BRITISH COLUMBIA EXPROPRIATION ASSOCIATION
1998 FALL SEMINAR

ANNUAL CASE UPDATE AND REVIEW

This paper deals with the cases decided by the Expropriation Compensation Board, other boards, and the courts since the date of the 1997 British Columbia Expropriation Association Fall Seminar. Decisions dealing with costs issues are not dealt with in this paper as they form the specific subject of Mr. Melville's presentation. The cases are set out in chronological order by date of decision with the topic(s) of interest set out beside the case citation.

1. Stierle v. Queen in Right of Alberta

1998 63 LCR 171 - DISTURBANCE DAMAGES

Court or Board: Alberta Land Compensation Board
Date of Decision: April 25, 1997 (not received by LCR editors until February 23, 1998)

- This case is of interest in that it follows Pike v. Ontario Ministry of Housing (20 LCR 184) in awarding disturbance damages even though the highest and best use on the basis of which land value was determined was a higher use than the existing use.

2. Armstrong v. Ontario Heritage Foundation

1998 62 LCR 66 - VALUE OF RESOURCE PROPERTY, EXPERTS' REPORTS

Court or Board: Ontario Municipal Board
Date of Decision: June 4, 1997

- This is a decision of the Ontario Municipal Board that, although it predated last year's annual seminar, contains some issues of current interest. There is some interesting comment with respect to the valuation of resource properties - in this case a gravel pit. The Ontario Municipal Board held that, if the value of the resource is viewed as part of the market value of the land as opposed to a business loss claim, land value is determined by calculating the present value of the resource, along with the residual value of the land after extraction of the resource.

- The case is also noteworthy for its discussion of the evidentiary issues given rise to when experts amend their reports prior to the hearing. In this case the expert who calculated discount rates, tonnage and production rates with respect to the resource and as well the appraiser for the Respondent each amended their reports three times prior to hearing. The Board, while indicating that that number of amendments may be viewed as a negative reflection on the witness in question, concluded by commenting "...obtaining information

on a case such as this is often difficult and it is only when the work of another appraiser has been done and reviewed that the witnesses are able to examine the totality of the evidence."

3. **Barrett v. City of Barrie**
1998 62 LCR 316 - INJURIOUS AFFECTION

Court or Board: Ontario Municipal Board
Date of Decision: June 11, 1997

- This is a decision of the Ontario Municipal Board which appears to be authority for the proposition that damages for injurious affection are not claimable, under the Ontario *Expropriations Act*, arising from the "use of the works for which the land is acquired." (quotation from Section 40(1) of the B.C. *Act*). This decision appears to be one given rise to by rather eccentric facts - the Claimant being concerned with, for instance, the fact that "more passing pedestrians are better able to peer into" his yard. Cases with unusual facts often give rise to unusual results. It is not clear from reading the decision whether or not appraisal evidence was led to establish a reduction in value arising from the proximity of the new works (widened road and sidewalk) to the Claimant's house and garden. There is also some indication that the Board member who decided this case views some kind of general undifferentiated benefit to the community, arising out of the works, as being an appropriate set-off for any such claims for injurious affection.

4. **Patterson et al v. Ministry of Transportation and Highways**
1998 62 LCR 89 - STANDARD OF REVIEW - APPEALS FROM EXPROPRIATION COMPENSATION BOARD

Court or Board: B.C. Court of Appeal
Date of Decision: July 8, 1997

- Although the case was referred to in Mr. Hincks' submission of last year the issue following, which is of particular interest in light of later cases, was not touched on at that time.

- In this decision, on appeal from a decision of the Expropriation Compensation Board, the Court of Appeal concluded, in the course of dismissing the appeal brought by the Claimants and following the decision of the Supreme Court of Canada in Toronto Area Transit Operating Authority v. Dell Holdings Ltd., that the appropriate standard of review of a decision of the Expropriation Compensation Board is, at least in part, that of correctness. The Court of Appeal concluded that the Expropriation Compensation Board does not have, although it has expertise in assessing compensation, "any particular expertise in interpreting their constituent statute where no novel questions of law are raised". The conclusion to be drawn from this finding is that the Court of Appeal may feel an obligation to defer to the conclusion of the Board with respect to the assessment of compensation, but not with respect to interpretation of the statute itself.

