

LAND COMPENSATION BOARD
FOR THE PROVINCE OF ALBERTA

ORDER NO. 440

FILE NO. 10947.0

July 18, 2005

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

BETWEEN:

MARVIN D. MARKS

Claimant

- and -

THE TOWN OF WESTLOCK

Respondent

BEFORE:

THE LAND COMPENSATION BOARD FOR THE PROVINCE OF ALBERTA

SITTING MEMBERS:

- S.S. Schumacher, Q.C., Presiding Member
- J.C. Mah, Q.C., Member
- E.F. Stevens, Member

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APPEARANCES:

For the Claimant: - D.P. Mallon, Q.C., Counsel
Prowse Chowne LLP

R. Salamucha, Student-at-Law

Witnesses:

- Marvin D. Marks
-
- Norman W. Dozorec
-
- James F. Lawrence
-
- William S. Taylor
-
- David M. Harrison, AACI

For the Respondent: - D.W. Moroz, Esq., Counsel

Witnesses:

James S. Doohan, P.Eng.

Stanley E. Schmode

Brian S. Gettel, B.Comm., AACI

PLACE: Held in the City of Edmonton on May 4, 5, 6, 25 and 27, 2004 at the office of the Land Compensation Board.

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APPLICATION AND BACKGROUND:

On August 27, 2001, the Town of Westlock expropriated:

Descriptive Plan 0123812
Block 1
Lot 1
Excepting thereout all Mines and Minerals.
Area: 32.37 Hectares (79.99 acres) more or less

(hereinafter referred to as "the land") from the Claimant Marvin D. Marks.

The purpose of the expropriation was to allow the Town of Westlock to develop the land that is now the site of a large John Deere farm equipment outlet and a Real Canadian Superstore.

Mr. Marks owns and operates a mixed farming operation that covers some 3000 acres of which 600 acres were rented. The operation consists of grain production for sale or use in the cow-calf part of the operation. The land was expropriated from the North Half of the North East Quarter of Section 33, Township 59, Range 26, West of the 5th Meridian.

Mr. Marks is also a partner with his brother in an automotive and farm machinery business that adjoins the land to the west. The land fronts on Highway 18 (100 Street) the main east west thoroughfare through the Town of Westlock.

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At the time of expropriation the land was used for an airstrip; a cattle feeding pad; a leased area to UFA Cooperative Ltd. for equipment storage, a water reservoir for stock watering and other agricultural purposes; pasture and as a conduit for collecting spring run off water for storage in the reservoir.

The land has mixed zoning being C-3 Highway Commercial, IG General Industrial District and UR Urban Reserve District. It also had a mixed tax assessment some being Highway Commercial and the remainder Agricultural.

The Claimant requests the following compensation for the expropriated land (Exhibit 4):

(i) Market value of the land:			
	40 acres @ \$12,000.00/acre (highway frontage)	\$480,000.00	
	40 acres @ \$4,500.00/acre (back of property)	<u>\$180,000.00</u>	\$660,000.00
(ii) Damages (new pasture fencing and livestock transition)			\$ 28,945.00
(iii) Damages (water):			
	Dugout & Waterline	\$123,070.00	
	Pump water to new dugout	\$ 6,215.00	
	Alternate water source	\$ 17,900.00	
	Trout re-stocking	\$ 300.00	
	Treatment building	<u>\$ 14,900.00</u>	
			\$162,385.00
(iv) Damages (feeding pad)			\$ 46,030.00
(v) Damages (perimeter fencing)			\$ 11,565.00

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(vi) Damages (airstrip)		\$ 31,415.00
(vii) Damages (lease revenue)		\$ 13,990.00
(viii) Damages (fixed costs)		\$ 3,900.00
(ix) Damages (loss of key personnel time)		\$ 5,000.00
(x) Damages (travel to check far pastures)		\$ 5,040.00
(xi) Damages (scours) - lost calves	\$ 22,012.00	
- Veterinary expenses	<u>\$ 2,566.00</u>	
		\$ 24,578.00
TOTAL		\$992,848.00
Less proposed payment		<u>\$481,507.00</u>
CLAIM		\$511,341.00

Plus interest and penalty interest based on average annual Treasury Bill 90 day rates compounded annually and the present value of damages claims based on the average annual Treasury Bill 90 day rate compounded annually, together with costs.

