Citation: A Maze in Corn Inc v Manitoba Emergency Measures Organization et al, 2022 MBCA 38
Date: 20220426
Docket: AI21-30-09696

# IN THE COURT OF APPEAL OF MANITOBA

***B E T W E E N :***

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| ***A MAZE IN CORN INC.*** | ***G. M. Driedger*** *and* ***P. F. Reimer*** *for the Applicant* |
| *(Appellant) Applicant* | |
| *- and -* | ***T. B. Dobson*** *and* ***T. D. Edkins*** *for the Respondent* |
| ***MANITOBA EMERGENCY MEASURES ORGANIZATION*** | *Manitoba Emergency Measures Organization* |
| *(Respondent) Respondent* | ***M. G. Tramley*** *for the Respondent* |
| *- and -* | *Manitoba Disaster Assistance Appeal Board* |
| ***MANITOBA DISASTER ASSISTANCE APPEAL BOARD*** | *Chambers motion heard:* ***April 7, 2022*** |
| *Respondent* | *Decision pronounced:* ***April 26, 2022*** |

**BURNETT JA**

[1] The applicant seeks leave to appeal Manitoba Disaster Assistance Appeal Board (the Board) Decision No. F-21-002 dated October 14, 2021 (the decision).

[2] An appeal from a decision of the Board is available, pursuant to section 5(2) of *The Red River Floodway Act*, CCSM c R32 (the *RRFA*), only with leave of this Court and only on a question of law.

[3] The parties agree, as do I, that the criteria for leave to appeal were summarized in *Her Majesty the Queen in Right of the Province of Manitoba v Kochanowski et al*, 2018 MBCA 2 at para 15. The three inquiries are:

1) Does the applicant raise a question of law?

2) Does the question raise an arguable case of substance which has a reasonable chance of success?

3) Is the question of sufficient importance to warrant consideration by this Court?

[4] The applicant raises four grounds of appeal, namely that the Board erred in law:

1) by applying the wrong statutory provisions to its appeal, treating the applicant's claim for compensation as a request for disaster assistance under *The Emergency Measures Act*, CCSM c E80 (the *EMA*) instead of as a claim for compensation under the *RRFA* and the *Floodway Compensation Regulation*, Man Reg 209/2009 (the *FCR*);

2) in finding that compensable economic loss under the *RRFA* does not include compensation for future loss of income, loss of investment opportunity, interest and professional fees (i.e., legal and accounting fees);

3) in finding that the Emergency Measures Organization (the EMO) was not required under section 8(2) of the *FCR* to use the assessment of losses calculated by the EMO's independent

licensed insurance adjuster when it valued the applicant's compensation awards;

4) in failing to provide sufficient reasons for its decision to deny the applicant's appeal.

[5] In response to the first ground of appeal, the Board submits that the references to the *EMA* in its covering letter accompanying the decision and to the Disaster Financial Assistance Program in the first and last sentences of its decision were inadvertent and resulted from clerical error. The Board strongly disputes the suggestion that it applied the wrong statutory provisions. As stated in its written submission:

> . . .
>
> The Board heard, considered, and founded the Board decision upon the applicant's application for compensation for economic loss due to artificial flooding as provided for and in accordance with the RRFA and the [*FCR*]. The Board did not consider or treat the applicant's claim for compensation as a request for disaster assistance under the EMA. Any references to the EMA disaster assistance program in the Board decision were the result of a clerical error in drawing up the printed version of the Board decision. The Board did not apply the wrong statutory provisions to the applicant's appeal.
>
> . . .

[6] The Board did not find, as asserted by the applicant in its written submission, that a compensation award under Part 2 of the *RRFA* is a form of gratuitous assistance or a form of "disaster assistance" under Part IV of the *EMA*.

[7] I agree that the first ground cannot be sustained when the Board's decision is read in the context of the submissions and evidentiary record that was before it. This ground of appeal does not meet any of the criteria for leave.

[8] With respect to the second ground of appeal, the question of law raised by the applicant is:

> Does compensation for economic loss under Part 2 of the *RRFA* include compensation for future/anticipated economic losses? For example, are losses such as future loss of income, brand damage, loss of opportunity to invest, interest and professional costs eligible economic losses?

[9] The applicant does not question the calculation of its future or anticipated economic losses. The issue is whether such losses are compensable under the legislation. Both the EMO in its initial assessment, and the Board, on appeal, concluded that such losses are not compensable.

