the earlier negotiations have no bearing on the amount of costs awarded.

3. AMOUNT¹⁹

McNaughton et al v. Cardston Municipal Hospital District No. 5 (No. 2) 19/180 (Boyd)

- The Board found an account for legal costs (50 hours at \$90 for 15 years experience) reasonable, taking into account the complexity and diversity of the issues raised in the compensation hearing (3 days), the thorough preparation by counsel, and his effective presentation of the case and his considerable experience in dealing with expropriation matters.

Nischik et al v. Village of Irricana 19/263 (Boyd, Molaro and Faulknor)

- A claim for legal fees was reduced by 60% because the hourly rate charged (\$125) implied a very high standard of experience, expertise and efficiency in carrying out his duties, but which, instead of so reflecting and demonstrating, showed less than careful and thorough preparation; moreover, the amount was substantially excessive and more than double the amount that could be considered to be reasonable for carrying out the legal work and services inherent in the case.

¹⁹ There appear to be two diverging approaches taken by the Board. On the one hand, the decisions of Boyd, Purves and Scragg attempt to delineate what is reasonable having regard to other hearings. On the other hand, Hetherington clearly states that such considerations are not relevant. In *252792 Alberta Ltd. v. Alberta (supra)*, he quoted the Court of Appeal in *Consumers Association of Canada v. Alberta Public Utilities Board* (1985) 58 A.R. 72, in which case the court held that it was inappropriate to use the number of hours spent by counsel for one intervenor in a proceeding as a benchmark to assess the reasonableness of fees charged by another intervenor. His view was that each account must be assessed in accordance with the instructions given and the work and labour involved. It is clear that there are two tests to determine whether accounts should be taxed. The first is whether they are reasonable and the second is whether there are special circumstances that would justify reduction or denial. The first step has been broken down into two sub-tests, namely (a) whether it was reasonable to incur the fees in the first place and (b) whether the manner in which the work was done reasonable. The evidentiary hurdle is before the claimants on the first two tests and before the respondent on the third. The problems with simply using a comparison approach are twofold: firstly, costs hearings do not occur all that frequently, i.e. two in 2000, one in 1999, two in 1998, one in 1997, and none in 1996; and secondly, hearing preparation and attendances usually are but one component of the costs. There may be extensive negotiations on any number of subjects, production of documents and examinations for discovery (once rare in expropriations, now very much the norm), production of answers to undertakings, interlocutory applications, adjournments and research on specific points in each particular case. In this writer's opinion, the day when a Board could say simply that counsel should have expended 80-120 hours in a hearing is a day gone by. More recent decisions appear to take an individualized approach.

Nissen v. City of Calgary (No. 3) 20/60 (Boyd)

- Costs of counsel cut in half (approximately) because 250 hours preparation and presentation was inordinately high in relation to other comparable hearings.

Minute Muffler Installations Ltd. v. The Queen in Right of Alberta (No. 2) 24/350 (Boyd)

- Legal costs based on 195 hours were reduced to 125.

Servold et al v. City of Camrose (No. 2) 26/316 (Boyd, Faulkner and Anderson)

- After finding “unnecessary work incurred through over-caution, over-preparation and the pursuit and development of issues which should not have been pursued”, the Board reduced an account of \$26,000 legal fees (160 hours) to \$10,000.

Lorenz et al v. City of Lloydminster (No. 2) 26/326 (Boyd, Faulkner and Chapman)

- The engaging of two law firms was rejected in principle, but costs that did not amount to duplication were allowed.

City of Calgary v. Spoletini et al (No. 2) 32/277 (Boyd)

- The matter of “customary or usual rates” charged by lawyers must be approached with caution and the primary test in considering rates must be the experience and effectiveness of the lawyer whose account is being contested;
- Where a high hourly rate is charged there must be a standard of experience, expertise and efficiency demonstrated in the conduct of the case.
- After criticism for lack of legal accounting details, legal costs were reduced from \$18,500 to \$14,000.

Humenuk v. The Queen 36/193 (Alta. Q.B. – Hutchinson, J.)

- The Court of Queen’s Bench, following a compensation hearing before the Court, considered costs and denied a previous legal firm’s costs on an apparent basis of duplication, excessiveness and unsuccessful results, and in the process

stated: “In the present instance the expropriating authority is not responsible for the fact that the claimant decided to change solicitors ...”

Gustafson v. The Queen in Right of Alberta 38/180 (Boyd)

- Following its decision in *Kerr v. Minister of Transportation (No. 2)* 20/107, the Board reduced 90 hours to the general area of 70-80 hours, prior to making further deductions to 70 hours based on counsel’s responsibility for failing to quantify the claim.

Kostiuk Holdings Ltd. v. Lloydminster (City) (No. 2) 43/173 (Lloyd)

- Billing rate of \$175 accepted, as was 115 hours of legal time, reference being made to the chapter on “Fees” in the Canadian Bar Association’s Code of Professional Conduct.

Copley v. Alberta 44/184 (Lloyd)

- 127 hours of legal time were allowed, although “ordinarily this would be quite high”, because of the circumstances, including: two adjournments of the hearing (six months apart) for reasons beyond the control of the claimant; the case was a “test” case; the case escalated from the “merely adversarial to the confrontational” and written argument was requested. However, the research time of a co-counsel (on a special issue) was reduced from 126 hours to 71 hours.

Meindertsma v. Alberta 45/26 (Scragg)

- The Board, after indicating that “In previous decisions of the Board 85 to 120 hours was deemed to be appropriate for the preparation and conduct of an entire proceeding.”, reduced a lawyers account of 303 hours to 218 (i.e. a reduction of 85 hours), expressing the view that 70 hours for written argument was excessive, as was 40 hours for research.

Slemko v. Red Deer 45/102 (Lloyd)

- Concerns were expressed by the expropriating authority about over-caution and over-preparation, and the Board found amounts claimed to be unreasonably high.

