Court of King's Bench of Alberta

Citation: Pentelechuk v Grand Rapids Pipeline GP Ltd, 2023 ABKB 692

Date: 20231206
Docket: 2103 06839
Registry: Edmonton

Between:

Darren Ward Pentelechuk and NPS Farms Ltd.

Plaintiffs

- and -

Grand Rapids Pipeline GP Ltd.

Defendant

Memorandum of Decision
of the
Honourable Justice M.E. Burns

I. Introduction

[1] The Appellants, Darren Ward Pentelechuk and NPS Farms Ltd (collectively NPS Farms), appeal a decision and related compensation order (the Decision) of the Surface Rights Board (the Board) under s 26 of the *Surface Rights Act*, RSA 2000, c S-24 (the Act). Grand Rapids Pipeline GP Ltd. (Grand Rapids) is the Respondent and the payor of any compensation order.

[2] There are two broad issues before the court:

A. What is the standard of review of the Decision; and

B. Depending on the standard of review, whether the Board's award of compensation for 2.83 acres of the Right of Entry lands (disputed lands) and a 1.24 acres area (the severed area) should change.

II. Standard of Review

[3] The standard of review issue here is relatively unique because the Decision was issued on March 10, 2021, after the Supreme Court of Canada issued its decision in ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65, but before legislative changes under the *Land and Property Rights Tribunal Act*, SA 2021, c L-2.3 (the *LPRT*). Before the ***Vavilov*** decision, courts had held that the appropriate standard of review of the Board's decision was reasonableness (see ***Imperial Oil Resources Ltd. v. 826167 Alberta Inc***, 2007 ABCA 131 at para 18; leave to appeal refused [2007] SCCA No 303).

[4] In ***Vavilov***, the Supreme Court of Canada held that the presumptive standard of review is reasonableness, but the presumption can be rebutted. As an example of such rebuttal, the Supreme Court noted that where a legislature provides for a statutory appeal mechanism, it has signalled its intention that appellate standards of review should apply instead. Subsequently, the *LPRT* codified a reasonableness standard of review for decisions of the Board's successor, the Land and Property Rights Tribunal. Thus, the Decision falls within a small window of time in which the standard of review of the Board's decision is unclear.

[5] Henderson J in ***Hart v ATCO Electric Ltd***, 2021 ABQB 162 and ***Sabo v AltaLink***, 2022 ABQB 156 (leave to appeal granted 2022 ABCA 233**)** was dealing with Board decisions in the same time period as here – after ***Vavilov,*** but before the legislative changes. He held that he was bound by the Supreme Court of Canada decision and that the appropriate standard of review of Board decisions before the legislative change was the appellate standard: palpable and overriding error for questions of fact and questions of mixed fact and law and correctness for pure questions of law (***Hart*** at paras 27-28; ***Sabo*** at para 17, 18 and 21). He noted (at para 25 of ***Hart***):

> *Vavilov* makes it clear that where the Legislature has provided for a statutory appeal mechanism, the appellate standard of review should be used, absent a legislative direction to the contrary. *There is presently no such contrary direction in the Act*. Nor did the Legislature signal in Bill 48 that the reasonableness standard should be applied to appeals currently in the system. (Emphasis added)

[6] The Supreme Court of Canada in ***Vavilov*** emphasized that the overriding consideration when determining whether the presumptive reasonableness standard of review was rebutted is legislative intention, saying that when the legislature creates a statutory appeal mechanism, it is indicating its intention to require appellate review (at para 36):

> In our view, this principled position also requires courts to give effect to the legislature's intent, signalled by the presence of a statutory appeal mechanism from an administrative decision to a court, that the court is to perform an appellate function with respect to that decision... Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to **scrutinize such administrative decisions on an appellate basis**. (Emphasis added)

[7] Henderson J in ***Hart*** rejected the respondent ATCO's argument that he should apply a reasonableness standard. ATCO argued that the standard had, until ***Vavilov***, been reasonableness and the subsequent legislation codified that standard for appeals under the new tribunal. Henderson J noted that the legislature could have indicated that reasonableness was to apply to

appeals currently in the system, and that in the absence of "legislative direction to the contrary," the Supreme Court mandated that appellate standards were to apply. In ***Sabo***, Henderson J relied on his decision in ***Hart***.

