The Boundary Point

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Case Commentaries on Property Title and Boundary Law

The Boundary Point is published by Four Point Learning as a free monthly e-newsletter, providing case comments of decisions involving some issue or aspect of property title and boundary law of interest to land surveyors and lawyers. The goal is to keep you aware of decisions recently released by the courts in Canada that may impact your work.

The calculation of compensation when an expropriation takes place is often a function of several factors. These may include the highest and best use, the value per unit of area and the area itself. But if a boundary survey is not conducted, how accurate must the calculation of area be? Moreover, what if the *minimum area* is itself a factor that may impact the "highest and best use"?

These considerations were alive in an appeal decision from the Alberta Court of King's Bench[1] in reviewing a decision of the Alberta Surface Rights Board.[2]

How do we Determine when the Accuracy is "Good Enough"?

Key Words: *accuracy; valuation; compensation; GIS; area*

This was an appeal from a decision of the Surface Rights Board under s 26 of the *Surface Rights Act*.[3] The Board had determined an amount of compensation payable by the pipeline company to the land owner based on certain findings of area and the value of these lands based on established appraisal principles.

The two issues before the appeal court were stated as:

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.

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[1] *Pentelechuk v. Grand Rapids Pipeline GP Ltd.*, 2023 ABKB 692, https://canlii.ca/t/k1jkj

[2] *Grand Rapids Pipeline GP Ltd. v. Pentelechuk*, 2021 ABSRB 407, https://canlii.ca/t/jdt6q

[3] *Surface Rights Act.*, RSA 2000, c S-24

While “Standard of Review” may seem academic, it is often a question of deference: an appellate court is not a trial court. It therefore generally defers to the court or tribunal below in its findings of fact – except when there is an overriding or palpable error. However, after finding that appeals under s. 26 are very different from other statutory appeals, the court explained:

> 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.[4]

In concluding that deference was not owed to the decision of the Board, the court explained further,

> 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)
>
> 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)[5]

Turning to the second issue, the court allowed additional evidence. NPS Farms had appealed two portions of the Compensation Award. The first related to a finding that 2.83 acres of land were 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

[4] *Pentelechuk v. Grand Rapids Pipeline GP Ltd.*, *supra*., fnote 1, at para. 18

[5] *Ibid*., at paras 19 and 20

Area) that were also found to be not developable.[6] Clearly, if lands are "not developable," they will have a lower value and the compensation payable is accordingly much less.

As the court explained:

> 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?[7]

The court reviewed how the Board had determined the area of land at 2.83 acres. It described the evidence and process as:

> 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.
>
> 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".
>
> 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).
>
> 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.
>
> 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.[8]

But what was this "grey box"? It might help if we saw a view of the site:

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[6] *Ibid.*, at para 30

[7] *Ibid.*, at para 33

[8] *Ibid.*, at paras 37 to 41

APPENDIX C

Figure 2: S.E. 1/4 Sec.27-53-23-W4M

Figure 1: a map of the zoning map of the site attached as Appendix C to the decision of the Board

In order to appreciate an aerial view of the same site, please consider the image in Figure 2.

