You Can Pay Me Now or…

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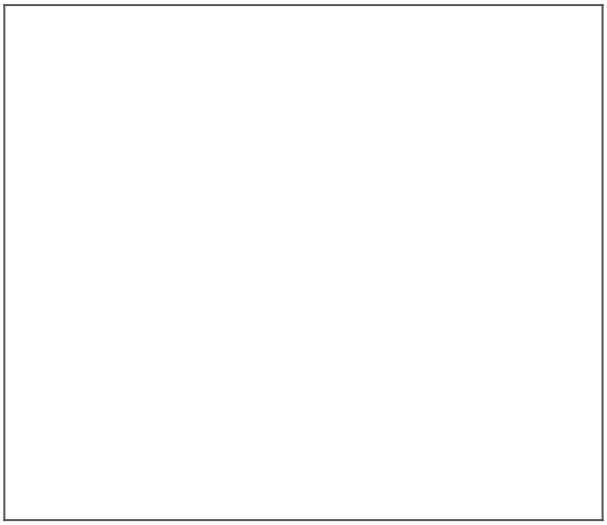
The Smith Decision and Costs in Expropriation



On February 11, 2011, the Supreme Court of Canada issued its decision in the Alberta case of Smith v. Alliance Pipeline Ltd. As Justice Fish colourfully described it, "The seeds of this dispute were sown in a thin layer of manure spread by the appellant on a strip of his land that the respondent was obliged to reclaim."

In 1999 Alliance built a pipeline over Vernon Joseph Smith's farm pursuant to an approval received from the National Energy Board. The following spring, Alliance failed to complete the surface restoration work on the right-of-way. Mr. Smith finished the work himself. He presented Alliance with an invoice for $9,829 as his cost of the work. Alliance offered to pay only $2,500, so in 2001 Mr. Smith took the matter to arbitration before the Pipeline Arbitration Committee. The hearing did not take place until May of 2003. The Committee reserved its decision.

Just a month later, in June of 2003, Alliance asked Smith for permission to use a 100-foot portion of the property outside of the right-of-way in order to perform urgent maintenance work on the easement area. Not surprisingly, Mr. Smith asked for compensation up front. This led to some heated discussion, and even a call to the R.C.M.P. Alliance refused to pay in advance, and sued to get access. Alliance lost its interim injunction applications. A year and a half later, Alliance discontinued its court action and paid Mr. Smith about $4,500 of his approximately $20,000 in legal costs incurred in fighting the Alliance suit.

Early in 2005, Smith and Alliance were informed that one of the members of the Arbitration Committee (which had still not rendered its decision) had been appointed to the bench. The parties had to start the arbitration process all over again. Smith added the shortfall in his legal costs to his compensation claim. The new Committee agreed with Smith, and, after five

days of hearings, awarded him most of his claims, including those legal costs. Alliance appealed the decision to the courts, saying that the Committee's decision to award the court costs and the costs of the previous hearing was unreasonable. And so, ten years after Mr. Smith did the work, the case wound its way to the Supreme Court.

The Court looked at the legislation governing the expropriation, which said, "… the company shall pay all legal, appraisal and other costs determined by the Committee to have been reasonably incurred by that person [in this case, Smith] in asserting that person's claim for compensation." (Manitoba's Expropriation Act provides that the expropriating authority "… shall pay reasonable appraisal, legal and other costs that are reasonably incurred by an owner for the purpose of determining the compensation payable under this Act for an expropriation.") The Court decided that it was entirely reasonable for the Committee to conclude that "all legal costs" indeed meant "all legal costs".

In fact, the Court ordered Alliance to pay all of Mr. Smith's legal costs all the way up to the Supreme Court. The Court affirmed legal principles that an expropriated person has a right to be made "economically whole" and that expropriating legislation should be read in a broad and purposive manner with the aim to fully compensate landowners whose property has been taken. By the end of the day, a $9,829 claim would cost Alliance over $100,000, plus tens of thousands (or more) in its own legal costs.

The Smith case is a bit of a cautionary tale for all expropriating authorities, including municipalities. Oftentimes, when an expropriating authority is looking to acquire land, it looks only at the market value at the parcel that it wishes to take. It is important to take a step back and carefully consider all of the elements of compensation that must be included in the cost of expropriation. It is not unusual for the final amount of compensation to be determined long after the land has been taken. In addition to the fair market value of the land, the property owner is ordinarily entitled to:

- the owner’s reasonable costs of hiring an appraiser, legal fees and survey costs;
- damages for injurious affection (loss in value and loss of use of other lands not taken);
- disturbance costs (such as the cost of moving, interruption of business, development of suitable replacement premises, etc.);
- the value of any special economic advantage to the owner that arises out of the occupation of the land;
- interest on these amounts from the date of expropriation to the date compensation is paid.

In some cases, these additional costs can dwarf the market value of the land being taken. As examples, this can occur where the property has unique characteristics that are of particular value to the owner, where a business is being relocated (especially one that needs special facilities) or where there is no ready market or readily available substitute for the property and buildings being taken (in which case the owner may be entitled to the reasonable cost of building a replacement).

A recent, high-profile, local example was the 2004 expropriation by the Division Scolaire Franco-Manitobaine of a factory site in Winnipeg owned by Rebel Holdings Ltd. The Division took the site to improve access to and expand the playground at the neighbouring school. When the compensation amount was determined by the Manitoba Land Value Appraisal Commission, it awarded significant disturbance costs, including an award for increased operating costs into the future at the owner's new, replacement factory. This brought the cost of a $1.1 million parcel of land to close to $11.0 million. The award was reduced on appeal to the Court of Appeal (in a split decision) but it still left the Division with about a $4 million bill.

Making an expropriated landowner whole is only fair. Getting a good handle on what this is likely to take before the expropriation process is started is only prudent.
