British Columbia Expropriation Association

2001 Fall Seminar

Noteworthy decisions – 2000-2001

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Premanco Industries Ltd.* v. *Ministry of Environment, Lands and Parks, E.C.B. 23/94/189, 71 L.C.R. 6, October 4, 2000;
and
Premanco Industries Ltd.* v. *Ministry of Environment, Lands and Parks, 2001 BCAA 116, February 15, 2001

The Board's decision arises from the expropriation of a number of Crown granted mineral claims in Kokanee Glacier Park. A small mine had sporadically operated on these claims. The decision contains a useful analysis of valuation principles applicable or otherwise to this type of property (and in particular, the discounted cash flow method). In addition, the Board ruled on the question of whether the surface had a separate value from the mineral claim itself (no).

The Claimant sought leave to appeal. One of the grounds of proposed appeal was an order which had been made before the hearing that precluded the Claimant from performing drilling or exploration on the property to obtain further information for its valuation. Justice Hall refused to grant leave. With mining properties in particular the state of knowledge available at the time of sale has a significant effect on value. Where there is an expropriation, the market value must be determined on the date of expropriation with the information that was available at that time. This reasoning is, with respect, more persuasive than the reasoning used by the Court of Appeal to reach a similar conclusion in *Casamiro.*

N. Y. Automobile Ltd.* v. *Richmond, E.C.B. 03/98/193, December 22, 2000

This case involved the assessment of compensation arising from the expropriation of a franchise automobile repair business carried on in leased premises. The parties agreed that it was not feasible for the business to be relocated. The issues, therefore, were the termination allowance under section 34(4) and other disturbance damages. The Board reviewed the calculations of the two business valuers to determine the goodwill/franchise value of the business based on the difference between estimated market value of net operating assets and estimated net tangible asset value. No reference was made to any market transactions to support this theoretical calculation. Furthermore, no recognition appears to have been given to the fact that the business was carried on in leased premises.

Accountants and business valuers will doubtless be fascinated with the discussion of sustaining capital re-investment, debt equity ratios and the tax shield.

The most interesting aspect of the award for disturbance damages is the recovery of six months of severance pay payable to the sole shareholder and an employee of the Claimant as a result of wrongful dismissal. This decision seems inconsistent with the earlier decision of the Board in *Surrey Animal Hospital*. If the shareholder had carried on business in his personal capacity, presumably no such award could have been made, despite an identical "loss".

Gonev et al.* v. *Richmond, E.C.B. 04/98/192, 05/98/192, 06/98/192, December 18, 2000

These claims arose from expropriations by the City of Richmond of three contiguous parcels of land for a community park. One parcel had a residence used as a rental property; one had a residence occupied by the owner and the third was vacant. The highest and best use for the property was a form of multi-family development and in the course of establishing compensation, the Board ruled on a number of issues which serve to clarify previous Board and Court of Appeal decisions.

First, the Board considered the extent to which the Plan which led to the creation of the park for which the parcels was expropriated should be excluded pursuant to section 33. After examining the Plan and previous decisions of the Board and the Court of Appeal, and in particular, *Vision Homes Ltd.* v. *Nanaimo*, *286682 B.C. Ltd.* v. *Colwood* and *Horsley* v. *MoTH*, the Board concluded that the development policies and density designations in the Plan did not have much connection with the park designation for which the subject properties were expropriated and, accordingly, that it would consider and apply the Plan with the exception of the parts dealing with the designation of the community park.

The Plan specifically provided for bonus density over and above base density in exchange for various specified community amenities. Not surprisingly, the Claimants took advantage of this bonus density in their valuations. The Board, however, concluded that typically developers do not pay in advance for a density bonus by paying more for land unless it is clear that density can be achieved at negligible cost. In this case, the Board concluded that a prudent developer/purchaser would not have been prepared to pay a higher price for potential bonus density on a raw lot at the date of expropriation.

In carrying out the actual valuation, the Board had to consider whether or not to use a price per buildable square foot or a price per gross square. It concluded that where the final density and the amount of road dedication is unknown, the price per gross square foot for similar properties is a better indicator of value. However, the Board was of the view that a price per buildable foot would be appropriate had the property been zoned for a particular density of multi-family residential.

The Board dealt with the claims for disturbance damages and the effect of section 31 of the *Act*. Following a number of decisions and, in particular, *Daflos* v. *School District No. 42*, *Husband* v. *Langley* and *Kliman* v. *Board of School Trustees of District No. 63*, the Board disallowed claimed disturbance damages. The Board interpreted *Kliman* as standing for the proposition that if the market value is based on the highest and best use other than the existing use, all disturbance damages are excluded whether there is double recovery or not. The Board was critical of appraisers characterizing the highest and best use as "holding for development" in an attempt to avoid the application of section 31. It concluded that the Board must consider whether the market value is based on use as a development property which is more valuable than the use to which the property is currently being put. The result of the Board's consideration appears to relate to the time horizon for the prospect of development. If the prospect of development is far into the future, then the effect of the development on market value may be so small that section 31 is not triggered. In this case the claimant would be entitled to disturbance damages in addition to the market value based on highest and best use. Here, the development horizon was close. Valuations were carried out on this basis. Accordingly, the Board disallowed disturbance damages by virtue of section 31. The Board also followed its decision in *Telep* v. *Maple Ridge* in that it disallowed the allowance under section 38 to the owner of the one owner-occupied parcel.

