BRITISH COLUMBIA EXPROPRIATION ASSOCIATION
1997 ANNUAL CONFERENCE

NEW CASES OF NOTE

1. Hertel v. British Columbia (MOTH) (June 30, 1997)

This case contains an interesting discussion regarding the characterization of the wife as the sole "owner" within the meaning of the statute, the property being registered solely in her name but in the context of the business (fruit stand) on the property it was being operated by the husband and wife in their joint capacity as partners. Where you know there is an expropriation coming, do you transfer one-half of the property to the spouse to protect their standing before the Board.

The case also has an interesting discussion regarding terminal loss, i.e. can the business be relocated. On the evidence, the Board concluded that it was "feasible" to relocate the business and the decision by the ma and pa operators was simply a personal choice and, consequently, not within Section 35(4), namely, that the decision to relocate is intended to reflect the "business reality".

There is a useful discussion regarding the evidence required to demonstrate business loss and the interesting position put forward by the Board that the owners were obliged from a mitigation point of view to seek alternate employment and to replace their fruit stand income.

2. Roadmaster Auto Center Ltd. v. City of Burnaby (July 31, 1997)

This case contains a further discussion regarding the issue of feasibility of relocation confirming that (a) the onus of proof is on the Claimant and (b) that although the owner may have made no efforts to relocate and had no intention to relocate, that this still begs the question as to whether or not it was feasible for the owner to relocate and that persuasive evidence in this regard will be sufficient to found a favourable decision to provide for some damage consideration.

The case also contains an interesting discussion regarding the prospect of lease renewal.

In this case the Authority had acquired the fee simple to the land and made it clear that as the Landlord they were not prepared to enter into an extended term to the lease only to then expropriate it. The Board found that there was no basis for disregarding the Authority's position as Landlord at the date of the taking and there was no evidentiary basis for ignoring their position as Landlord and consequent impact upon the lease.

3. Mayfair Resources Corporation v. GVWD (June 13, 1997)

This case has some interesting discussion and analysis of the "ripe for development" property scenario.

The Board accepts a three year probable time line for development and on that basis moves away from a raw acreage approach to a subdivision analysis.

The Board considered the uncontested planning evidence and its relevance in the overall developability of the site.

The Board reviewed and adopted a discount rate of 11% as properly embodying the cost of money and risk factors and readjusted the rate used in the evidence by the Claimant even in the absence of evidence being tendered by the Authority.

4. Lutsch v. The Board of School Trustees of School District 42 (October 25, 1996)

This is a lengthy case dealing with valuation of property generally. It is interesting, however, in the context of the Kliman decision discussed next in its consideration of Section 31(1)(a) and (b) where if the highest and best use of the property at the date of the taking is different from the existing use, then no disturbance damages are recoverable. In this case, the accepted highest and best use was as a short-term holding property for future residential urban development. The property, in conjunction with its neighbouring properties, was single family residential with the owners resident in the same. The evidence was accepted that the owner and his wife had bought the property for the specific purpose of holding it for a future residential development and further accepted evidence of their various attempts to develop the property prior to the taking to come to the conclusion that there is also an entitlement to disturbance damages.

This case is difficult, if not possible, to reconcile with the decision of:

5. Kliman v. School District No. 63 (January 14, 1997 Court of Appeal).

The previous decision of the Board, the subject of the appeal, was that the property was a holding property for future redevelopment, that is to say, a subdivision. There was a rental house on the property which was being occupied at the time of the taking. The Claimant's argument that the use of the property throughout the period of the taking was as a holding property for redevelopment was dismissed on the basis that "the Board was not persuaded that it is probable that but for the actions of the Authority that the pre-requisites to development would have been accomplished by the date of the taking". Given that the property was a holding property and valued as a holding property in the same fashion that the Lutsch decision was what difference is being highlighted here. The actual attainment of the subdivision was not the use at the date of the taking, it remained a holding property in both cases. The Court of Appeal found that "as the market value based on the highest and best use at the date of expropriation is greater than the market value based on the existing use at the date of expropriation disturbance damages are not compensable". With considerable respect this thinking is completely inconsistent with the concept of the use at the date of the taking being something less than the subdivision itself.