Shell Canada Ltd. v. Minister of Transportation and Utilities (No. 2) 47/202 (McManus, Hetherington and Lloyd)

- Overall accounts were reduced by 12.5%.

Bartle & Gibson Co. Ltd. v. City of Edmonton (No. 2) 48/112 (Archibald)

- Legal costs were reduced from \$322,000 to \$165,000.

Melin v. M.D. of Provost No 52 (49/276) (Scragg, Nelson, Stevens)

- Legal costs were reduced by \$1,000 for duplication in the circumstance of an unexplained change of law firms.

Mau-Shar Enterprises Ltd. v. Alberta (No. 2) 51/200 (Scragg)

- Legal costs were reduced by 30% when two counsel used but not warranted.

252792 Alberta Ltd. v. Alberta (No. 2) 52/65 (Hetherington)

- No special circumstances existed to justify reduction or denial of “robust” accounts. The proper test was enunciated in Rule 635.

Malmberg et al. v. M.D. of Cardson No.6 (57/86) (Purves, MacKenzie, Scragg)

- The Board reduced the amount of research time by 10 hours, or \$950, and allowed total legal fees of \$23,806.

Jackson et al. v. M. D. of Foothills No. 31 (NO. 2) 64/182 (Purves, MacKenzie,McManus)

- Using an overall approach, the Board determined that in comparison with other cases the legal costs should be reduced by 10% to \$25,500.²⁰

²⁰ See footnote 15 above.

Busse et al. v. St. Mary River Irrigation District 69/121 (MacKenzie, Weber, Schumacher)

- The Board held that legal fees were to reflect the small number of issues and their lack of complexity. The legal costs were reduced from approximately \$25,000 to \$23,000.

Pratt et al v. City of Camrose (No. 2) L.C.B. Order #393 (McAvoy, Miller and Nelson)

- Notwithstanding very limited success, counsel accounts were approved with the exception of a reduction of 25 hours research time. \$2,889.00 was deducted from an account totalling \$32,361.00.

Tarani Rebuilders Inc. v. City of Edmonton (No. 3) Board Order No. 395 (Weber, McAvoy and Nelson)

- The Board ordered total legal and consulting costs of \$201,831.52, reducing only some owner and second counsel costs, which were the result of duplication or over-caution.

VI. EXPERT COSTS

Abasand Holdings Ltd. et al v. Minister of Transportation (No. 2) 17/207 (Boyd)

- The Board denied the costs of an expert who did pre-hearing work but did not testify and whose work was duplicative of experts who did testify.

Robertson v. City of Calgary 27/290 (Boyd, Faulknor and Chapman)

- The costs of an expert engineering consultant were disallowed when he was not called initially and was not allowed to be called a first time in rebuttal.

City of Calgary v. Spoletini et al (No. 2) 32/277 (Boyd)

- As to the costs of an expert witness at a hearing before or after he testifies, the Board had this to say:

It is not unusual in proceedings before the board that counsel for both parties keep one or more of their expert witnesses present throughout the hearing to assist and advise, particularly during Cross-examination of experts on the other side. In expropriation and similar cases it is not reasonable to allow the authority such assistance and to deny it to the Owner.

252792 Alberta Ltd. v. Alberta (No. 2) 52/65 (Hetherington)

- It is inappropriate to use accounts of respondent's experts as a benchmark for the claimant's expert costs.²¹

A. APPRAISERS

Damen et al v. Town of Strathmore 21/171 (Boyd)

- In this case the Board set the standard for the general test to be applied in taxing appraisal costs:

In the Board's opinion the test for allowing or disallowing costs is not based on whether or not the evidence of the appraiser is favourably received and given weight by the Board. To apply such a test would be unfair to the Owners In selecting an appraiser for that purpose the owner should have regard to the qualifications, experience and reputation of the expert so engaged but, having done so, the owner cannot be expected to be responsible for the performance of the expert so selected or the manner in which the Board may weigh the evidence.

- The Board also held that an appraisal report obtained to assist in negotiations fell within s. 33 (now s. 35) of the Expropriation Act.

²¹ See footnote 19 above.

Gustafson v. The Queen in Right of Alberta (No. 2) 38/181 (Boyd)

- The Board applied the reasoning in *Damen et al v. Town of Strathmore* 21/171, and then went on to reduce one appraisers fee to about 1/5 of its original amount on the basis that:

The purpose for calling an appraisal witness is to provide an independent and professional opinion as to the nature of and foundation for the claim advanced and as to the method for and quantification of the amount claimed. That purpose was not met or fulfilled Consequently, the evidence added little or nothing to the evidence which was presented by other witnesses called for the Owner.

Bartle & Gibson Co. Ltd. v. City of Edmonton (No. 2) 48/112 (Archibald)

- Appraisers and other costs reduced or disallowed on grounds services rendered unnecessary or through over-caution.

Melin v. Municipal District of Provost No. 52 49/276 (Scragg, Nelson and Stevens)

- Cost were reduced where the issues were not complex.
- Administrative support and overhead costs were not allowed, as they should be included in the appraiser's hourly rate.

252792 Alberta Ltd. v. Alberta (No. 2) 52/65 (Hetherington)

- Robust accounts allowed. It is inappropriate to use the accounts of the respondent's experts as a benchmark for the claimant's expert costs.

Malmberg v. Municipal District of Cardston No. 6 57/86 (Purves, MacKenzie and Scragg)

- Invoices must be in form permitting analysis of their reasonableness. The appraiser was over-directed or over-cautious. His account was reduced from \$23,000 plus GST to \$15,000 plus GST.

C-A Meats Ltd. v. City of Red Deer 50/310 (Lloyd)

- An administrative charge of 20% was denied.

Stierle v. The Queen in right of Alberta 63/171 (Purves, MacKenzie and Nelson)

- Where two expropriated properties are similar, time should be reduced for the second appraisal.

Pratt et al v. City of Camrose (No. 2) L.C.B. Order #393 (McAvoy, Miller and Nelson)

- The fact that the Board rejected a comparable of the claimant's appraisal report and preferred others, does not make the claimant's appraisal report or his approach unreasonable. The account was taxed in full.