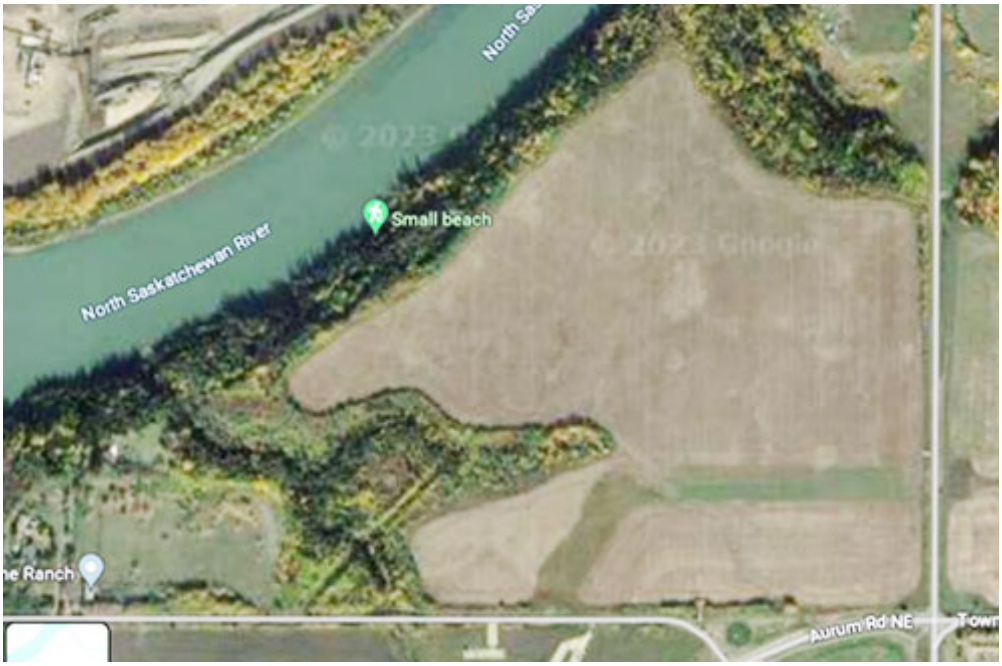

Figure 2: Image of site from Google® maps

This is where it gets interesting. If a "rigorous survey" had not been done, what kind of inaccuracy could be expected in the evidence available to the Board? In the additional evidence before the court, it was apparent that NPS Farms hired a Mr. Evans as an expert in geotechnical engineering and slope stability assessment, and Charles Kwok was hired by Grand Rapids to review Mr. Evans' report. The court described their evidence:

> 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.
>
> 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).
>
> 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".
>
> 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.[9]

In determining that the Board's finding that the 2.83 acres were not developable was an unreasonable conclusion, the court gave several reasons:

> 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 a binary choice: land is designated Medium Light Industrial, which is developable or ER, which is not.
>
> 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.

[9] *Ibid.*, at paras 47 to 50

> 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.
>
> 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 include 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*.
>
> 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.
>
> 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.***[10] [***Emphasis*** added]

It would have been interesting to view some of the evidence before the Court. In terms of the "grey box" discussion regarding the developable area, the court's description suggests that inherent inaccuracy for this portion of the land taken might appear like the schematic in Figure 3. Figure 3 is simply an illustration of a hypothetical "grey area" and a hypothetically accurate red boundary for the developable area. The point of course is *the court's preference for the best evidence, rather than a map that is known to be inaccurate*.

[10] *Ibid.*, at paras 52 to 57

The other aspect of the court's reasons is the preference for what would ultimately be determined, on the ground, as the "developable area". While the two experts who gave further evidence in court offered differing views of how the boundaries of such area would be determined, the court preferred an approach that was based in the reality *on the ground*.

Figure 3: Overlays of a hypothetical "grey area" and an "accurate" red boundary for the developable area.

With increasing reliance on GIS mapping applications, we run the risk of viewing the map on the screen as somehow trustworthy. When we lose sight of what the map is supposed to represent, we risk overlooking the best available evidence. We risk losing touch with the ground.

Editor: Izaak de Rijcke

Cross-references to *Principles of Boundary Law in Canada*

The question of uncertainty and best available evidence are discussed in Chapter 5: *Boundaries of Easements* and Appendix 2: *Overview of Land Surveying for Lawyers*.

FYI

There are many resources available on the Four Point Learning site. These include self-study courses, webinars and reading resources – all of which qualify for *formal activity* AOLS CPD hours.[11] These resources are configured to be flexible with your schedule, range from only a few hours of CPD to a whole year's quota.

Webinar from ANLS AGM

One of the presentations at the AGM of the Association of Newfoundland Land Surveyors on May 31, 2024 was on the topic *of Maintaining Public Confidence and Trust in the Work of Surveyors*. Izaak de Rijcke recorded his presentation as a CPD webinar. [12]

Eastern Regional Group of AOLS "Education Day" Webinar

The theme of the Eastern Regional Group (ERG) of AOLS "Education Day" held on April 30, 2024 was *Water Boundaries in a Changing Climate Context*. Four Point Learning co-hosted the event which is now available as a CPD webinar.[13]

Course: *Survey Law 1*

Survey Law 1 provides a foundation for professional surveyors to integrate legal principles, legislation and regulations within the overall framework of property boundary surveys. This course will be taught online Wednesday evenings by Izaak de Rijcke, starting September 4th. For more information, consult the syllabus. Please go to Four Point Learning to register.

If you wish to contribute a case comment, email us at TBP@4pointlearning.ca.

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[11] Please note that the designation of CPD hours is based on the estimated length of time for the completion of the event. The criteria used are those set out in GeoEd's *Registered Provider Guide* for Professional Surveyors in Canada. Other professions may qualify under different criteria. References to AOLS are to its Continuing Education Committee. Elsewhere in Canada, please confirm your eligibility for claiming CPD hours.

[12] This webinar qualifies for 1.5 *Formal Activity* AOLS CPD hours.

[13] This webinar qualifies for 8 *Formal Activity* AOLS CPD hours.