[8] The appellants in ***Hart*** argued that applying the appellate standard of review in the brief period between ***Vavilov*** and the enactment of the *LPRT* would be unreasonable and inconsistent with the standard that was applied in the past and will be applied in the future. Henderson J had some sympathy for this position noting the desirability of consistency, but he considered himself bound by the Supreme Court of Canada decision (***Hart*** at para 25).

[9] Grand Rapids argue that I am bound by Henderson J's decisions in ***Hart*** and ***Sabo***, by virtue of horizontal *stare decisis***,** described in ***R v Sullivan***, 2022 SCC 19. The Supreme Court of Canada in ***Sullivan*** held that courts should only depart from binding decisions of courts of coordinate jurisdiction in three circumstances (at para 75), as originally set out in ***Re Hansard Mills Limited***, [1954] 4 DLR 590 (BCSC):

> 1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;
>
> 2. The earlier decision was reached *per incuriam* ("through carelessness" or "by inadvertence"); or
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> 3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.

[10] NPS Farms argues that Henderson J failed to consider the content of the appeal mechanism and instead focused simply on the fact that the section provided for a statutory appeal.

[11] Section 26 of the *Act*, as of March 2021, provided:

> 26(1) The operator or any respondent named in a compensation order may appeal a compensation order made under this Act to the Court of Queen's Bench as to the amount of compensation payable or the person to whom the compensation is payable or both.
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> ...
>
> (6) An appeal to the Court shall be in the form of **a new hearing**.
>
> (7) The Court
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> > (a) **has the power and jurisdiction of the Board** in determining the amount of compensation payable and the person to whom the compensation is payable,
> >
> > (b) **shall determine the amount of compensation payable and the person to whom the compensation is payable,**
> >
> > (c) shall
> >
> > > (i) confirm the order of the Board, or
> > >
> > > (ii) **direct that the compensation order be varied in accordance with its judgment**,

> and
>
> (d) shall make directions as to costs of the appeal in accordance with subsection (9). (Emphasis added)

[12] NPS Farms further argues that Henderson J failed to interpret s 26, and in so doing inadvertently failed to consider legislative intent. NPS Farms notes the following:

- The right of appeal is broad and not limited, for example not limited to questions of law and jurisdiction, as some statutes provide (see for example s 13.4(1) of the *Workers Compensation Act*, RSA 2000, c W-15; s 53(1) of the *Safety Codes Act*, RSA 2000, c. S-1; s 52 of *Charitable Fund-Raising Act*, RSA 2000, c. C-9)
- The appeal takes the form of a new hearing;
- Section 26 gives the Court the power and jurisdiction of the Board; and
- The Court is not limited to affirming, varying, or vacating the decision, but is empowered to determine the amount of compensation available.

[13] ***Vavilov*** directed Courts to consider legislative intent, not just the presence of a statutory appeal. Before Henderson J, ATCO argued that the Board had in the past been subject to the reasonableness standard and that it would be similarly subject to reasonableness under the new legislation; it was an appeal to certainty that did not address statutory interpretation to determine legislative intent. I conclude I am not bound by Henderson J's decision in ***Hart*** because the question of legislative intent and statutory interpretation was not addressed, only the existence of the statutory appeal.

[14] Section 26 of the Act, unlike most statutory appeals, expressly provides that the appeal will be conducted as a new hearing, including hearing new evidence. Most appeals limit the admission of new evidence. At common law, new evidence is only admissible in an appeal if it meets the test in ***Palmer v. The Queen***, [1980] 1 SCR 759: ***Barendregt v. Grebliunas***, 2022 SCC 22 (at para 3). Appeal tribunals are often similarly limited by statute in their ability to hear new evidence. See for example s 20(g) of the *Police Act*, RSA 2000, c P-17 (the Board may receive new evidence that was not available when the matter was initially heard); s 89(4)(b) of the *Health Professions Act*, RSA 2000, c H-7, s 45(4)(a) of the *Veterinary Profession Act*, RSA 2000, c V-2 and ss 6 and 8 of the *Corrections Act*, RSA 2000, c C-29 provide that an appeal tribunal hears the appeal on the record of the tribunal below and if there is an application for new evidence, the appeal tribunal can direct the tribunal appealed from to hear the new evidence. Others expressly exclude any new evidence. See for example: s 49(4) of *Animal Health Act*, SA 2007, c A-40.2, s. 31(7); *Natural Resources Conservation Board Act*, RSA 2000, c. N-3, s 27(8) of the *Agricultural Operation Practices Act*, RSA 2000, c. A-7; s 689 of the *Municipal Government Act*, RSA 2000, c. M-26; s 72 of the *Public Utilities Board Act*, RSA 2000, c. P-45; s 41(6) of the *Energy Resources Conservation Act*, RSA 2000, c. E-10; s 45(7) of the *Responsible Energy Development Act*, SA 2012, c. R-17.3.