1. **ENTITLEMENT PREREQUISITES**

Paterson Park Ltd. et al v. Town of Grand Centre (No. 2) 30/178 (Boyd)

- The presence of both a planning consultant and appraiser throughout a hearing was found to be excessive and an over-abundance of caution, not meriting costs.

City of Calgary v. Spoletini et al (No. 2) 32/277 (Boyd)

- Where an appraisal was carried out before damages arose, the appraisal report was not presented to the Board, and no explanation was given for the purpose of the appraisal, costs were denied. Furthermore, costs for four appraisal reports of another appraiser were reduced to almost nil where: there was uncertainty as to the proper characterization of the grounds for damages (due in part to the appraiser); the board rejected the report and evidence of the appraiser in its entirety; and the appraiser had both difficulty in attempting to explain the rationale for the method and valuation approach which he adopted and in establishing the particulars of the date which he had used in applying the approach. In coming to this conclusion the Board purposefully went beyond the principle that an appraisers costs will normally be awarded notwithstanding that the Board did not accept the approach of the appraiser (*Damen et al v. Town of Strathmore* 21/171) stating:

In the present case in applying the [*Damen*] test the board must go one step further and consider the reasons for rejection of the appraisal report and evidence In the *Damen* case, supra, the board said “,, the fact that the Board did not accept [the appraiser’s] approach to valuation or give weight thereto in the determination of market value *is not in itself sufficient ground* to disallow the costs so incurred” ... In the present case the facts are quite different ... the board found [the appraiser’s] report and evidence to be riddled with inconsistencies and unsubstantiated and unexplained assumptions. The data used was not adequately substantiated and frequently did not support the conclusions purported to be based thereon. All of the foregoing resulted in considerable confusion and in an unnecessary expenditure of time in attempting to unravel and understand such matters and the position adopted by the appraisal witness (Emphasis added in the original text.)

Ravvin Holdings Ltd. v . Calgary (City) 44/198 (Archibald)

- The Board disagreed with the argument that only one appraisal and the services of only one solicitor were allowable, and held that it was “all reasonable appraisal and legal fees incurred” that are compensable under both ss. 35 and 39 of the Act.

Ravvin Holdings Ltd. v . Calgary (City) 48/81 (C.A.)

- It is reasonable for an owner to obtain legal and appraisal advice after an authority indicates it wishes to purchase his lands and before a Notice of Intention to Expropriate is delivered. To tell an owner that he will not be paid for appraisals or legal advice before a notice is simply to frustrate the negotiation process.

2. REASONABLENESS

a. APPROACH/PROCESS/RESULTS

Double F Motel Ltd. et al v. Minister of Transportation (No. 2) 23/1 (Boyd)

- In the circumstances of this case, well documented costs associated with updating an appraisal report, and costs associated with presence of appraiser and assistant at all of the three day hearing were allowed.

Van de Walle v. Village of Legal 23/162 (Boyd)

- Appraisal costs of report denied but hearing time allowed where Board, on application of the authority at the beginning of the hearing, put the appraiser on notice that he would proceed “at his own peril” in relying on the development approach to valuation, an approach subsequently denied by the Board. See *Community Shopping Developments Ltd. et al v. City of Edmonton 19/59 (supra)* for the genesis of such a warning.

Saint Mary’s Russian Orthodox Greek Catholic Church v. The Queen in Right of Alberta (No. 2) 24/379 (Boyd)

- The Board held that appraisal costs are “reasonable” if they are both reasonably incurred and are reasonable in amount.

City of Calgary v. Spoletini et al (No. 2) 32/277 (Boyd)

- The Board held that counsel, appraiser and consultant
 ... failed to properly characterize the damage claim until relatively late in the proceedings before the board. In the result the proceedings to determine compensation for damages were unnecessarily complicated and protracted and additional costs were incurred.

Price v. Town of Hanna 34/80 (Rusnell, Faulknor and Anderson)

- While the Board indicated that an appraisers presence might provide guidance and assistance to an owner and its counsel at a hearing, it found that it was inappropriate and “not necessary for such an appraiser to be present throughout the entire proceedings” – and reduced it to 25% of the original fee.

Semeniuk et al v. Saint Mary River Irrigation District 37/152 (Boyd)

- The costs of counsel and appraiser were reduced by 25% due to the Board’s dismissal for a claim for injurious affection, in circumstances where the Board felt both “should have recognized that no injurious affection had occurred”.

Tessier et al v. Town of Millet (No. 2) 37/157 (Chapman)

- Where an appraiser took no account of market demand in forming his opinion of highest and best use, and therefore invalidated his conclusion, costs were denied.

Kostiuk Holdings Ltd. v. Lloydminster (City) (No. 2) 43/173 (Lloyd)

- In this case, the expropriating authority challenged the appraisers account on the basis that he had used the wrong evaluation approach, which was not accepted by the Board. The Board held that there was no criticism of the appraisal being poorly done, or derivative – rather the report was well documented and comprehensive. The Board acknowledged that “at times it can be very difficult to compartmentalize loss”, and did not reduce the appraisal account stating, relying upon *Damen et al v. Town of Strathmore 21/171*: the test “is ot based on whether or not the evidence of the appraiser is favourably received and given weight by the Board.”

Shell Canada Ltd. v. Minister of Transportation and Utilities (No. 2) 47/202 (McManus, Hetherington and Lloyd)

- An overall reasonableness approach was used to reduce the total accounts of legal counsel and appraiser and business valuator, any one of which accounts viewed in isolation might be said reasonable.