The Town proposes compensation for the expropriated land as follows (Exhibit 2):

(i) Market value @ \$5,000.00/acre		\$400,000.00
(ii) Disturbance Damage:		
-loss/replacement of airstrip	\$ 1,819.00	
-construct new dugout, fill-in old and build-up spring cattle feeding area	\$ 48,150.00	
-waterline to dugout	\$ 14,766.00	
-fencing (paige/barbed wire)	\$ 10,978.00	
-construct new approach and gate	\$ 1,380.00	
-extra travel time to feed cattle in spring	<u>\$ 4,414.00</u>	
		<u>\$ 81,507.00</u>

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TOTAL

\$481,507.00

ISSUES AS DEFINED BY THE BOARD:

1. What was the market value of the land at the date of expropriation?
2. What damages were suffered by the claimant as a result of the expropriation?

ISSUE NO. 1 - Market Value of the Land

In considering the highest and best use which is the basis of all valuations of land, the parties' appraisers, David M. Harrison for the Claimant and Brian S. Gettel for the Town of Westlock, took somewhat different approaches. Mr. Harrison viewed the land as being developed in two distinct stages i.e. the northerly 40 acres consisting primarily of Highway Commercial potential with the southerly 40 acres having a mix of Commercial, Light Industrial and Industrial potential. Mr. Gettel, on the other hand, treated the entire 80 acre parcel as being homogeneous in nature.

They both agreed the entire parcel would be developed over the long term but Mr. Harrison specifically felt there would be Highway Commercial development on the highway frontage in the short term.

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Based on their differing views of highest and best use, Mr. Harrison divided the land into two 40 acre parcels with the northerly parcel having a significantly higher value than the southerly 40 acres. Mr. Gettel pursuant to his view of the land awarded a uniform value to the entire parcel.

As a result Mr. Harrison valued the northerly 40 acres at \$12,000.00 per acre and the southerly 40 acres at \$4,500.00 per acre. Mr. Gettel valued the entire 80 acres at \$5,000.00 per acre.

Both appraisers based their valuation on the direct comparison approach. While there was some commonality in their respective comparables the difference in their resulting valuation hinges mainly on which comparable they deemed most important.

Mr. Harrison clearly thought his Comparable No. 14, the 24.25 acre parcel directly across the road from the land, was the most cogent with the rest of his comparables being useful to demonstrate market trends.

Mr. Gettel did not have a single comparable that stood out in his report in the same way that Mr. Harrison's Comparable No. 14 did. The closest comparable in Mr. Gettel's report appeared to be No. 5 which was a 143.80 acre parcel on the West side of Westlock fronting on Highway 18 from the south across the road from the Town's industrial area. The railway adjoined the easterly boundary of that parcel. The parcel also had the disadvantage of not having access to the Town's

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water and sewer system without running lines from the North side of the highway. Mr. Gettel arrived at his valuation by making significant adjustments to most of his comparables and averaging the resultant values.

The Board prefers Mr. Harrison's approach to the appraisal problem raised by this application where he appraised the subject property as two parcels with the northerly 40 acres being primarily highway commercial and the southerly 40 acres as potential light industrial to industrial. The Board felt Mr Gettel's approach to the problem where he appraised the subject property on a homogeneous basis did not accurately reflect the way the property would eventually develop.

The Board finds Mr. Harrison's evidence of value to be more cogent and persuasive than that of Mr. Gettel and finds the market value of the land on the effective date to be \$660,000.00.

