In the Court of Appeal of Alberta

Citation: Selenium Creative Ltd v Edmonton (City), 2025 ABCA 120

Date: 20250404
Docket: 2303-0015AC
Registry: Edmonton

Between:

Selenium Creative Ltd. operating as Selenium Architectural Millwork

Appellant

- and -

City of Edmonton

Respondent

The Court:

The Honourable Chief Justice Ritu Khullar
The Honourable Justice Kevin Feehan
The Honourable Justice Jane Fagnan

Memorandum of Judgment

Appeal from the Orders of
The Honourable Justice S.N. Mandziuk
Dated the 16th day of December, 2022 and the 21st day of February, 2023
Filed the 27th day of January, 2023 and the 27th day of April, 2023
(Docket: 2203 14853)

Memorandum of Judgment

The Court:

I Introduction

[1] Selenium Creative Ltd is an industrial manufacturing business. The City of Edmonton expropriated Selenium's leasehold interest to accommodate the utility relocation work required to facilitate the Yellowhead Freeway Conversion Project.

[2] Section 64(3) of the *Expropriation Act*, RSA 2000, c E-13 permits the expropriating authority or the party in possession of the property to apply to adjust the statutorily mandated time to give up possession of the property. Selenium, the party in possession of the property, was required to give up possession "at least 90 days" from service of the City's notice to provide vacant possession: s 64(2). Selenium applied under s 64(3) for an extension of time. The City agreed to an extension, but not for the length of time Selenium requested. A chambers justice declined to grant any further extension.

[3] Selenium appealed on the ground that the justice erred by holding the relevant consideration on whether to extend time under s 64(3) was how long it would take Selenium to *vacate* the property, and that any difficulties in *relocating* were irrelevant in deciding whether to extend the date of possession. Selenium also appealed the costs decision.

[4] Selenium eventually applied for permission to appeal as both parties agreed the issue regarding extension was moot, Selenium having vacated the premises as required. The Court granted permission to appeal regarding the interpretation of s 64(3): ***Selenium Creative Ltd v Edmonton (City)***, 2023 ABCA 312.

[5] The appeal is allowed. For the following reasons, we conclude that factors relating to relocation are relevant to a decision under s 64(3) and the law of costs applicable in expropriation contexts should be applied on an application under s 64(3).

II Background

[6] Federal and provincial funding for the Yellowhead Freeway Conversion Project was announced in 2016. It was anticipated the project would be completed by 2027.

[7] There is no dispute that the formal steps required to be completed under the *Expropriation Act* were followed.

[8] There was an extensive factual record before the justice addressing how much informal notice Selenium received about the expropriation, and contrasting the notice it received as a tenant

of affected property with the notice received by owners. That factual record was relevant to the chambers judge's exercise of discretion but is not relevant to the issue of law before the Court in this appeal.

[9] At the hearing, Selenium submitted that the City's communications with Selenium were inadequate, not timely, and misled Selenium to believe that an agreement on compensation would be reached. It had spent considerable time and resources obtaining cost estimates for the relocation of the business in the context of ongoing discussions with the City. It asserted that it would have needed two to three years to plan and execute a relocation in the normal course of business due in part to the increased lead times that contractors and suppliers required to make new premises suitable for Selenium's unique operations. It argued that Selenium could not relocate to suitable new premises by the date of possession.

[10] The City took the position that Selenium had ample notice and opportunity to prepare for relocation, but in any event Selenium's complaints would be addressed in its claim for compensation.

[11] The chambers justice recognized that the court has discretion on an application under s 64(3) to extend the date of possession. He found on the record before him that Selenium had received ample notice, formal and informal, of the expropriation and had taken some preparatory steps to relocate.

[12] The chambers justice held that it is the remedial aspects of the *Expropriation Act* that are to be given a broad and purposive interpretation, and those remedial aspects are monetary, not possessory. He relied on various authorities for the proposition that the parties were in a tenancy-at-will situation at the time of the application. In particular, he relied on a non-expropriation case, ***Cadillac Fairview Corp v Great Pretenders Sparkle Tree*** (1988), 92 AR 365, 1988 CanLII 3874 (KB), which concerned a temporary licensee. The Master in that case held that the licensee was entitled to a reasonable period of time to vacate the premises, and that the ability of the respondent to find other premises was irrelevant to the determination of reasonable time to vacate: para 42.

[13] The chambers justice further held that s 64 is not about compensation or other financial considerations and declined to address the financial impacts claimed by Selenium, reasoning that they would be addressed through separate and distinct proceedings. He concluded that the focus on a s 64(3) application is time required to vacate, not time required to relocate. He added that Selenium should have taken steps to mitigate prior to registration of the certificate of approval.