C-A Meats Ltd. v. City of Red Deer 50/310 (Lloyd)

- Where an appraiser played a larger role than simply appraising the lands, but assumed many of the duties of legal counsel with consent of counsel and client, a larger award of costs was justified.²²

²² The interesting aspect of this case was that the expropriating authority did not attempt to tax the legal counsel’s accounts, but only that of the appraiser, notwithstanding that the appraiser stood in the lawyer’s shoes for much of the case.

b. AMOUNT

Western Estates Ltd. v. City of Calgary (No. 2) 18/35 (Boyd)

- The Board reduced an appraiser's costs from \$7,500 to \$6,500, disapproving of the appraiser's charges relating to reading land compensation case reports, reviewing transcripts of the hearing, and for viewing the land with the Board.

Schwindt v. Minister of Transportation (No. 2) 27/205 (Boyd)

- The Board found the appraisal costs excessive and reduced them from \$5,100 to \$4,500.

Price v. Town of Hanna 34/80 (Rusnell, Faulknor and Anderson)

- The Board reduced an appraiser's costs from \$23,000 to \$8,500 due to a number of stated reasons: unreasonable amount of time (by a factor of 10) counseling counsel and other experts to the claimant; excessive time spent at the hearing; in comparison to other similar cases; balanced by expertise of the expert (which was positive in an urban setting), but with a suggestion that rural appraisals were outside his expertise.

Indevco Management Ltd. v. City of Medicine Hat (No. 2) 38/28 (Boyd)

- In applying the principles (see *supra*), in considering counsel fees of \$21,500 (120 hours) and appraisal fees of \$16,000 (160 hours) for an award of \$5,000 and rejected claims of \$160,000 stated, the Board found the appraisal costs too high by \$3,000 based on and because there was some research overlap with counsel, the Board's experience, and the evidence in one area was "vague, undocumented and speculative".

Bartle & Gibson Co. Ltd. v. City of Edmonton 48/112 (Archibald)

- Although it was determined reasonable to place before the Board evidence of an appraisal which had been previously prepared for financing purposes, the amount of the appraiser's costs (\$1345) were reduced to \$700 by reason of the

limited use made by the tribunal of his evidence and the necessity for that evidence.²³

Melin v. Municipal District of Provost No. 52 (49/276) (Scragg, Nelson, Stevens)

- A high hourly rate charged by an appraiser was held to indicate a high degree of expertise and knowledge and should have eliminated research and compilation time. Account of \$13,950 reduced by 30%.

C-A Meats Ltd. v. City of Red Deer 50/310 (Lloyd)

- Matters were made more complicated than they had to be. The appraiser took too long to write his report. Account of \$15,625 reduced by approximately \$4,000.

Malmberg v. Cardston(No. 6) 57/86 (Purves, MacKenzie, Scragg)

- Where an appraiser was over-directed or over-cautious, an account of \$23,000 was reduced to \$15,000.

Stierle v. The Queen in right of Alberta 63/171 (Purves, MacKenzie and Nelson)

- Where two expropriated properties are similar, time should be reduced for second appraisal. Total appraisal fees were reduced from approximately \$15,500 to \$13,000.

Jackson v. M.D. of Footills No. 31 (No. 2) 64/182

- The Board found over-direction and over-caution and reduced the account of the appraiser by approximately 2,800 to \$17,500.

B. OTHER EXPERTS

1. BUSINESS VALUATORS

²³ Quære: Does this not amount to penalizing the claimant for having lost? The Court of Appeal did not disturb this finding.

Minute Muffler Installations Ltd. v. The Queen in Right of Alberta (No. 2) 24/350 (Boyd)

- The fees associated with preparing a report of business loss were reduced from \$5,700 to \$4,000.

Southland Canada Inc. v. Calgary (City) 44/27 (Ackroyd)

- The Board reduced the hours of a business valuator because the “approach to valuation was over-cautious, resulting in excess hours”.

Shell Canada Ltd. v. Minister of Transportation and Utilities (No. 2) 47/202 (McManus, Hetherington and Lloyd)

- The costs of a second business valuator were allowed. Reasonableness is the key. Such costs are allowed in situation akin to where second appraiser would be allowed.

Melin et al. v. M. D. of Provost No. 52 49/276 (Scragg, Nelson, Stevens)

- The appraiser’s hourly rate indicated a very high degree of expertise and knowledge and should have eliminated much time spent in researching and compiling data to establish the claims.²⁴

2. CONSULTING ENGINEERS

Nischik et al v. Village of Irricana 19/263 (Boyd, Molaro and Faulknor)

- The Board found that the evidence of a professional engineer and consultant on the value, based on quantity and quality, of gravel closely bordered on being frivolous and vexatious, in that it was found to be inadequate, inconclusive, ill-conceived and ill-founded. Accordingly, the Board found this sufficient reason to deny costs to the expert.

²⁴ Quare whether this is an appropriate consideration. Data is the factual and evidentiary basis for expert opinion. Is it not the time spent in analysis that should lessen with experience?

Humenuk v. The Queen 36/193 (Alta. Q.B. – Hutchinson, J.)

- The Court of Queen’s Bench denied an owner recovering engineering fees for drainage damage which was found to have nothing to do with the expropriation, but related to a pre-existent problem.

Tessier et al v. Town of Millet (No. 2) 37/157 (Chapman)

- The costs associated with an expert firm giving engineering advice concerning a road and services to be constructed by the expropriating authority, to ensure they met future needs of the owner, were allowed.

Bartle & Gibson Co. Ltd. v. City of Edmonton 48/112 (Archibald)

- The Board refused to provide any award for two engineers for their costs involved with the hearing as it had awarded a generous amount for hypothetical design costs in its compensatory hearing and considered a subsequent costs award would constitute double recovery.²⁵

3. PLANNING CONSULTANTS

Paterson Park Ltd. et al v. Town of Grand Centre (No. 2) 30/178 (Boyd)

- Costs of a report and composite map, as to highest and best use, by a planning consultant and his drafting technician, were taxed down from \$13,000 to \$4,500 because 239 hours was inordinate and excessive.

Tessier et al v. Town of Millet (No. 2) 37/157 (Chapman)

- While certain hearing preparation costs were reduced, the full negotiation costs associated with an expert firm giving planning advice concerning a road and connection with a future subdivision, were allowed.