ISSUE NO. 2 - Damages suffered by Claimant

The Claimant identified the losses sustained by his farming operation in Exhibit 4 entitled Claim Summary which total \$332,848.00 but which was reduced by \$16,900.00 by reducing the cost of obtaining an alternate water source by \$13,000.00 and abandoning the claim with respect to fixed costs of \$3,900.00. The Respondent has a much more restricted list of losses which total \$174,456.00.

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It is proposed to examine the differences between the individual claims listed by the parties and come to a final amount of each item based on the evidence given with respect to them.

New Pasture Transition

The evidence indicates almost 80 acres of pasture had to be replaced. This was accomplished by converting previously cultivated adjoining land to pasture.

The particulars of this claim were dealt with at page 34 of Exhibit 6 (Mr. Harrison's report) and are based on information given to Mr. Harrison by the Claimant. The element of the claim is:

-seeding and fertilizing replacement pasture	\$ 7,600.00	
-fencing	\$ 1,320.00	
-feeding 25 cows with calves at feed lot 300 days over 2 years @ \$175.00	\$ 13,125.00	
-trucking cattle to feed lot	\$ 800.00	
-medical care to cattle at feed lot	\$ 2,500.00	
-opportunity costs of not cropping 80 acres of new pasture taken from previously cultivated land of \$24,000.00 less \$20,400.00 for silage/hay revenue	\$ 3,600.00	
		\$ 28,945.00

The Town takes the position there was no loss to the Claimant under this head but in fact there should be a credit to the Town of \$12,800.00 being the difference between the hay and silage produced on the new pasture less the cost of seeding of \$7,600.00. The premise of Mr. Moroz's

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argument is that there was no cost to replace the expropriated land with adjoining lands owned by the Claimant which was cultivated grain growing land requiring conversion to pasture. He argues the hay/silage net income from the converted land during the two year conversion period should be treated as "found money" by the Claimant and therefore a credit to the Town. The Board feels this argument to be incorrect and agrees with Mr. Harrison's analysis that the \$12,800.00 should be deducted from the \$24,000.000 opportunity loss resulting from the Claimant's inability to grow Canola and other crops on the new pasture land leaving a net opportunity loss of \$3,600.00.

The Board finds the evidence does not support the position of the claim relating to the cost of boarding cattle, which totals \$16,425.00. Mr. Mallon urges the Board to adopt an alternative approach arguing that the Claimant was entitled to compensation for reducing his herd during the two year transition period required to replace the pasture taken by the expropriation. The Claimant testified that he reduced his herd in July 2002 by 59 sets or pairs which is more than double the 25 pairs Mr. Mallon based his calculations on. The evidence indicates the Claimant receives \$611.00 per calf sold. Based on the loss of income from the sale of 25 calves in each of the two year transition period at \$611.00 per head the loss would have been \$30,550.00 of gross income. Unfortunately the evidence is not clear as to what costs should be associated with and deducted from the income for the true measure of the loss. Mr. Mallon did argue however that this approach more or less equals the theoretical approach used by Mr. Harrison. The Board accepts the alternative

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approach outlined by Mr. Mallon, but will not award any amounts that exceed the claim of \$16,425.00.

The Board is satisfied the transition to replace the land by converting existing cropland to pasture land over a two year period has a value of:

-seeding and fertilizing replacement pasture fencing	\$ 7,600.00	
-fencing	\$ 1,320.00	
-net opportunity costs of replacement pasture	\$ 3,600.00	
-cost of reducing herd by 59 pairs	<u>\$ 16,425.00</u>	
		\$ 28,945.00

Water Issues

This part of the claim revolves around the cost of replacing a 1.5 – 2.0 million gallon dugout, waterlines and electrical lines for filling and delivering water from the dugout and providing for an alternate source of water to make up for water that had drained from the land which was collected and pumped to the dugout. This claim is itemized in Exhibit 4 and totals \$157,485.00 after a reduction of \$4,900.00 from the alternate source element of the claim. This sum related to the cost of filters, which were also included in the cost of the treatment building. This also includes \$300.00 for restocking the new dugout with trout that were lost during the replacement process. The total claim is based on the best price resulting from invitations given to six contractors of which Standard General was the lowest.