[15] Moreover, in many of those appeals, the legislation only permits the appeal court to draw inferences that are not inconsistent with the facts expressly found by the Board. See for example s 27(8) of the *Agricultural Operation Practices Act*; s 31(7) of the *Natural Resources*

Conservation Board Act; s 29 of the *Alberta Utilities Commission Act*, SA 2007, c. A-37.2; s 689(1) of the *Municipal Government Act*.

[16] Further, this appeal is not limited in terms of the grounds of appeal. Many statutory appeals limit appeals to questions of law and jurisdiction. See for example s 13.4(1) of *Workers' Compensation Act*, RSA 2000, c W-15; s 49(1) of the *Animal Health Act*, SA 2007, c A-40.2; s 688 of the *Municipal Government Act*; s 45 of the *Responsible Energy Development Act*, SA 2012, c. R-17.3; s 45(1) of the *Responsible Energy Development Act*; s 31(1) of the *Natural Resources Conservation Board Act*.

[17] In other words, this appeal is very different from other statutory appeals.

[18] Reading s. 26 in its entire context and grammatical and ordinary sense, reveals a legislative direction to not apply the appellate standard of review. The section expressly states that the appeal is to be heard as a "new hearing", and that the Court hearing the appeal has the same power and jurisdiction as the Board to determine the amount of compensation payable and to whom it is payable.

[19] The Manitoba Court of Appeal in ***Thorkelson v The College of Pharmacists of Manitoba et al***, 2023 MBCA 69 considered similar language to s 26(6) of the Act in the *Pharmaceutical Act*, CCSM c P60; section 22(4) explicitly states that the court must consider the appeal "as a new matter". At para 27, the Court noted:

> Here, the Act is clear on the standard of review—the appeal is to be considered as a new matter. As such, the application judge could redetermine the facts on the basis of the fresh evidence tendered on appeal without deference to the findings under appeal… (citations omitted)

[20] Palpable and overriding error is a highly deferential standard of review: ***Benhaim v. St-Germain***, 2016 SCC 48, [2016] 2 S.C.R. 352, at para. 38; ***Modern Cleaning Concept Inc. v. Comité paritaire de l'entretien d'édifices publics de la région de Québec***, 2019 SCC 28, at para 69, where the Supreme Court noted:

> Under this standard, an appellate court's role is **not to reconsider the evidence globally and reach its own conclusion**s, but simply to ensure that the trial judge's conclusions -- including the trial judge's legal inferences -- are supported by the evidence. (Emphasis added)

[21] It is plainly inconsistent with legislative intention to apply this highly deferential appellate standard to the Board's findings of fact, when the Court is empowered to not only hear new evidence without restriction and to determine the amount of compensation, but to also conduct the appeal as a new hearing.

[22] For example, the standard of review of an appeal of a Master's decision (now Applications Judge) is correctness on all issues. In ***Bahcheli v. Yorkton Securities Inc***, 2012 ABCA 166, the Court of Appeal confirmed this standard, particularly in light of the fact that the judge could receive new evidence that the Master/Applications Judge did not have before them (at paras 17 and 25) and that the hearing could be conducted essentially *de novo*.