252792 Alberta Ltd. v. Alberta (No. 2) 52/65 (Hetherington)

- Full costs of planner were allowed where issues were “very challenging” .

²⁵ Quare whether this can be true. Note: This finding was not overturned on appeal.

4. SURVEYORS

City of Calgary v. Spoletini et al (No. 2) 32/278 (Boyd); and Gustafson v. The Queen in Right of Alberta 38/181 (Boyd).

- Surveyor's costs were allowed.

5. OTHER EXPERTS

Minute Muffler Installations Ltd. v. The Queen in Right of Alberta (No. 2) 24/350 (Boyd)

- The costs associated with a construction consultant were found reasonable in preparing the cost approach to valuation, as were (in principle, but no quantum) the costs associated with an advertising study.

Servold et al v. City of Camrose (No. 2) 26/316 (Boyd, Faulkner and Anderson)

- The Board accepted that the evidence of an architect was of relevance to an injurious affection case, but found the time expressed excessive, and accordingly reduced the costs.

Lorenz et al v. City of Lloydminster (No. 2) 26/326 (Boyd, Faulkner and Chapman)

- Costs of the actual witness time of an economic consultant, as to valuation principles (including capitalization rates and rates of return), were allowed, with reduction for unnecessary time.

Schwindt v. Minister of Transportation (No. 2) 27/205 (Boyd)

- Costs for a horticulturist were allowed.

Smith v. the Queen (No. 2) 31/172 (Boyd)

- The Board allowed the costs of a geo-technical expert and a geologist relating to granular material, and a civil engineer with expertise and experience in matters of acquiring, stripping, extracting, processing and hauling gravel.

Town of Grand Centre v. Dalbar Feeders Ltd. et al 31/255 (Boyd)

- The Board had “serious reservations” as to the qualifications of persons with: (a) a B. Comm, who was a fellow of the Real Estate Institute and had certificates in land planning and development and in property management; and (b) university training (no degree), but some planning courses and nine years in real estate – furthermore, their work in selecting experts was either unnecessary or not useful, and accordingly were only awarded \$1,000 of a \$22,000 fee.

City of Calgary v. Spoletini et al (No. 2) 32/277 (Boyd)

- Costs of an expert who was qualified as a chartered accountant, developer, and development and investment consultant, were allowed in a reduced amount.

Grotten v. Minister of Environment 37/377 (Boyd, Rusnell and Faulknor)

- The Board allowed the fees of an expert economist (to give opinion evidence on discounting factors), and consulting geo-technical and mining engineers (relating to irrigation seepage).

Southland Canada Inc. v. Calgary (City) 44/27 (Ackroyd)

- Services of an expert (professor of finance) to calculate a discount rate denied as being “over-cautious” and of little value.

Bartle & Gibson Co. Ltd. v. City of Edmonton 48/112 (Archibald)

- The costs of a professor of marketing were disallowed when his evidence was ignored by the tribunal.

C. DISBURSEMENTS*Ravvin Holdings Ltd. v. Calgary (City)* 44/198 (Archibald)

- Costs of transcripts of a cost hearing were reasonable for counsel where written argument was required, but as to a copy for the owner, such was held to unnecessary and therefore costs for same were held to be unreasonable.

Shell Canada Ltd. v. Minister of Transportation and Utilities (No. 2) 47/202 (McManus, Hetherington and Lloyd)

- Actual out-of-pocket costs were allowed.

Melin v. Municipal District of Provost No. 52 (49/276) (Scragg, Nelson, Stevens)

- A disbursement amount categorized as “Administrative Support” was not allowed, as the Board was of the view that administrative support is covered in the overall per hour rate of the expert.
- The costs of transcripts ordered for a subsequent costs hearing were disallowed, as the Board felt they were unnecessary for the hearing.

VII. OWNER’S COSTS

Servold et al v. City of Camrose (No. 2) 26/316 (Boyd, Faulkner and Anderson)

- Owner’s costs of 260 hours were found “totally unreasonable” and \$1,000 was allowed.

Lorenz et al v. City of Lloydminster (No. 2) 26/326 (Boyd, Faulknor and Chapman)

- Hourly rate of \$20 for a family member was specifically approved, as was 236 hours time (precisely documented), with only small deduction.

Schwindt v. Minister of Transportation (No. 2) 27/205 (Boyd)

- The Board documents many of the off-setting factors relevant to an owner recovering costs (I recommend one see the text at 210-1 for details) and under the *rubric* “the over-all tenor and intention of the Act is that an owner should not be out of pocket as a result of the expropriation” awarded costs to the owner, after deducting the costs for the inquiry.

Higdon v. Smoky Lake General and Auxiliary Hospital and Nursing Home District No. 73 27/213 (Boyd)

- Owner’s costs of \$400 and \$1,000 were allowed following an inquiry.

Smith v. The Queen (No. 2) 31/172 (Boyd)

- Due to an unusual history, misunderstandings by the expropriating authority and other special circumstances, the owner was granted \$7,200 costs, at the rate of \$20 per hour.

Humenuk v. the Queen 36/193 (Alta. Q.B. – Hutchinson, J.)

- Apparently because it was insignificant, the owner's personal disbursements were allowed at \$400.

Tessier et al v. Town of Millet (No. 2) 37/157

- Owner's costs of 20 hours at \$50 were allowed for negotiations and \$1,000 for hearing.

Gustafson v. The Queen in Right of Alberta 38/180 (Boyd)

- The Board denied costs of a relative of the owner (who apparently negotiated on behalf of the owner) because he did not testify and gave no details of what he did, noting that:

There is an onus on the Owner to establish the foregoing matters and to provide a basis upon which the Board may assess and determine the reasonableness or otherwise of the cost claimed. That onus was not met by any reasonable standard.

Ravvin Holdings Ltd. v. Calgary (City) 44/198 (Archibald)

- The Board found that
a cost item with respect to the time spent by the owner, having to do with an expropriation of his lands, is not a "reasonable legal, appraisal and other costs actually incurred by the owner for the purpose of determining compensation payable", unless such time claim is a sum expended, charged or paid or loss sustained, and is *ejusdem generis* with legal and appraisal costs.