Mischek* v. *MoTH, E.C.B. 36/98, 72 L.C.R. 221, January 10, 2001

An encroachment of gravel on private land does not constitute an expropriation. There was no "legislative" [sic] act as in *Tener* or *Casamiro* which took away legal title to the encroached land. For a finding to be made that the land encroached upon was a road pursuant to section 4 of the *Highway Act*, it would be necessary to show strong evidence of expenditure of public funds on the encroached area. There was no such evidence in this case.

Sequoia Springs West Development Corp. v. ***HMTQ***, E.C.B. 93/95/198, January 26, 2001

Yet another futile attempt to persuade the Board to consider Calderbank offers where the Board has a discretion as to costs. Here, the discretion existed. The offer pursuant to the Calderbank letter was considerably higher than the eventual award. In awarding full costs, despite the offer, the Board noted that the Claimant was close to the 115 percent of the advance payment (though not close to the Calderbank offer); that there were "justiciable" issues and that the offer was made shortly before the beginning of the hearing.

In an earlier decision which the Board relied on (*Baines*), the Board noted differences between the costs regime under the *Expropriation Act* and costs in Supreme Court (where Calderbank letters have long been recognized).

What is significant about this decision is what the Board does not say. In both this case and the *Baines'* decision, the authority argued that use of Calderbank offers in expropriation litigation had been endorsed at a very high level, and that in particular, in *Shun Fung Ironworks Ltd.* v. *The Director of Buildings and Lands*, the Judicial Committee of the Privy Council, on appeal from the Court of Appeal of Hong Kong, ruled that a Calderbank offer should be given effect in expropriation litigation. *Shun Fung* was the first major common law decision where damages due to delay before the expropriation were awarded. The Supreme Court of Canada in *Dell Holdings Ltd.* followed it. *Shun Fung* certainly had justiciable issues – the Claimant succeeded in establishing novel law. The hearing itself was enormously protracted and expensive. Despite all of this, the Judicial Committee determined that because of the Calderbank offer, the Claimant was not entitled to its costs. The Board made no reference to the costs ruling in *Shun Fung*. There was evidence – again, not referred to, that the Claimant had sufficient time to provide a detailed counter offer following receipt of the offer.

Leave to appeal has been granted on this issue. As a result of this appeal, an appeal on the merits and a cross-appeal on the merits, most of the Sequoia Springs findings are under appeal.

Campbell River Woodworkers' & Builders' Supply (1966) Ltd.* v. *HMTQ, E.C.B. 35/97/200, 70 L.C.R. 161, February 12, 2001

This involved a total taking of land subject to a long term lease with Beaver Lumber. The issues were market value, special economic advantage and allowance for capital gains tax as disturbance damage.

In determining market value, the Board relied primarily on two methods – the Overall Capitalization method of the Income Approach and the Discounted Cash Flow method. It placed more weight on the Overall Capitalization method for two reasons: it did not require an estimate of the future value of the property; and the market evidence of comparables for an overall capitalization rate was better than for discount rates. For the Discounted Cash Flow method, the Board was particularly critical of the lack of market evidence to support the discount rate and the treatment of the reversionary value (at the end of the lease).

The Board concluded that the claim for special economic advantage could not succeed, as there was no "special" value in the property to the Claimant. No characteristic of the property, including the lease to Beaver Lumber, provided a benefit or advantage that was peculiar to the Claimant as owner. Furthermore, the value of this lease was the central feature of what was valued by the appraisers when they determined the market value of the property.

The Board also dismissed the claim for disturbance damages for the capital gains tax in keeping with previous authority. The Claimant had paid capital gains tax at the time of the expropriation (unnecessarily, as it turned out). The Board concluded that the claim

was more properly characterized as one for the acceleration of tax rather than for the tax itself which would have to be paid on an eventual voluntary sale. Such a claim was too speculative. There was no certainty when the property would have sold if the expropriation had not occurred. If a sale occurred, neither the market value of the property nor capital gains tax rates would not be known at the time of sale. Furthermore, the Board appeared to conclude that a replacement property was available which would have deferred taxation of the capital gain, and that the Claimant did not take advantage of this opportunity.

Golden Valley Golf Course Ltd. v. ***HMTQ***, 2001 BCAA 392, June 5, 2001

Part of the continuing saga of *Golden Valley*. Here the issue was whether, in the rather unusual circumstances of this case, the Claimant could discontinue its claim for compensation. Also, the Court of Appeal considered whether a "reasonable apprehension of bias" arose from the participation by the Vice-Chair in the decision-making process by virtue of her subsequent hiring by the Ministry of Attorney General, Legal Services Branch.