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The Town's estimate of the costs under this head is \$117,998.00 and is based primarily on the estimate it received from Stan Schmode Holdings Ltd. This estimate was not as comprehensive as that of Standard General, particularly in that the cost of pumping the water from the old dugout to the new one, fencing, water treatment building, reseeding, hook-up to town water for alternate source and restocking of trout were not included.

The Board therefore finds the Claimant's estimate of costs under this head more accurate than that of the Town and therefore allows this part of the claim at \$157,485.00.

Feeding Pad

This claim results from having to move a cattle feeding pad from the land to the east side of the new pasture area. Its elements consist of:

- approach from road including culvert
- access road
- fencing
- 12"+ fill for drainage purposes (900 cubic metres)
- 3" topsoil (480 cubic metres)
- gravel surfacing
- mobilization and supervision

The claim is valued at \$46,030.00 by the Claimant and at \$39,643.00 by the Town again based on quotes by Standard General and Stan Schmode Holdings Ltd., respectively. In the Board's view the information received from Standard General was more comprehensive than that received

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from Stan Schmode Holdings Ltd., however the Town's estimate did not include an allowance for "mobilization and supervision" and also the Town's estimate did not provide for gates and fencing. Mobilization and supervision were valued as a lump sum in the Standard General estimate relating to the dugout claim and thus should not be allowed under this head. The Board therefore accepts Standard General's estimate of value for the feeding pad area for a total of \$46,030.00.

Perimeter Fencing

There is little disagreement between the parties as to this claim. The difference between them is merely \$305.00 and Mr. Gettel agrees that Mr. Harrison's estimate was "...within 10 percent. That's reasonable". The Board therefore chooses Mr. Harrison's value of \$11,565.00.

Airstrip

The evidence reveals the land contained the eastern half of an airstrip that parallels Highway 18. The airstrip was used for the convenience of customers of Marks Motors Ltd. and of the Claimant who used it as a means of surveying his summer pastures twice a week during the months of June to October each year. These pastures were 25 miles and 35 miles from Westlock, respectively. The Claimant found it to be more efficient to use his airplane for this purpose than to use his truck.

Mr. Moroz questions the utility of the airstrip and Mr. Mallon argues the airstrip was a long

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established amenity that the Claimant was entitled to be compensated for. The Board agrees with Mr. Mallon.

As to the cost of replacing this amenity, it seems clear that re-establishing a new strip is more economical than moving to the Municipal Airport and thus the issue for resolution is the relative merits of the Standard General and Stan Schmode Holdings Ltd. estimates which appear to be:

Standard General		Stan Schmode Holdings Ltd.	
Airstrip	\$21,580.00	Airstrip	\$14,000.00
Swale	\$ 2,622.00		
Fencing	<u>\$ 4,375.00</u>		<u> </u>
	\$28,577.00		\$14,000.00

As mentioned previously, the Schmode estimate was not as comprehensive as was that presented by Standard General. The Board feels that Mr. Schmode's estimates could be coloured to some extent by his close working relationship with the Town which appears to be his largest single customer and therefore prefers to rely on the Standard General quotes. The Claimant is awarded \$28,577.00 under this head.

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Lease Revenue

The claim under this head is \$13,990.00 based on a present value calculation of 5% of \$3,050.00 annual rental for a farm equipment yard and several signage sites over 5 years.

Mr. Harrison admitted a calculation error with respect to the annual income (which was in fact \$2,800.00 annually) and the claim therefore should have been for \$12,730.00 rather than \$13,990.00.

Mr. Moroz argues there should be no claim because the lease revenue was reflected in the value of the land taken.

While the Board recognizes that in proper circumstances the Claimant could have a valid claim under this head, in the instant case the Claimant's argument that one of the reasons upon which the claimed value of the land taken was based the imminence of the development of the north half of the parcel. This argument is inconsistent with the argument that compensation for lost lease revenue over an extended period should be paid. If, for example, there were some kind of sign lease revenue potential in the south half of the parcel taken the Claimant's argument would have some validity.