Shell Canada Ltd v. Minister of Transportation and Utilities 46/133 (Archibald, Scragg and McMannus)

- Similar to *Ravvin*, the Board held loss of owner's time not compensable as not *ejusdem generis* with appraisers and other experts.

Bartle & Gibson Co. Ltd. v. City of Edmonton (No. 2) 48/112 (Archibald)

- The Claimant's manager's executive time was denied.

Melin v. Municipal District of Provost No. 52 (49/276) (Scragg, Nelson, Stevens)

- The Claimant was allowed the cost of a hired man to replace him during the hearing.

Mau-Shar Enterprises Ltd. v. Alberta (No. 2) 51/200 (Scragg)

- An amount was allowed for a replacement worker and mileage for travel during the process of the expropriation.
- Hotel and food bills for owner reduced to what Board felt was a reasonable amount.

Bartle & Gibson Co. Ltd. v. City of Edmonton 58/36 (C.A.: Kerans, McFadyen and Russell)

- Lost executive time is an expense naturally and reasonably arising out of the expropriation. Although technically 39(1) is limited to actual expenses incurred, the amount claimed is compensable as a disturbance damage.

Tarani Rebuilders Inc. v. City of Edmonton (No. 3) Board Order No. 395 (Weber, McAvoy and Nelson)

- In the case of a small privately-held corporation, the Board allowed the time of one executive but stated the respondent should not be liable to pay for two executives and denied the second claim.²⁶

²⁶ One can envision the circumstance where the efforts of more than one executive would not result in duplication.

VIII. PROCEDURES

A. PROCESS – IN GENERAL

Aiello et al v. City of Calgary (No. 2) 26/310 (Boyd, Chapman & Anderson)

- The Board set out its normal two-step procedure (entitlement to and taxation of costs) in the following way:

Pursuant to the foregoing statutory provisions [s. 39(1) and (2)] and the board's practice the disposition of the costs of a compensation hearing is accomplished in two stages, namely:

(a) Under s-s. (1) of s. 39 a claim for costs is invariably included in the application for determination of compensation and consequently, is an issue raised and to be determined by the board at the compensation hearing. At this stage the board will hear counsel on the issue of costs and indeed invites counsel to address that issue. The board, on the basis of representations made, then determines whether the applicant owner is entitled to costs and whether "special circumstances exist to justify the reduction or denial of costs". At this stage the board does not normally deal with an itemized bill of costs but rather makes a general disposition as to whether or not the applicant owner is *entitled* to costs.

(b) Where costs have been dealt with and awarded pursuant to s. 39(1) at the compensation hearing, the board also orders that if the quantum of such costs cannot be agreed upon by the parties, either party may pursuant to s-s. (2) of s. 39 apply to have such costs "taxed and allowed". It has been the consistent practice of the board pursuant to s. 39(2) to

order that the board shall be the taxing authority or officer for this purpose. Where taxation of costs is required a separate hearing for that purpose is held and the board, as taxing officer, determines *the quantum* of the costs which will be allowed.²⁷

Nissen v. City of Calgary (No. 3) 28/321 (C.A.)

- Under section 39(2), the Board can specify the taxing officer, and the practice of the Board has been to tax the costs itself.

Ravvin Holdings Ltd. v. Calgary (City) 44/198 (Archibald)

- The onus of proof is on the owner to demonstrate that costs are compensatory under the *Act* and that they are reasonable.

²⁷ The procedure outlined in this case does not, in fact, occur in current practice of the Land Compensation Board. In the absence of an agreement between the parties to postpone the issue of costs, the Board sends a notice to the parties as follows:

“The Board intends to consider the matter of reasonable legal, appraisal and other costs at the time of the Compensation Hearing, in accordance with section 39 of the Expropriation Act. The Board would encourage each of you to attempt to resolve any outstanding issues with regard to costs and interest prior to the hearing. **Please ensure that a Bill of Costs and any other documentary evidence you intend to present at the hearing are furnished to each other and filed with the Board (prior to the hearing).** Should a settlement not be reached in either of these areas prior to the compensation hearing, the Board will then hear submissions concerning same upon conclusion of the compensation evidence.”

This revised practice was instituted a number of years ago, presumably with the intent of reducing the overall costs and the number of hearings dealing with a particular matter. As laudable as these objectives are, it is the writer’s opinion that they are outweighed by the difficulties arising from the new process. The Board has, of course, two separate and distinct roles: one as compensation tribunal and the second as taxing officers. As a compensation tribunal, they are restricted to consideration of the evidence in the compensation hearing, but as taxing officers they are entitled to delve in great detail into other ancillary issues: different facts, evidence, without prejudice conversations and offers, discussions with varying experts, the considerations underlying strategies taken, and any of a number of other issues, all of which should be excluded from consideration in the compensation hearing. One wonders how this is possible when it is all heard at the same time or, in any event, prior to the compensation decision being made. The old adage “justice must not only be done but it must be seen to be done” is applicable.

252792 Alberta Ltd. v. Alberta (No. 2) 52/65 (Hetherington)

- Accounts are not unreasonable simply because they are large. Respondent must show they were unnecessary, vexatious, prolix or improper or taken through over-caution, negligence or mistake.

B. PARTICULARS

Amdue Holdings Ltd. et al v. City of Calgary (No. 2) 11/370 (Boyd)

- The particulars for a cost application were early documented by the Board and have been frequently commented on:

Bills of costs prepared pursuant to the *Expropriation Act* should be sufficiently itemized and contain sufficient detail to permit the application of the foregoing principles. Without limiting the generality of the foregoing such bills should:

1. set out the number of hours spent in preparation and presentation of the matter to the Board and the rate or rates charged therefore;
2. set out in detail costs incurred for reports of appraisers and other experts with verification of such costs;
3. set out the costs incurred or charges made for attendance by expert and other witnesses at the hearing before the Board;
4. itemize correspondence, telephone calls and attendances in connection with the matter and the charges made therefor;
5. itemize and verify other disbursements made in connection with the matter.

