FORFEIT BY MISCONDUCT

In *Bernardo* v. *City of Toronto*, [2004] O.M.B.D. No. 604 (Q.L.), the City of Toronto was applying under section 26 of the *Expropriations Act* to determine the compensation to be paid to the Claimants. However, in a June 16 decision, the claim was dismissed by the OMB on the grounds that the Claimants had "forfeited their day in court". It is interesting to note that this was not due to a long period of inaction; it was due to a Board finding that there had been misconduct by the Claimants and their counsel over a relatively short period of time.

The Board set out the misconduct of the Claimant in the proceeding throughout its decision. On February 26, 2004, the Claimant did not attend Examinations for Discovery. On March 15 and 18, 2004, the Claimant again failed to attend after its counsel informed the claimant that its "Claim will be struck". Board Member J. R. Boxma found that this was an "abuse of the Board's process".

On the same day as the third non-attendance, there was a scheduled conference call that the OMB found that Claimant's counsel refused to participate in. The notice had given the wrong day of the week, but there was evidence that counsel was given notice of the proper day. Counsel then refused to come to the phone for a minute during the call when requested. Counsel later informed the Board that it was no longer representing the Claimants by that point, but Board Member Boxma pointed out that counsel did not inform the Board at the time and had filed no Notice of Discontinuance. He found that all of these actions together constituted "another example of flagrant disrespect for the Board's process".

As a result of the March 18 conference, the Claimants were ordered to produce a number of documents and complete discoveries by April 16. By the time of the hearing in June, this had not been done and the Claimants instead challenged the correctness of the March 24 order as part of their response. Board Member Boxma found that "this was improper", because they should instead have applied for a rehearing under Section 43 of the *Ontario Municipal Board Act*. Meanwhile, the Claimants had failed to either produce an Affidavit of Documents or contact counsel for the City to reschedule Examinations.

In dismissing the claims for compensation, Board Member Boxma relied on *Energy Marketing Inc*. v. *Novagas Clearinghouse Core Ltd*., [2004] O.J. No. 1436 (S.C.J.), *Madonia* v. *Mulder*, [2001] O.J. No. 1326 (S.C.J.), and *Cardoso* v. *Cardoso*, [1998] O.J. No. 841 (Gen. Div.). In the first case, the action began in July 1995, Discoveries did not begin until February 1999, and undertakings still had not been provided by the time of the hearing in February 2004. In the second, the events in question occurred in 1989, Discoveries took place in 1995 and 1996, and undertakings still had not been provided by the hearing in February 2002.

In *Madonia*, the court commented on the fact that misconduct may deprive a litigant of its day in court:

> Where a litigant has failed so completely to meet his pre-trial responsibilities as in this case, and where that failure has resulted in actual or potential prejudice to the opposite party, then that litigant has forfeited his right to a day in court.

On appeal, Justice McCombs of the Divisional Court held at paragraph 10:

> The respondents' right to a fair and timely determination of their claim has been defeated by the misconduct of the appellants. Failure to intervene in these circumstances would not only be unfair to the respondents; it would also encourage those who would frustrate the public's right to access to justice, and would quickly undermine public respect and faith in the administration of justice.

Cardoso comes closest to the Bernardo situation. The Statement of Claim was issued in 1995, Discovery took place in 1997, and it was found at paragraph 19 that "[t]here is no prospect that the rights of the defendants will be respected" after a hearing in January 1998. The problem in that case was that answers in discovery and to undertakings failed to adequately address the issues raised. However, Justice Kiteley did note, "In motions such as this, the plaintiff is often given a further opportunity to comply with its obligations".

Board Member Boxma did not award full costs requested, "having considered the results achieved by the Respondent in being successful in having the two actions dismissed". However, the OMB did award costs to the City for both the claim and the motion. In a recent unreported decision, the Board has also dismissed an injurious affection claim for inexcusable, inadvertent, and unexplained delay in moving an expropriation claim to discoveries after seven years. These cases serve as a warning to claimants and to counsel to comply with Board orders and procedures or risk dismissal of claims.

— Jason Cherniak

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