[23] ***Clorox Company of Canada, Ltd. v. Chloretec SEC***, 2020 FCA 76 dealt with s. 56 of the *Trademarks Act*, RSC1985, c. T-13, a section the Alberta Court of Appeal in ***Imperial Oil*** considered to be similar to the appeal provisions in the Act (at para 10). Section 56 provided that

on an appeal, "evidence in addition to that adduced before the Registrar may be adduced and the Federal Court may exercise any discretion vested in the Registrar (at para 10 of ***Imperial***). The Federal Court of Appeal considered how the decision in ***Vavilov*** affected the standard of review in an appeal under s. 56, and concluded that where there is new material evidence, the case will be heard *de novo* and the correctness standard applies (at para 21); if no material evidence is adduced, the appellate standards apply (at paras 22-23).

[24] A similar approach was considered and rejected in ***Bahcheli***, with the Court noting (at para 25):

> If the standard were deferential when the evidence was the same, that could tempt lawyers to file additional peripheral or scarcely different affidavits on appeal in order to engineer a different standard of review. That would not help anyone in the long run.

[25] Admittedly, the Federal Court of Appeal in ***Clorox*** addressed this concern by requiring that the new evidence be material i.e., sufficiently substantial, and significant (at para 21). However, in my view this adds unnecessary complexity.

[26] The Supreme Court of Canada's focus in ***Vavilov*** was on legislative intent, and it held that the Courts may only depart from the presumptive standard of reasonableness if there is contrary legislative intent. The Court further held that the presence of a statutory appeal mechanism from an administrative decision to a court signalled a different legislative intent: that the court perform an appellate function, saying (at para 36):

> This expressed intention necessarily rebuts the blanket presumption of reasonableness review, which is premised on giving effect to a legislature's decision ***to leave certain issues with a body other than a court***. (emphasis added)

[27] The appellate mechanism in s. 26 does not demonstrate a legislative intent to leave certain issues with the Board: it provides for a new hearing, with new evidence, and it gives the Court the same jurisdiction and power as the Board. Section 26 does not rebut the blanket presumption of reasonableness review in favour of a deferential or appellate standard therefore the standard of review under the principles in ***Vavilov*** is reasonableness.

III. Application of the Reasonableness Standard

[28] The Supreme Court in ***Vavilov*** (at paras 13-14) outlines how a reviewing court is to approach the reasonableness standard noting that reasonableness review ensures that courts only intervene in administrative matters to safeguard the legality, rationality and fairness of the administrative process. While the principles of judicial restraint demonstrate respect for administrative decision makers' distinct role, it is not an excuse to "rubber-stamp" an administrative decision or to shield the decision makers from accountability. The Supreme Court went on to note that courts should adopt an appropriate posture of respect towards the decision-makers, while at the same time the administrative decision makers must also justify their decisions in terms of rationality and fairness.

[29] At para 15 of ***Vavilov***, the Court indicated that when conducting a reasonableness review, a court must consider both the outcome of the reviewed decision and the underlying rationale to ensure that the decision as a whole is transparent, intelligible and justified, noting:

> What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.

IV. Contested Findings

[30] NPS Farms appeals two portions of the Compensation Award. The first relates to a finding that 2.83 acres of land are not developable as they are designated "environmental reserve" (ER) and the second relates to a dismissal of an Adverse Effect Claim relating to 1.24 acres of land (the Severed Area) that were also found to be not developable.

A. New Evidence

[31] NPS Farms relies upon new evidence before this court. While the standard of review is reasonableness, this does not change the form of the appeal which is by way of a new hearing with new evidence. Neither the Supreme Court of Canada in ***Lamb v. Canadian Reserve Oil & Gas Ltd.,*** *v.* ***Canadian Reserve Oil & Gas Ltd.***, [1977] 1 SCR 517 nor the Alberta Court of Appeal in ***Imperial Oil*** suggested otherwise; in fact both courts specifically acknowledged that the appeal judge could hear new evidence. In ***Lamb*** (an appeal from the Surface Rights Board of Saskatchewan) the Supreme Court of Canada noted that the appellate judge was entitled to consider the administrative decision-maker's findings and accord them weight (at p 527-28).

[32] Most of the case law provided with respect to new evidence predates ***Vavilov***, but what can be extracted from the caselaw is that an appellate or reviewing judge hearing such new evidence must be mindful of the Board's award and, as such, the Board's fact finding will have substantial evidentiary weight (see ***Esso v Smulski***, 1981 ABCA 214; but note the challenges where fulsome reasons are not provided as in ***Re Northwestern Utilities*** [1979] 1 SCR 684 at 706). This approach accords with the directive in ***Vavilov*** that this court must adopt a posture of respect while balancing the Board's need to adopt a culture of justification.

