



New Expropriation Law:

Noteworthy cases from the last year

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Injurious Affection – No Land Taken (Ontario)

S. 21 of the *Expropriations Act* (Ontario)

Antrim Truck Centre Ltd. v. Ontario (Transportation), 2011 ONCA 419

- ❑ New highway re-routed traffic away from Antrim's truck stop – rather than being right off the highway, Antrim found itself a one mile detour from the new route
- ❑ Antrim sought \$8.2 million in damages - said its business had to be relocated and the re-routing of the highway had substantially interfered with its enjoyment of its property
- ❑ Ontario Municipal Board (OMB) awarded \$393,000 in damages, and both parties appealed



Antrim cont...

- The test, in Ontario, for determining whether a claimant is entitled to compensation for injurious affection where no land is taken is:
 - a) The damage must result from an act rendered lawful by statutory powers of the person performing such act (the statutory authority rule)
 - b) The damage must be such as would be actionable under the common law, but for the statutory powers (the actionable rule)
 - c) The damage must be occasioned by the construction of the public work, not its use (the construction not the use rule)

Antrim cont...

- Ontario Court of Appeal (OCA) ultimately held the Board (and later the Divisional Court) failed to balance the parties' competing interests when it found the re-routing caused an actionable nuisance. This makes Antrim generally consistent with the Heyes decision – an authority found to have caused a substantial nuisance, but protected from liability by a statutory exclusion (Canada Line)
- The OCA said the new highway was built for public safety, and set aside the compensation award entirely, leaving Antrim with nothing



Antrim cont...

- On 14 November 2012 the Supreme Court of Canada (SCC) will hear a further appeal by Antrim
- The Attorney General of BC has intervener status to provide comment at that SCC hearing

Disregarding the “Scheme”

S. 33 of the *Expropriation Act* (BC)



Thunderbird Entertainment Ltd. v. Greater Vancouver
Transportation Authority, [2012] B.C.J. No. 1352
(C.A.)

- GVTA expropriated a 21,420 square foot strip of Thunderbird's 20 acre property, along 200th Street Langley. The taking was to widen 200th Street, which led to the new Golden Ears Bridge
- The expropriation took place in July 2006, but in 2005 Thunderbird had granted Langley a covenant that it would not build on the area later expropriated by the GVTA



Thunderbird Entertainment cont...

- Thunderbird had also agreed to a building setback in 2005
- The trial decision is noteworthy for the analysis provided on S.33 of the *Expropriation Act*, which is the section that mandates that when determining market value of land, consideration must not be taken of the “scheme”



Thunderbird Entertainment cont...

- Increases or decreases in value of the subject land caused by the project for which the expropriation would occur cannot be a factor in the compensation paid to the owner
- Alan Hincks and James Yardley spoke about Section 33 of the *Expropriation Act* at the 2011 conference: Materials available on BCEA website (soon)



Thunderbird Entertainment cont...

- The trial judge ruled (May 2011) that the widening of 200th, the GVTA expropriation, the setback and the no-build covenant were all part of the same “scheme” - resulting from collaboration between Langley and GVTA
- The trial judge found that the advance payment paid to Thunderbird was too low – as the GVTA’s appraisal treated the expropriated land as constrained by the covenant and set-back



Thunderbird Entertainment cont...

- The advance payment was \$556,900 for the land taken, which was increased by \$80,000 at trial (as a consequence of the court accepting a broader view of the “scheme”)
- Trial judge also awarded \$690,000 for injurious affection to the remainder (*Expropriation Act* - s. 40)
- The injurious affection claim was highly complex, and was ultimately a battle of experts - the Court accepted that the development potential of the remainder was reduced



Thunderbird Entertainment cont...

- BCCA heard GVTA's appeal in June 2012
- BCCA reasons are a good summary of the expert evidence from trial re: “Before” and “After” development potential of the site – including analysis re reduced parking capacity and impact on development potential
- The BCCA dismissed the GVTA's appeal of the injurious affection award (July 2012)

Disregarding the “Scheme”

S. 14(4)(b) of the *Expropriations Act* (Ontario)



Windsor (City) v. Paciorka, 2012

ONCA 431

- As in BC, when land is expropriation in Ontario, the expropriation authority must pay the owner the market value of the land, without regard to any increase or decrease in value due to the project that triggered the expropriation. [in BC, s.33 of BCEA]



Paciorka cont...