[10] In the compensation claim evaluation issued by the EMO on September 10, 2020, it said:

> . . .
>
> Future loss of income
> Claims for brand damage and future loss of customers in the amount of $247,081.00 does not fall within either part (a) or part (b) of the statutory definition of an economic loss.
>
> **"economic loss"** means

> (a) wages, salary or business income that a person loses because he or she cannot work or carry on business due to artificial flooding; and
>
> (b) extraordinary costs and expenses of working or carrying on business that a person incurs due to artificial flooding.
>
> Instead, the amounts claimed are for anticipated losses, based on a set of assumptions about what will happen in the future. Until an eligible economic loss is incurred and it is established based on evidence that the loss was caused by artificial flooding and not any other factor, there is no statutory authority for the Red River Floodway Compensation program to pay a claim. As such, the claim for future loss of income $247,081.00 is outside the scope of the program, and is not eligible for compensation.
>
> . . .
>
> Professional Fees
> The claim for professional fees of $7,500.00 does not fall within the scope of the definition of economic loss as defined in the [*RRFA*] and is not eligible for compensation. Liability for the manner in which the program is administered is expressly excluded by section 12 of the [*RRFA*]. We therefore find these costs ineligible for compensation.
>
> Lost Business Opportunities
> The claim for loss of business opportunities of $50,000.00 does not fall within the scope of the definition of economic loss as defined in the [*RRFA*], nor has it been supported with documentation. Liability for the manner in which the program is administered is expressly excluded by section 12 of the [*RRFA*]. There is no statutory authority for the program to pay this amount and therefore is not eligible for compensation.
>
> [emphasis added]

[11] The Board confirmed the EMO's decision with respect to these claims. Its reasons were brief:

> . . .

> 2) Economic loss:
>
> Under [section 2(3) of the *RRFA*], Eligible economic loss clearly states that a person may claim compensation under this Part for economic loss caused by artificial flooding only. The [applicant] is trying to obtain more compensation for losses that were not intended to be covered by this program. This program is limited to covering property related damages caused by artificial flooding and those related losses. The claim for Brand damage does not fall within the type of damages covered under this program. The amounts claimed are for anticipated losses, based on a set of assumptions about what will happen in the future.
>
> 3) Interest costs and lost opportunity:
>
> This type of future loss falls outside the scope of part (a) or part (b) of the statutory definition of economic loss. It is not "wages, salary or business income" tied to the period of artificial flooding or the resulting property damage. And it is not "an extraordinary cost or expense of carrying on business" incurred during the period of artificial flooding. Nor was the delay in administering the compensation program, if any, was caused by artificial flooding.
>
> 4) Lawyer and Professional Fees:
>
> This type of damage of loss does not meet the definition of economic loss as this term is used and defined in the [*RRFA*] and the [*FCR*], and therefore, this type of damage or loss is not eligible for compensation under this program.
>
> . . .
>
> [emphasis added]

[12] In my opinion, the second ground meets all of the criteria for leave. As was the case in *Pelchat v Manitoba Public Insurance Corp and Automobile Injury Compensation Appeal Commission*, 2006 MBCA 90, the question raised is sufficiently important to warrant the consideration of this Court. The EMO and the Board should know whether claims for future or anticipated

economic losses are or are not compensable under Part 2 of the *RRFA* so that future disputes may be properly dealt with (see para 16).

[13] Turning to the third ground of appeal, section 8(2) of the *FCR* states:

> **8(2)** Whenever possible, the Emergency Measures Organization must use independent licensed insurance adjusters to evaluate compensation claims.

[14] In this case, the EMO did use an independent licensed insurance adjustor, and his report was considered by the EMO when it determined the value of the applicant's claim.

[15] As noted in the EMO's written submission, valuation of a claim and determination of the compensable amount fall squarely within its statutory grant of decision-making power (see section 3(2) of the *RRFA*). Section 7(3) of the *FCR* permits the EMO to use "the valuation method it considers appropriate, having regard to the nature of the claimant's economic loss", and section 11(12) stipulates that the Board "must follow the valuation procedure used by the [EMO] unless it is satisfied that another valuation procedure is more appropriate and fair, having regard to the nature of the claimant's property damage or economic loss."

[16] In my view, the applicant's third ground raises neither a question of law nor an arguable case of substance, as its interpretation of section 8(2) of the *FCR* is plainly wrong. The EMO was required to use an independent licensed insurance adjuster in evaluating the applicant's claim for compensation, which it did.

[17] As to the fourth ground of appeal, the Board says that the substance of the decision addresses and deals with each of the four grounds upon which the applicant relied in its appeal from the EMO's decision and that the clerical errors did not alter the substance of the decision in any way.

[18] In *Histed v Law Society of Manitoba*, 2021 MBCA 70, this Court observed (at para 82):

> Inadequate reasons are not a free-standing right of appeal entitling appellate intervention. To find an error of law, an appellant must establish that the reasons are inadequate and that they prevent appellate review (see *R v Sheppard*, 2002 SCC 26 at para 28; *R v REM*, 2008 SCC 51 at paras 54-57; and *R v Ramos*, 2020 MBCA 111 at para 48). Reasons must meaningfully account for the central issues and concerns raised by the parties, be justifiable, transparent and intelligible and support the conclusions reached (see *Vavilov* [*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65] at paras 79, 81, 127). Reasonable inferences need not be spelled out (see *REM* at para 56).

[19] As was the case in *Kochanowski*, the Board cannot be commended for its reasons in the present case. Having said that, I am not persuaded that the fourth ground of appeal meets the criteria for leave.

Conclusion

[20] Leave to appeal is granted on the question set out at para 8 above. The applicant did not seek costs.

Burnett JA