B. Are the 2.83 acres of the ROE lands undevelopable?

[33] The first contested finding relates to 2.83 acres of land within SE27. I note that both parties before me framed the issue as to whether the land was developable. If it is developable, both accepted that the value would be $200,000 per acre and, if not developable, the value would be $20,000 per acre. I analyze the Board's decision and the new evidence in this context – was the Board's determination that the 2.83 acres of the right of entry (ROE) lands was undevelopable, reasonable?

[34] This analysis is made in the context of determining what compensation is payable under s 25(1)(a) and (b) of the ***Surface Rights Act*** for the value of SE27 land granted to Grand Rapids through a right of entry order. Those sections provide:

> **25(1)** The Board, in determining the amount of compensation payable, may consider
>
> > (a) the amount the land granted to the operator might be expected to realize if sold in the open market by a willing seller to a willing buyer on the date the right of entry order was made,

> (b) the per acre value, on the date the right of entry order was made, of the titled unit in which the land granted to the operator is located, based on the highest approved use of the land, ...

[35] As Grand Rapids argued, the compensation for the acquisition of lands is effectively a proxy for what participants in the marketplace would be willing to pay for the lands.

[36] As directed in ***Vavilov***, reasonableness review starts from a posture of judicial restraint and focusses on "the decision the administrative decision maker actually made, including the justification offered for it" (paras. 15 and 24).

1. The Board's analysis

[37] The Board's Analysis and Findings are found at paragraph 43. Essentially the Board finds that with respect to the 2.83 acres the best evidence was that found in the Aurum Plan because it had been around since before 2009, no efforts had been made to change the zoning and therefore the Board could not know if a zoning change would be successful.

[38] Given this justification for its decision, I must consider if it is reasonable "based on an internally coherent and rational chain of analysis and . . . is justified in relation to the facts and law that constrain the decision maker".

[39] The Board's analysis of the extent of developable land is at paragraphs 38 to 42 of its decision where it outlines the evidence of Mr. Romanesky, Grand Rapids' witness, and Mr. Gettel, NPS Farms' witness. I note that the Board identified that Mr. Romanesky testified that SE27 had not been rigorously evaluated and the boundaries of the River Plan had not been determined. He opined that until the refinements had been made to the upland land use boundaries, the development potential of any land not already identified in the Aurum Plan as Medium Industrial would be "speculative". (The area found developable within the Aurum Plan was referred to as the "grey box" for obvious reasons when viewed on the Aurum Plan).

[40] Mr. Gettel testified that he had walked the entire area and, in his opinion, the Aurum Plan does not portray the lands potential with respect to the land designated as ER. He noted that with a "proper survey" the area should be found developable.

[41] While recognizing that the Board considered the Aurum Plan to be the best evidence, I must also consider the new evidence to determine if the Board's finding that the land outside the grey box was "undevelopable" was reasonable.

2. Planning evidence

[42] Planning evidence was presented to the Board on behalf of Grand Rapids through Mr. Romanesky. Mr. Romanesky was accepted as an expert in land use planning matters. He also testified in this appeal. In his evidence he essentially conflated the Urban Development Line (UDL) with the boundaries on the Aurum Plan – the grey box. He defended this position by asserting that anything beyond what was delineated on the Aurum Plan was speculative. At various time, he acknowledges that the UDL will be determined when development occurs and based upon a slope stability assessment – which I note, and he acknowledged, he is not qualified to do.

[43] At the appeal, NPS Farms retained David Capper of Urban Systems Ltd to give opinion evidence about land use planning. Mr. Capper recognized the need to consider the top of bank line and recommended that geotechnical information would be critical in determining the

development potential of the property. I accept his evidence that the urban development line and setback are determined through the development process, with the assistance of geotechnical information.

[44] The fact that there is a need for approvals, rezoning etc. to develop the land, does not change the nature of the land or its potential use. The entire property is currently zoned agricultural – even the grey box. To develop any portion of SE27 will require further work.