[14] The chambers justice described the task before him as a binary choice between a possession date six weeks into the future to which the City was prepared to agree or a date almost a year into the future requested by Selenium. He ordered Selenium to provide vacant possession in six weeks (subsequently extended for two weeks by agreement).

[15] The chambers justice awarded costs to the City as the successful party: ***Selenium Creative Ltd v Edmonton (City)***, 2023 ABKB 94. He determined that s 64(3) does not relate to compensation and therefore ss 35 and 39 of the *Expropriation Act* do not apply, nor does the common law principle of indemnification of owners for taking of land. He concluded that the usual rules relating to litigation costs apply to s 64(3) applications to adjust a possession date. He relied on s 554.1(1) of the *Municipal Government Act*, RSA 2000, c M-26, and awarded costs under Column 1 of Schedule C.

III Standard of Review

[16] The interpretation of s 64(3) of the *Expropriation Act* is a question of law reviewable for correctness: ***Housen v Nikolaisen***, 2002 SCC 33 at para 8, [2002] 2 SCR 235.

[17] A costs decision is entitled to deference unless there is an error in principle or the costs award is plainly wrong: ***Hamilton v Open Window Bakery Ltd***, 2004 SCC 9 at para 27, [2004] 1 SCR 303.

IV Analysis

A Is the time required to relocate to new premises a relevant factor on an application to adjust the date of possession under s 64(3)?

[18] Section 64 provides in part:

> 64(1) Within 30 days after the certificate of approval has been registered, the expropriating authority shall, subject to any agreement to the contrary, serve on the person in possession a notice that it requires the land on the date specified in the notice.
>
> (2) The date specified in the notice shall be
>
> …(b) at least 90 days from the date of service of the notice.
>
> (3) Any time after service of the notice [of possession], either party may apply to the court on 3 days' notice for an adjustment of the date for possession specified in the notice referred to in subsection (1) and the court may order an adjustment in the date…

[19] Section 64(3) expressly grants the decision maker the discretion to extend or otherwise adjust the date of possession. It does not identify relevant or irrelevant factors in relation to such an application.

[20] Selenium submits this provision should be interpreted as being remedial and therefore relocation issues are necessarily relevant.

[21] The City argues that if s 64(3) requires the court to favour the individual and fact-dependent relocation needs of each expropriated party, without regard for the public interest or circumstances, the ability for an expropriating authority to plan and execute complex infrastructure projects in the public interest will be significantly compromised.

[22] This argument misconstrues the issue. There is no dispute that the court must weigh competing interests and factors in exercising discretion under s 64(3). The question is whether s 64(3) should be interpreted to *preclude* consideration of problems relating to relocation.

[23] Section 10 of the *Interpretation Act*, RSA 2000, c I-8 mandates that an enactment be construed as being remedial, and be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

[24] The words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statute, the object of the statute, and the intention of the legislature: ***Rizzo & Rizzo Shoes Ltd (Re)***, [1998] 1 SCR 27, 1998 CanLII 837 at para 21.

[25] In ***Toronto Area Transit Operating Authority v Dell Holdings Ltd***, [1997] 1 SCR 32 at 44, 1997 CanLII 400, the Supreme Court held that the expropriation of property is one of the ultimate exercises of governmental authority and it follows that the power of an expropriating authority should be strictly construed in favour of those whose rights have been affected, citing Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2nd ed (Cowansville: Yvon Blais, 1991) at 402. The Court held that Ontario's equivalent expropriation statute is a remedial statute and must be given a broad and liberal interpretation consistent with its purpose.

[26] The Ontario Law Reform Commission, *Report on the Basis for Compensation on Expropriation* (1967) at 55, recognized that relocation difficulties may not be fully addressed through compensation. As noted in the *Royal Commission Inquiry into Civil Rights: Report No 1*, vol 3 (Toronto: Queen's Printer, 1968) at 1025, extreme hardship could result to owners if they are not given sufficient notice of the time when the expropriating authority intends to take possession of their premises, the main hardship being the inability to relocate to adequate alternative accommodation and the interference with any business conducted on the property.

[27] Following Ontario's lead, the Alberta Institute of Law Research and Reform, *Report No 12, Expropriation* (1973) at 57, recommended implementing a measure to prevent the authority from taking possession (one of the incidents of ownership) immediately upon the acquisition of

legal title. Alberta's legislature subsequently adopted the Institute's recommended 90-day minimum notice period.