6. Captain's Square Holdings Ltd. v. MOTH (April 21, 1997)

This is a very important and interesting case where truth and justice and equitable principles win out over the evil Highways empire and their legalistic interpretation of who is constituted as an owner. In this case two related companies owned adjacent parcels of land. Although no registered easement or right-of-way was in existence effecting the titles allowing passage and re-passage over the adjacent parcel it was apparent on the facts that the two companies both controlled by the same shareholder acted consistently with them having reciprocal rights and privileges to use their adjacent parcels. The owner of Parcel A suffered a loss when the taking effected Parcel B over which the Board had found an implied easement and that easement constituted an "estate, interest, right or title in or to the land" giving the corporate owner of Parcel A status before the Board.

7. McEachern v. B.C. Hydro and the City of Nanaimo (January 13, 1997)

This case explores a number of very important procedural and substantive issues surrounding what constitutes an expropriation, the importance and role of the procedural steps involved in an Authority moving under its expropriation powers and, ultimately, the

differences to be considered between the common law remedies of nuisance and trespass and a claim for compensation.

From this decision, it can be taken that:

(a) The Board is prepared to consider the actions of an authority to determine substantively whether an expropriation has occurred. It remains an alternative to go to the Supreme Court for a declaration but it would appear the Board is prepared to determine that it has jurisdiction, i.e. a compensation claim exists on appropriate facts.

(b) The procedural statutory steps for an Authority to follow are for the benefit of the Claimant, not the Authority who fails to use them and then holds up its procedural failures as a shield denying the element of expropriation and arguing that the substantive matters cannot be looked at.

There appears to be some recognition that the complete denial of a property interest is not necessary to found an expropriation (defacto) but in appropriate circumstances a diminution obviously substantial of those rights may be sufficient.

One should never lose sight of the common law remedies of trespass or nuisance arising out of interference with your property rights as being substantive remedies available in the Supreme Court to deal with matters of encroachment or apparent utilization of property without some form of agreement.

8. Hampton Investments Ltd. v. MOTH (June 11, 1997)

This case is also a deemed taking discussion surrounding the effect of the Nanaimo Parkway Bylaw introduced in 1993, passed in 1994 as an amendment to the Official Community Plan paralleling the right-of-way acquired by MOTH around the City of Nanaimo applying major setbacks from the highway route and essentially prescribing no development areas or limited development within certain distances of the freeway.

On the facts of the case it was clear that the land impacted by the Parkway Bylaw was limited in its development potential and the question was whether this was a compensable claim either against Highways or against the City of Nanaimo directly given that the effect of the scheme was to bring in the Parkway existence.

The Board reiterated the statements that there must be an extinguishment of the owner's

interest (value) in the property and the acquisition of the asset by the Authority involved or its designate to comprise a taking. In this case, the City of Nanaimo was protected by Section 972 of the *Municipal Act* denying compensation for land use regulation. It is the severity of the effect on the entirety of the owner's lands that must be considered to determine the extinguishment question not just the area affected.

9. Oceanside Village Developments Inc. v. MOTH (February 3, 1997) (Supreme Court)

This case was a Judicial Review of the previous decision of the Board, not an appeal. The Court confirmed that the Board had difficulty carrying out its mandate without having the jurisdiction to interpret its statute. A particular issue was the provisions of the then Section 19, the advance payment requirements of the Authority. The Court confirmed the Expropriating Authority must pay under the scheme of the Act 100% of an independent appraisal or other appraisal report carried out by a properly accredited person. The statute does not permit the Authority to prepare its own appraisal or base an advance payment upon an appraisal ordered by it but subsequently modified internally by its staff. The Authority must make its advance payment in compliance with an appraisal report independently obtained for it.

10. Sutherland v. Township of Langley (July 18, 1997) (Supreme Court)

This is an important decision which emphasizes the difference between signing a Section 3 Agreement and forcing an expropriation. The Court held that the Section 3 Agreement, pursuant to which an owner agrees to transfer or dedicate land, does not constitute an expropriation to provide non conforming use protection under the *Municipal Act*. On the particular facts of the case the difference to the remainder site after the partial taking was being left with a useless and unbuildable remainder with no footprint versus the ability to reconstruct with a zero lot line clearance.

One immediate result of this decision would appear to be that in a Section 3 situation the damages to the remainder are significantly higher than if an Expropriation Vesting Notice had been utilized. It also might serve to highlight concerns regarding the manner in which the *Income Tax Act*, at present at least, chooses not to differentiate between a compulsory taking completed through the agreement process or completed by way of the expropriation procedures.

This result might be put along side of the abandonment sections of the *Expropriation Act* as one more substantive reason why there is apparently a major difference between the Section 3 process and the Vesting Notice process.