[45] I have difficulty with Mr. Romanesky's evidence, as he seems to want to lead me to the conclusion that the only reliable evidence of developability is the Aurum Plan and its grey box. I reject this conclusion. The geotechnical evidence does not lead to a conclusion that the grey box is the only developable land. Grand Rapids conceded that the end result of the development process was likely going to be different than the grey box in the Aurum Plan. To resort to the grey box because anything else is "speculative" is simply unreasonable. The Aurum Plan is but one of many considerations (and a dated one) that should be considered in determining the developable land.

3. Geotechnical evidence

[46] In addition to the planning evidence, I heard from experts in geotechnical engineering for the purpose of commenting on the ER areas of SE27, including evidence on slope stability and its influence on whether the area was suitable for development; no such evidence was before the Board. Rick Evans was hired by NPS Farms as an expert in geotechnical engineering and slope stability assessment, and Charles Kwok was hired by Grand Rapids to review Mr. Evans' report.

[47] Based on his experience Mr. Evans established what he deemed to be conservative setbacks for both the top of bank (100 metres which is 37 metres greater than he has seen in his experience in the Edmonton area) and the North and South Ravines (30 and 20 metres being twice what he would have typically derived). He was clear that by "conservative" he meant the actual setbacks would be less than the values he proposed. Mr. Evans concludes that all but .2 acres of the ROE lands are stable and therefore developable from a geotechnical perspective.

[48] Mr. Kwok was not prepared to accept that the setbacks proposed by Mr. Evans were accurate because Mr. Evans did not rely on bore holes or LIDAR and the ravine setbacks were not based on site specific information. It is noteworthy that Mr. Kwok was also not prepared to express his own opinion about the setbacks (fairly, as he was not engaged to do so).

[49] I am satisfied that given Mr. Evans expertise, although there were no bore holes or LIDAR analysis, I should accept Mr. Evans conservative setbacks. They are conservative and therefore not the actual setbacks that will ultimately be determined – they are not intended to be. Mr. Kwok quite rightly pointed out that the analysis was not as precise as it might be, but even after he examined LIDAR information himself, he did not conclude that Mr. Evans was wrong; in fact, he testified that they were "generally correct", just not "accurate".

[50] In addition, Mr. Evans found that "no geotechnical concerns" for land development were observed in the low areas that were referenced as the East and West draws. Again, Mr. Kwok did not disagree.

4. Conclusions on 2.83 acres

[51] I find that the Board's finding that the 2.83 acres were not developable was unreasonable for several reasons.

[52] While the Board found the Aurum Plan was the best evidence, it never really indicates why it is the best evidence. The Board's approach seems to be black and white. Relying on the Aurum Plan establishes an binary choice: land is designated Medium Light Industrial, which is developable or ER, which is not.

[53] The experts' evidence before me does not agree with this black or white approach. Some land within the ER zone is developable. The Aurum Plan itself, at 4.3.1 notes that the boundaries identified is a general boundary and is subject to more precise location which will be established through approved subdivision plans or survey plans of top of the bank.

[54] Both Mr. Romanesky and Mr. Gettel indicated that it was unlikely that the plan was in fact an accurate depiction of what would be developable in the future. Mr. Romanesky testified that it would be a risk to go outside the grey box, but he also admitted that the grey box was not likely the boundary of the developable land. In his view it would take some work to get a clear idea of what that would look like, and the owner had not started the process.

[55] Grand Rapids points to previous decisions of the Board (for example, ***Altalink Management v Franklin***) where weight was attached to ASPs. The Board found in that decision that persuasive evidence was not simply intention to develop, but would unclude such things as planning documents or other steps taken toward development. While I accept that evidence of steps taken towards development would impact the market value of the land (as some of the risk of knowing the extent of development potential would be removed), I struggle with the reasoning that steps towards development must be taken to prove the potential for the property with respect to the question of whether it is developable *per se*.

[56] Of course, this suggests that the owner had some sort of onus to take steps to develop the land beyond agriculture. The owner does not. The owner is entitled to compensation based on its fair market value reflecting whether the land is developable, not simply its current status as agricultural. (How far along the permitting process the land is might affect how much a purchaser is prepared to pay for the land – but price for the land is not before me – only the question of developability). Even the Board's reasoning that it is undevelopable because no efforts have been made to determine the issue through development applications – suggests that if efforts are made – some of the land could be developed i.e., it is developable.