This is a confusing decision with three different judgment by the three judges participating. The distinction between the judgment of Madam Justice Newbury and Rowles is nuanced. Furthermore, while the majority (Newbury and Rowles) ruled that a reasonable apprehension of bias existed and that the decision should, therefore, be quashed, it was the unanimous decision of all three justices that the decision was, notwithstanding the apprehension of bias, correct.

On the substantive issue, the justices unanimously ruled in three separate decisions that, under the circumstances of this case the Claimant could not discontinue, thereby resiling from an agreement it had made with the Respondent.

On the bias issue, Justices Newbury and Rowles concluded that a person in *Golden Valley*'s position would not feel "a sustained confidence in the independent mind" of the panel or at least of the panel member. In dissent, Justice Hall is less strict – he doubts that the fJuly 12, 2001ormer Vice-Chair had a role to play in the decision rendered by the panel of the tribunal, noting the qualification of the remaining panel members (the Vice-Chair did not sign the decision). When these two members rendered their decision, the Vice-Chair had left the tribunal and had nothing to gain or lose from its decision.

This decision on bias is one that may well come up again in the future given the use of legally trained part time Board members.

Sutherland v. ***A.G. Canada and Vancouver Airport Authority,*** 2001 BCSC 1024, July 12, 2001

This is a recent decision where Mr. Justice Holmes of the B.C. Supreme Court found that both the Federal Crown and the Airport Authority were liable in nuisance to residents of the subdivision under the flight path towards the north runway at Vancouver International Airport. The decision received a large amount of media attention and is current under appeal. It is of particular interest for its legal analysis of nuisance and the defence of statutory authority. There are similarities between recovery of damages for nuisance and recovery of compensation for injurious affection where no land is taken.

The plaintiffs were residents in a subdivision under the flight path of the north runway of Vancouver International Airport which went into operation in November, 1996. The airport land is owned by the Federal Crown and the authority operates the airport under lease from the Federal Crown.

Prior to the construction of the runway, an environmental assessment and review panel (EARP) recommended that persons who would be adversely impacted by noise if the runway were built be identified and compensated. That recommendation was not adopted by the Minister of Transport who, instead, chose to implement noise abatement procedures to address the problem of noise in surrounding areas.

The Court found that there had been a significant increase in the noise from landing aircraft passing over the subdivision following the opening of the runway. The Court also concluded that this noise would become worse in future when the new runway was used for takeoffs over the subdivision as well.

In assessing the interference caused by the noise, the Court considered the character of the neighbourhood and the utility of the impugned conduct. While the airport was found to be "of immense utility to the public at large", nevertheless the Court found that the nature of the burden imposed on the property owners in the subdivision "far exceeds that reasonable degree of tolerance expected of residential property owners to facilitate airport expansion". Other factors and defences were considered – the character of the neighbourhood, "coming to the nuisance", the fact that there were noisier residential areas on the lower mainland. None of these factors negated the finding that the noise associated with the use of the north runway constituted an actual nuisance.

The Airport Authority and the Federal Crown argued that if there was a nuisance, they were not liable as a result of statutory authority – the nuisance was the inevitable result of an undertaking authorized by statute.

The Court did not apply the defence for two reasons: 1) there was no statutory authority for the Airport Authority, which permitted the nuisance that occurred; and 2) if there was such statutory authority, the nuisance was not the inevitable result of performing statutorily authorized operations.

To come to the first conclusion the Court reviewed the statutory and regulatory framework and the relationship between the Federal Crown and the Airport Authority. The Court concluded that the Airport Authority was not statutorily authorized to construct or operate the north runway (which it did) and could not take advantage of the Minister of Transport's power to do so under the *Aeronautics Act*. The Court further concluded that the airport certification process and Air Traffic Control Regulations did not provide the statutory authority as they did not authorize the nuisance that occurred but were for the purpose of public safety.

With respect, the learned Judge applied the wrong test. The nuisance was not caused by the construction of the runway but rather by its use. Statutes and regulations governing the operation of airports and aircraft landing at airports authorize the use of the runway that caused the nuisance. Just because the purpose of this regulatory regime was public safety does not mean there was no statutory authority. The learned trial Judge seems to have confused this part of the test with the next part when he concluded that the statutory authorization was not intended to authorize nuisance.

The second part of the test for the defence of statutory authority is whether the nuisance was an inevitable result of performing the statutorily authorized operations. On this point, the Court concluded that the nuisance was inevitable only if the new runway had to be located where it was and operated to its fullest potential capacity. The Court concluded that the nuisance was not inevitable as there were possible alternatives, including the expansion of facilities at satellite locations in combination with the new runway at Vancouver Airport operated to lesser capacity or a runway at Vancouver Airport in a different location. The Court recognized that these alternatives might not have been as economical or functionally desirable or might have involved substantial costs of remediation but concluded that these measures were practically feasible in view of the situation and of expense.

The conclusion of the Court on this point is, with respect, also in error. With virtually every public project of this nature, alternatives exist. These alternatives are considered at length by the responsible authorities in the planning process. Courts are not well equipped to carry out this function. The restrictions placed on the defence of statutory authority in this case virtually eliminate the defence. Under appeal.