City of Calgary v. Spoletini et al (No. 2) 32/277 (Boyd)

- Where accounting details were lacking in the lawyer's account, the Board stated:

Where an hourly rate of \$200 is being recorded, both the board and the authority, which is being requested and ultimately required to pay the costs, is entitled to full explanation of the items of account.

Slemko v. Red Deer 45/102 (Lloyd)

- The Board declared that a “properly drawn bill of costs is essential in order to conduct a meaningful taxation”. It discussed specifically the need that fees and disbursements be clearly separated as to inquiry costs, other allowable expropriation costs, and non-allowable costs. Furthermore, it endorsed the concept that solicitors had to keep sufficient records to demonstrate the fairness of the account.

Malmberg v. Cardston(No. 6) 57/86 (Purves, MacKenzie, Scragg) and *Stierle v. The Queen in right of Alberta* 63/171 (Purves, MacKenzie and Nelson)

- The Board criticized appraiser accounts where the time was billed in lump sums covering several days as being “almost impossible to tax”.

C. ENFORCEMENT²⁸

Smith v. The Queen (No. 2) 31/172 (Boyd)

- In denying interest claimed on costs awarded by an inquiry officer but which the expropriating authority withheld for over a year, the Board said:

This board has no power or authority to enforce the payment of costs awarded by an inquiry officer. In the board’s opinion it follows that the board has no power or authority to assess or award what amounts to a penalty for failure to pay such costs.

Tarani Rebuilders v. City of Edmonton 69/161

- Costs respecting an interlocutory award were “to be paid within 30 days of respondent’s receipt of claimant’s account”. And “in any dispute as to reasonableness, either party may apply to the Board.”

²⁸ Although an appeal from a Board Order is direct to the Court of Appeal, the Order itself does not have the force and effect of a judgment of the Court of Queen’s Bench. The likely process to enforce payment of a compensation or a costs order is to issue a Statement of Claim in the Court of Queen’s Bench and apply for summary judgement, then take ordinary enforcement proceedings such as garnishee or seizure of assets. Interestingly enough, even a judgment of the Court of Appeal requires a specific order allowing it to be filed as a Court of Queen’s Bench Judgment in order for those steps to take place. This was done by counsel in *Paterson Park Ltd. et al v. Town of Grand Centre* 29/86.

- The Board refused to enforce an account when it was being questioned by the respondent and overall costs hearing was already scheduled.

*Alberta Rules of Court (AR 390/68 s. 607)*²⁹

607 Notwithstanding the final determination of an action, the costs of any interlocutory proceeding in that action, whether ex parte or otherwise, shall, unless otherwise ordered, be paid forthwith by the party who was unsuccessful on the interlocutory proceeding.

IX. INTERIM COSTS

Hat Development v. City of Medicine Hat 33/122 (Boyd)

- A lump sum payment of \$25,000 for interim costs was directed to be paid by the expropriating authority.

Lafarge Canada Inc. v. City of Calgary 52/235 (Lloyd)

- Interim costs were allowed in long complex case.

Riebel v. The Queen 68/282 (Schumacher, MacKenzie, (Weber)

- The Board determined that ss. 35 and 39 of the Act are broad enough to confer jurisdiction on it to award interim costs. Costs were awarded in lump sum without prejudice to the respondent's right to tax the claimants' account. Factors: number of claimants, number of parcels, complexity of issues from both surveying and legal aspect.

²⁹ Rule 607 of the Rules of Court has recently been amended requiring payment of costs for interlocutory proceedings forthwith following those proceedings. Is there any reason why the same procedure should not be followed in expropriation matters?

X. INTEREST ON COSTS

Abasand Holdings Ltd. et al v. Minister of Transportation (No. 3) 24/251 (Boyd)

- Where the expropriating authority wrongfully withheld costs, the Board held that it had jurisdiction under s. 2 and 26 of the *Expropriation Act* to award interest and costs incurred in the application to the Board therefor.

Minute Muffler Installations Ltd. v. The Queen in Right of Alberta (No. 2) 24/350 (Boyd)

- Interest on outstanding costs was not allowed.

Saint Mary's Russian Orthodox Greek Catholic Church v. The Queen in Right of Alberta No. 2) 24/379 (Boyd)

- Interest was denied on accounts because a proposed payment had been received by the claimant and “under those circumstances the board disallows the claim for interest as it is not a cost which the expropriating authority should be required to bear.”

Schwindt v. Minister of Transportation (No. 2) 27/205 (Boyd)

- After referencing the *Minute Muffler* and *Saint Mary's* cases (*supra*), the Board held that

... in taxation of costs, no general rule can be established as to the allowance or disallowance of interest charges on outstanding accounts of appraisers and other experts. Careful regard must be had to the facts and circumstances in each case to enable proper application of the principles previously discussed herein.

- The Board went further to find the factual situation not different from *Greenslade et al v. Minister of Environment 25/259 (Ont. H.C.)*, where Justice Steele stated, *inter alia*:

The tenor of the Act is to provide that a claimant is entitled to his costs and compensation so as to place him in as good a position after the expropriation as he would have been before ... When a person's property is expropriated, he must retain legal, appraisal and other consultants to assist him Often it is not until the

completion of the arbitration proceeding that the full amount of the compensation is paid. In the meantime, the claimant incurs expenses. I take it that the legislation meant that all reasonable expenses incurred were to be compensated and I include the reasonable interest charge ... as being reasonably incurred.

- The Board allowed interest on funds borrowed to pay costs.

Paterson Park Ltd. et al v. Town of Grand Centre (No. 2) 30/178 (Boyd)

- For the reasons set out in *Schwindt v. Minister of Transportation (No. 2)* 27/205, interest on unpaid costs was allowed.