- In *Windsor (City) v. Paciorka*, the owner's lands had been impacted by various government actions between 1983 and 2002, all designed to protect natural habitats and threatened species
- In 2004, Paciorka's land was partially expropriated for a nature park



Paciorka cont...

- Key issue was: What is the scope of the “scheme” that ultimately led to the expropriation?
- Owner said scheme started in 1983, and without all the environmental controls, it could have developed the land – i.e. land could be valued as developable



Paciorka cont...

- OMB agreed, and granted Paciorka approximately \$4.5 million for market value of land taken and loss in value to remainder land
- City had argued that not all government action that affected the Owner could be seen as part of the “scheme”
- City says “Park Plan” only began in 2002
- OMB decision was upheld by the Divisional Court



Paciorka cont...

- OCA overturned the damage award, stating it was unclear whether the OMB considered a 1996 Provincial Policy Statement (PPS) to be part of the “scheme”
- The PPS affected land all over Ontario, and couldn’t be seen as part of the governmental action that resulted in the taking of Paciorka land
- Arguably, the PPS would on its own significantly impact the development potential of the claimant’s land – so disregarding the PPS resulted in a significant over-valuation in the “before” scenario



Paciorka cont...

- The OCA said the OMB needed to re hear the matter, while taking the impact of the PPS into account
- OCA confirmed that unlike the valuation of expropriation land, which excludes the scheme's effect, the “implications on market value of the wider expropriation scheme are not relevant in assessing injurious affection damages” to the remainder

Expropriation By Private Land Owners

S. 27 of the *Water Act* (BC)



Wilson v. Travis, 2012 BCSC 963

- Wilsons had a Conditional Water Licence to divert water from a nearby creek, pursuant to the *Water Act*, RSBC 1996, c. 483
- Wilsons needed an easement over Travis' land to access the creek and carry water back to their property



Wilson cont...

- Travis allowed the Wilsons to bury a pipe and electric supply in a trench through his property
- The creek and the Wilson's pump were all on Crown land
- Despite informal permission to cross his land, Travis refused a formal written easement



Wilson cont...

- Relations deteriorated and Travis dug up the Wilson's pipe
- S.27 of the Water Act provides a Conditional Water Licence holder the right to apply to the BC Supreme Court for an expropriation order, where an easement is not granted willingly



Wilson cont...

- The Court is directed by ss.30 to 32 of the Water Regulations, BC Reg 204/88 to determine compensation and determine the terms of the instrument required to give effect to the easement
- Mr. Justice Melnick then made an order setting out all the terms of an easement to be registered on the Land Title Office



Wilson cont...

- Noting the Wilson's appraiser had valued the easement taking at \$0, and noting Travis had no evidence of value (but had received a pre-litigation offer of \$500), the Court awarded Travis \$500 compensation
- Having determined the Wilsons were successful in the litigation, Travis was ordered to pay the Wilson's \$5,000 in legal fees – minus the \$500 the owed him for the easement!

Claimant Delay – Reduced Interest Award Paid

SS. 46 and 47 of the *Expropriation Act* (BC)



Rainbow Country Estates Ltd. v. Whistler (Resort Municipality), 2012 BCSC 713

- In 1987, Whistler expropriated Rainbow's resort property
- The compensation action, in which Rainbow was largely successful, was not heard until 2010
- [Neil Hahn and Evan Cooke spoke about the trial decision at the 2011 BCEA Conference: Materials available on the BCEA website (soon)]



Rainbow Country Estates cont...

- Rainbow had only received an Advance Payment \$367,000, but was awarded an additional \$933,000 at trial
- In 2012 the trial judge heard Rainbow's argument on interest and costs
- Rainbow claimed interest on \$933,000 from 1987 (in the millions)



Rainbow Country Estates cont...

- The parties agreed that interest is compounded annually, since compound interest “more readily achieves the objective of compensating a claimant for its temporary loss of capital than does simple interest”



Rainbow Country Estates cont...

- Court found intentional delay by Rainbow, which resulted in the court denying Rainbow interest for 13 of the 23 years between expropriation and the compensation award
- Lesson: If you snooze, you may lose out on the interest award!



THANK YOU!

- If you have any questions or comments about the presentation or cases cited, please feel free to contact me:

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