[28] The expropriating authority has control over the major timing decisions in an expropriation. Of the many timing requirements in the *Expropriation Act*, s 64(2) is the only provision which mandates a minimum timeframe, thus extending the time otherwise required to expropriate. Section 64(2)(b) ensures a minimum 90-day period after the expropriating authority gives "notice that it requires the land". It enables an owner to mitigate the effects of the expropriation. It is clearly a remedial provision intended to mitigate the impact of an expropriation on an owner, and therefore it has a consequential impact on the issue of compensation.

[29] As s 64(2) is remedial, then logically s 64(3) is also remedial as it offers the opportunity for an owner to seek an extension of the date of possession beyond the 90-day minimum. An application under s 64(3) allows the court to further mitigate, where justified, the impact of the expropriation on the owner. If compensation is always a full answer to relocation difficulties, s 64(3) would serve little purpose.

[30] Section 65 authorizes the court to issue an order for possession if an owner or tenant resists or opposes the authority's right to take possession of the land. Such an order for possession would typically set a date in the future when vacant possession is to be provided. As noted by the appellant, an approach to s 64(3) which ignores relocation issues would have the potential to encourage those in possession to forego s 64(3) applications and wait to address difficulties at or following the date of possession.

[31] The chambers justice relied on ***Cadillac Fairview Corp*** which was a tenancy-at-will case. Unlike a tenancy-at-will, expropriated owners' rights of possession are statutorily protected for at least 90 days with potential for adjustment of the date under s 64(3). The issue here is one of statutory interpretation in the expropriation context, not interpretation of the common law on the reasonable time for a tenant-at-will to vacate premises.

[32] The chambers justice took the view that Selenium should have taken steps to mitigate prior to the certificate of approval being registered against title. However, the right to apply for an extension past the date of possession under s 64(3) only arises upon service of the notice of possession, which may only be served after formal notice of the expropriation has been served and objection rights are settled through registration of the certificate of approval. If the focus of s 64(3) is solely on the time required to vacate, owners requiring more than 90 days to relocate would need to initiate steps to relocate before the expropriation settled, thus taking on the financial risk of relocation before the expropriation and related timing are certain.

[33] The discretion under s 64(3) must be exercised in accordance with the purposes of the *Expropriation Act* and its entire context. As indicated by the City, the "determination of what is

reasonable requires consideration of all relevant factors to further the objectives of the Act and properly balance the needs of the expropriating authority with the rights of the expropriated party". An application under s 64(3) requires the decision maker to consider all the various relevant facts, factors and interests at play in a particular case. It also requires the decision maker to apply s 64(3) keeping in mind the remedial purpose of the *Expropriation Act*. Difficulties experienced by the owner not just in vacating within the 90-day period, but also in relocating, are among the relevant factors to be considered by the court.

[34] We conclude the chambers justice erred in holding that only the monetary aspects of the *Expropriation Act* are remedial, and as a result he incorrectly fettered his discretion in determining that the focus of s 64(3) is on the time required to vacate the current premises to the exclusion of any consideration of relocation requirements.

[35] The chambers justice also fettered his discretion by holding that he had a binary choice between the two dates proposed by the parties, but the application for permission to appeal did not focus on that aspect of the decision.

B Do the normal rules for litigation costs apply to s 64(3) applications rather than the rules for costs in expropriations?

[36] Sections 35 and 39 of the *Expropriation Act* provide:

> 35(1) The owner may obtain an independent appraisal of the owner's 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 the owner's 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 for that advice.
>
> …
>
> 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 Tribunal determines that special circumstances exist to justify the reduction or denial of costs.

[37] The chambers justice determined that ss 35 and 39 do not apply to s 64(3) applications because they relate to legal costs incurred by the owner for the purpose of determining compensation and s 64(3) is not related to compensation. With respect to the common law approach to costs in the expropriation context, he reiterated his view that the broad, purposive,

liberal interpretation applies only to the financial aspect of the expropriation process, being the compensation to the owner for the taking of the land.

[38] The chambers justice also relied on s 554.1 of the *Municipal Government Act*, RSA 2000, c M-26 which provides that a municipality is entitled to collect lawful costs in all actions and proceedings to which the municipality is a party.

[39] However, s 2(1) of the *Expropriation Act* provides that the *Expropriation Act* applies to any expropriation authorized by the law of Alberta and prevails over any contrary provisions that may be found in the law except those enumerated in the Schedule, not relevant here.