Smith v. The Queen (No. 2) 31/172 (Boyd)

- Based on the *Schwindt* case, interest was awarded on expert accounts, but jurisdiction was denied regarding interest on withheld inquiry costs awarded by the inquiry officer.

Ravvin Holdings Ltd. v. Calgary (City) 44/198 (Archibald)

- In an apparent major change in interpretation, or policy, it was held that as there was no jurisdiction under s. 66 of the *Act* to pay interest on costs, interest was denied.

Slemko v. Red Deer 45/102 (Lloyd)

- The Board held that it had no jurisdiction under section 66 of the *Act* to award interest on bank loans incurred to pay legal fees.

Lam v. Edmonton (City) (No. 2) 47/55 (Lloyd, Nelson, Scragg)

- Interest is awarded on a case by case basis. In the proper case, interest should be awarded on accounts. Factors determining whether interest reasonably incurred in this case:
 - account rendered promptly with interest warning;
 - account outstanding over protracted time;
 - proposed payment did not allow the claimant sufficient funds to pay the accounts on time.

Ravvin Holdings Ltd. v. City of Calgary 48/81 (Cote J.A.)

- The Court declined to consider the question of interest because there was little or no evidence that:
 - (a) the owner was actually out of pocket;
 - (b) the owner was obliged to pay interest or otherwise suffered identifiable loss.

C-A Meats Ltd. v. City of Red Deer 50/310 (Lloyd)

- Interest was not awarded absent evidence it was a necessary expense.

Pitt v. City of Red Deer 63/113 (C.A.: Bracco, Hunt and Sulatycky)³⁰

- No “special circumstances” existed to justify denying a claim for interest on professional accounts.
- It is an error to suggest that the landowner should use the proposed payment to pay his legal and other costs.
- The argument that interest should be awarded only if the Appellant can produce the actual terms of agreement is untenable. An interest warning on some accounts was deemed sufficient.

Stierle v. The Queen in Right of Alberta 63/171 (Purves, MacKenzie and Nelson)

- The Board determined interest on the appraiser’s account was not payable, as it was not actually incurred.³¹

³⁰ The Court of Appeal in this case seems to have reversed the suggestion that the claimant’s use of the proposed payment is a relevant consideration in the determination of whether or not interest should be payable on outstanding professional accounts. It is an economic reality that the majority of businesses or individuals must finance the cost of their claims either through bank debt or arrangements with the professionals themselves. It would seem as a result of this decision that financing through the professionals themselves is a commercially reasonable alternative.

³¹ The Board obviously did not have the benefit of the *Pitt* decision at the time that this one was made.

Mount Lawn Industries Ltd. v. City of Edmonton 69/50

- Following an established line of authority, all the claimants' damages were present-valued from the date of occurrence to the date of the award.³²

XI. APPEAL COSTS*Kerr v. Minister of Transportation (No. 2)* 20/106 (Boyd)

- The Board's cost orders are subject to appeal to the Court of Appeal under s. 35 (now s. 37) of the *Expropriation Act*.

Price v. Town of Hanna 34/80 (Rusnell, Faulknor and Anderson)

- The Board held that it did not have jurisdiction to tax and fix costs of appeal to the Court of Appeal pursuant to s. 37.

Price v. Town of Hanna 36/323 (Alta. C.A.)

- The Court of Appeal had apparently awarded costs to the owner on a party-and-party basis in a previous appeal, but the owner on going back to the Board has requested the Board to award solicitor-and-client costs of the appeal, and appealed the refusal to the Court of Appeal – the Court of Appeal obviously concurred that the Board had no jurisdiction to alter its award of costs, and awarded the respondent party-and-party costs.

Ravvin Holdings Ltd. v. City of Calgary 48/81 (Cote J.A.)

- Where the appeal was met with mixed success, both parties were to bear their own costs.

Bartle & Gibson Co. Ltd. v. City of Edmonton 58/36 (C.A.: Kerans, McFadyen and Russell)

- No costs where appeal not reasonable.
- Costs at triple Column 6 where appeal reasonable.

³² If claimants are allowed present value on funds expended for items such as survey costs, does it not also follow that they similarly should be entitled to the present value of costs of legal and other professional costs expended over time?

Malmberg v. Municipal District of Cardston No. 6 63/8 (C.A.: Fraser, Conrad and Hunt)

- Although the claimant appellant's success on appeal was very limited, the central issue was deceptively simple and of potential importance throughout the province. Costs of the appeal were, therefore, awarded.

XII. G.S.T.³³

Melin v. Municipal District of Provost No. 52 49/276 (Scragg, Nelson and Stevens)

- G.S.T. was held payable but if the claimant received an input credit he was to repay the Respondent.

Mau-Shar Enterprises Ltd. v. Alberta (No. 2) 51/200 (Scragg)

- G.S.T. was held payable, but repayable if credit received.

Tarani Rebuilders Inc. v. City of Edmonton (No. 3) Board Order No. 395
(Weber, McAvoy and Nelson)

- The Board denied G.S.T. in respect of internal payroll costs.

³³ In the first two cases under this heading, both decided in the early days of G.S.T., the Board placed a condition on the payment of costs to the claimants that those funds were repayable in the event an input credit was received. Authority for such an order certainly is not found in section 39 of the Act. However, the Board was on to something. If the claimant is a registrant for the purposes of G.S.T., then he or she should be entitled to input credits for the amounts paid to professionals and thus G.S.T. should not form part of the claim of those individuals or corporations. On the other hand, if the claimant is not a registrant or cannot claim the input credits, then they should be reimbursed to the claimant as additional damages or costs. This should be so regardless of the G.S.T. status of the expropriating authority.

XIII. CONCLUSION

The object of the Act has not changed: a displaced owner is not to be “out-of-pocket” as a result of expropriation. If a change in the pattern of costs awards over the past decade can be discerned, it is probably reflective of two things:

1. The interpretation of the statute is, appropriately, more liberal or purposive than in the past; and
2. The definition of “reasonable” remains a moving target.

On balance, that’s likely a good thing.

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