[57] I note that the boundaries of the grey box were not scientifically derived, nor were they derived by following the Top of Bank Policy. There was consensus that, ultimately, the development setback will be determined by the Urban Development Lines as established by the Top of Bank Policy – not the Aurum Plan – through the development process. It is unreasonable to make a finding based on a plan you know is not accurate. It was easy to resort to the plan as the "best" evidence – but the Board did not justify why the other evidence presented was not as good as or better than the inaccurate evidence they were relying upon.

[58] I also note that the Board found that there was no evidence that the land was developable. This is not correct as Mr. Gettel testified that it was developable. It appears, without reasons, to reject this evidence.

[59] I find the Board's conclusion with respect to the developability to be unreasonable. The Board did not have the benefit of the geotechnical evidence I had before me and I find that 2.63 acres of the ROE land are, in fact, developable.

C. Adverse Effect/Injurious Affection Claim

[60] NPS Farms argues that the 1.24-acre area (the severed area) has lost value because it is stranded between the existing corridor and the newly taken area. NPS Farms argues that the resulting small irregular area would be too small to develop on its own and would have reduced utility and value. NPS Farms' expert before the Board, Mr. Gettel, opined that a 60% reduction in value from the developable value would be appropriate – so a loss of $148,000.

[61] Grand Rapid's position was that no compensation was warranted as the land in question was not developable since it contains an ephemeral draw and is classified as environmental reserve.

[62] The Board found that NPS Farms had not provided evidence that their current or future use of the land had been detrimentally affected as a result of the pipeline construction. The Board specifically found that the land, since it is designated ER in the Aurum Plan, is not developable beyond its current agricultural use regardless of the existence of the pipelines. The Board uses the same reasoning as for the ROE lands – that the Aurum Plan shows only the grey box as developable and this area is not in the grey box. It concludes, as a result, that the lands have not been severed and dismissed the claim for compensation.

[63] Having concluded that the Board's reliance on the Aurum Plan was unreasonable with respect to the ROE lands, I find the same with respect to the severed lands, but that does not end the issue. I must consider the other evidence that was presented to the Board and the additional evidence provided to me.

[64] Mr. Gettel provided evidence of the value of the severed land and compared it to other parcels that in his view were similar takings and found a reduction of value between 54 and 67%, with a fair reduction in these circumstances of 60%.

[65] Mr. Wasmuth was retained by Grand Rapids and pointed out that just because a pipeline right of way exists, it does not mean it cannot be sold and used for industrial purposes and such rights of way can and often are developed so there are no impact or limited impact on the future use. Mr. Gettel accepted these general statements by Mr. Wasmuth, but noted that this particular lot was small and severed. He concludes that this particular piece of land would have less utility and suffer a loss in value.

[66] No direct evidence on the value of the severed area was called on behalf of Grand Rapids, but Mr. Gettel's comparables were challenged in cross examination as not comparable given the size of the "severed" parcel and that the lands were not "severed" in the sense that there was no road or physical barriers to development.

[67] Upon reviewing the cross examination and Mr. Gettel's responses, I am satisfied that he was aware of the limitations of his comparables and was using his expertise to read the market in determining the value of the severed area. I accept his evidence and I am convinced that if the land is developed, the "severed" land will realize a decreased price that is 60% less than the other developable land for a decrease of $148,400.

V. Conclusion

[68] With respect to the ROE lands I allow the appeal and order that the compensation payable for the 2.63 acres is $526,000 for the developable area and $4,000 for the undevelopable land for a total of $530,000.

[69] With respect to the severed land I allow the appeal and find an adverse effect that is to be compensated by the payment of $148,800.

[70] Costs, if not agreed to between counsel, may be addressed by written submissions provided to the court by January 31, 2024. Submissions to be limited to 3 pages not including a draft bill of costs, offers exchanged and authorities.

Heard on the 5th-9th day of December, 2022..
Written arguments provided the 6th day of March, 2023.
Dated at the City of Edmonton, Alberta this 6th day of December, 2023.

M.E. Burns
J.C.K.B.A.

Appearances:

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