[40] Section 35 addresses the reasonable legal costs incurred by an owner in respect of a potential full settlement of compensation. Section 39 addresses the reasonable legal costs incurred where no settlement is reached. These are remedial provisions; the legislator intended that those who are affected by an expropriation will recover their reasonable legal costs whether the expropriation is effected through a settlement or through an impartial arbiter's determination of compensation.

[41] The common law recognizes that the law of costs in an expropriation context ensures that "a prudent and reasonable owner will not be financially jeopardized by exercising statutory rights at every stage of the expropriation process": Eric CE Todd, *The Law of Expropriation and Compensation in Canada* (Scarborough: Carswell, 1992) at 501, 507.

[42] This approach is consistent with cases in which costs have been awarded in various situations not specifically referenced in ss 35 and 39 because they arose in the broader expropriation context, for example: costs of a trial under s 69 to determine the scope of title taken in an expropriation because it was necessary to finalize the issue before compensation could be determined: ***Johnson v Alberta (Minister of Public Works, Supply and Services)***, 2005 ABCA 10 at paras 15-16, 247 DLR (4th) 724; costs of an application seeking a declaration that an application for the determination of compensation was not barred by a limitation period: ***298507 Alberta Ltd v Calgary***, 2009 CarswellAlta 2289 at para 30 (LCB); costs associated with preparation and attendance at a taxation hearing in the expropriation context: ***Tomshak v Alberta***, 2003 CarswellAlta 1942 (LCB); costs incurred to challenge and open up a settlement agreement in an expropriation context: ***Tessier v Edmonton***, 2018 ABLCB 1 at paras 55-59; and costs in a trespass action in relation to an invalid expropriation: ***Calgary (City) v Costello***, 1997 ABCA 281 at paras 84-85, 152 DLR (4th) 453.

[43] Solicitor-client costs are available in the context of expropriation proceedings on the rationale that individuals whose land has been taken should receive full compensation for their expenses: ***Costello*** at para 84, citing ***Nissen v Calgary (City)***, 1983 ABCA 307, 51 AR 252,

Humenuk v Alberta (Minister of Transport) (1986), 76 AR 161, 1986 CanLII 1980 (QB), ***Village of Acme v Beirele***, 1993 ABCA 98, [1993] AUD 29.

[44] The City submits that costs are not always absolute, even in an expropriation context. That is true; both ss 35 and 39 are limited to "reasonable" costs and s 39 provides that "special circumstances" may justify reduction or denial of costs. It was held in ***Nissen*** at para 12 that special circumstances are costs which are excessive in all the circumstances of a particular case or where the proceedings are improper, vexatious, prolix, or unnecessary, or taken through over-caution, negligence or mistake, citing then Rule 635.

[45] We conclude that the chambers justice erred in his approach to costs in this matter. As a result of this error, he did not address whether the costs claimed were reasonable nor whether there were special circumstances justifying reduction or denial of costs.

[46] The City had submitted that it was entitled to its costs on Column 3 arguing the matter was urgent, complex and important. In imposing costs under Column 1, the chambers justice held the issues were important to the parties and were cloaked in urgency, the materials were well-prepared and voluminous, and all counsel "put a great deal of effort into this well-argued application".

[47] Given our conclusion on the permission application and on this appeal, the issues before the chambers justice were of public importance.

[48] There is nothing in the chambers justice's reasons on costs to suggest he was critical of Selenium for having applied for relief under s 64(3), nor that there were any special circumstances that would have disentitled it to costs. On appeal, the City did not argue there were any special circumstances affecting costs.

[49] We conclude that if the chambers justice had taken the proper approach to costs, he would have granted solicitor-client costs to Selenium.

V Disposition

[50] The appeal is granted. Selenium is entitled to solicitor-client costs on its application before the Court of King's Bench.

VI Costs of Appeal

[51] The ground of appeal regarding the interpretation of s 64(3) was moot. Had the appeal been confined to that issue, we would not have considered the appeal to attract the same scale of costs appropriate for an expropriation as Selenium's rights were no longer being affected by this appeal.

[52] However, Selenium was successful on the costs issue, which was not moot and was tied to the fact of expropriation. The analysis of the main issue informed the analysis of the costs issue. In the circumstances, Selenium is entitled to its costs based on expropriation principles and there is no need to deviate from R 14.88.

Appeal heard on March 17, 2025

Memorandum filed at Edmonton, Alberta
this 4th day of April, 2025

Khullar C.J.A.

Feehan J.A.

Fagnan J.A.

Appearances:

G. Weber
for the Appellant

K. Schauerte
for the Respondent