In the result the Board denies the claim under this head.

Personal Time

The Board feels the claim for personal time spent by the Claimant as a result of this taking and the consequences that involved:

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1. the replacing of infrastructure
2. adding some new elements of infrastructure
3. the effort and time involved in re-ordering some elements of managing the re-configured mixed farming operation, and
4. preparing for these proceedings

is fair and reasonable.

The Board awards the sum of \$5,000.00 under this head.

Travel to Pastures

The claim under this head is \$5,040.00 and arises from the fact it takes two summer growing seasons for the grass surface of the replacement airstrip to establish itself before airplanes land and take off. Looking at the very significant amount of earthwork required with respect to replacing the dugout and associated utility lines, the new feeding pad and the airstrip it seems clear the summer of 2002 would be taken up by doing the earthwork with the reseeding being done near the end of that years growing season thus making the airstrip unavailable until near the end of the 2004 growing season.

The Claimant has two distant pastures, one 25 and the other 35 miles from Westlock. Based on a \$20.00 per hour rate the Claimant calculated his claim as follows:

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2.25 hours per trip x 7.5 times per month x \$20.00 x 5 months = \$1,680.00
x 3 growing seasons = \$5,040.00

This calculation is based on the Claimant using his pickup truck rather than the airplane he would have used which would have meant a saving of 1.5 hours per trip.

The Town led no evidence to refute the claim. The Board accepts this claim.

Scours Loss

This claim amounts to \$24,578.00 for the loss of 36 calves to scours in the spring of 2003. The spring was abnormally cold and wet. The Claimant suggested that if he had access to a feeding pad the loss would have been avoided. The Town argues that the cause of the scour outbreak was multi-functional and the Claimant did not handle the calves properly considering the abnormal weather.

The Board finds on the evidence before it that it cannot link this loss to the expropriation that occurred a year and a half earlier and therefore denies the claim.

INTEREST:

The Board utilizes the average annual interest paid on 90 day Treasury Bills, compounded annually as the rate of interest and the means of calculating the present value of damages.

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Interest on the awards made by the Board less the proposed payment shall be paid from August 27, 2001, until paid in full.

If the parties cannot resolve issues surrounding the question of interest they may return to the Board.

SUMMARY OF THE BOARD'S AWARDS:

The Board hereby Orders as follows:

The Town shall pay to the Claimant:

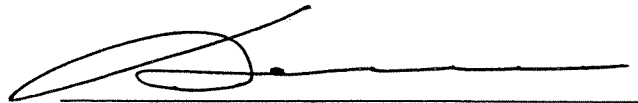
- (i) \$660,000.00 for the market value of the land
- (ii) \$ 28,945.00 for new pasture transition
- (iii) \$157,485.00 for water issues
- (iv) \$ 46,030.00 for replacement feeding pad
- (v) \$ 11,565.00 for perimeter fencing
- (vi) \$ 28,577.00 for replacement airstrip
- (vii) \$ 5,000.00 for personal time
- (viii) \$ 5,040.00 for travel to pastures
- (ix) Interest as hereinbefore provided

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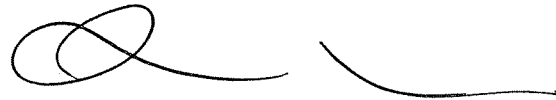
COSTS:

Mr. Marks is entitled to the reasonable costs contemplated in Section 39 of the Act that may be brought to the Board if the parties are unable to resolve same.

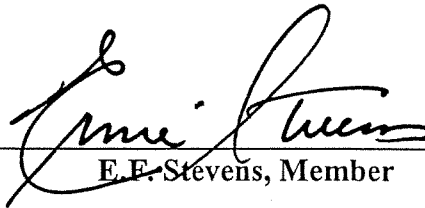
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