5. **3F Developments (1987) Ltd. v. Regional Municipality of Waterloo**
1998 63 LCR 161 - PROCEDURE - PRIVILEGED DOCUMENTS

Court or Board: Ontario Municipal Board
Date of Decision: August 13, 1997

- In this case an obviously privileged letter was provided, in error, by the solicitors for the authority to the Claimants. The authority made an application to the board, during the course of other proceedings, requiring that all copies of the privileged letter be returned to it. The Board granted that request. In doing so it relied on relatively recent decisions which hold that the traditional rules relating to waiver of privilege do not apply where it is clear that the document was privileged and delivered in error, and as well on the basis that privilege may be waived only by the litigant, not by its counsel or agents.

6. **Costello v. City of Calgary**
1998 62 LCR 161 - CONSTRUCTIVE EXPROPRIATION/TRESPASS - MITIGATION

Court or Board: Alberta Court of Appeal
Date of Decision: September 8, 1997

- This decision of the Alberta Court of Appeal is of interest to those who have followed the unsuccessful trail blazed by me in attempting to convince the ECB and the Supreme Court of British Columbia that the remedy of constructive expropriation (if it exists in this province at all) should be given a liberal interpretation. The Costello decision arose when the City of Calgary thought it had effectively expropriated land from the owner, but in fact had not done so. The Supreme Court of Canada, in other proceedings, held that the expropriation was void.

- The court determined that the owners were entitled to compensation on the basis of trespass, and upheld the decision of the trial judge that the damages should be assessed as if, absent the City's wrongful occupation of the property, the Claimants would have developed a forty-unit motel on the property.

- The court also dealt with the issue, raised by the City, that the owners should have purchased another property and developed their motel on it. The court held that an owner is entitled to litigate for the return of property wrongfully occupied by the City, and is not required to settle for substitute property. In addition, in this case, the court's conclusion was that mitigation by purchase of alternate property was not reasonably possible in the circumstances.

- It appears from the reading of the trial court decision (1995 55 LCR 161) that the claim was advanced as one for damages in trespass, not alleging a constructive expropriation.

7. **Reimer v. City of Surrey**
1998 62 LCR 222 - CONSTRUCTIVE EXPROPRIATION/TRESPASS

Court or Board: British Columbia Expropriation Compensation Board
Date of Decision: October 10, 1997

The Board held in this decision that an owner of property subject to a requirement under the *Municipal Act* and applicable municipal bylaws for dedication of land and works and services if the property is subdivided is not entitled to claim compensation for constructive expropriation. The Board dealt with the matter on the basis that what has occurred is not a constructive expropriation even though the municipality had at one time negotiated with the owners for the purchase of a 30 metre strip to establish the works that would be required in the event of subdivision.

8. **Parks v. Ministry of Transportation et al**
1998 62 LCR 252 - STANDARD ON APPEAL

Court or Board: Ontario Court (General Division), Divisional Court
Date of Decision: October 21, 1997

In this decision of the Ontario Divisional Court the conclusion was that an appeal court owes "no particular deference" to a decision of the Ontario Municipal Board.

9. **Baines et al v. Ministry of Transportation and Highways (No. 2)**
1998 62 LCR 210 - OTHER SETTLEMENTS, IMPACT OF SETTLEMENT OFFERS ON SECTION 45(5)

Court or Board: British Columbia Expropriation Compensation Board
Date of Decision: October 29, 1997

- This case provides an indication that the Expropriation Compensation Board is taking a very narrow view of the use to be made of other settlements made by the expropriating authority in determining the market value of the land at issue. The Board said, essentially, that it requires something very close to a complete appraisal of the other property(ies) in question before finding the amount of a settlement to be of probative value.

- This decision arose out of the Baines case referred to by Mr. Hincks in his material last year. The Claimants achieved, at hearing, 112% of the total of the advance payments, but only 92% of the amount that would have been recovered had the Claimants accepted a settlement

offer made by the Ministry one week before the hearing. The settlement offer was made by way of a Calderbank letter. The argument was made on behalf of the Claimants that Section 45(5) of the *Expropriation Act* sets out the exclusive test that should be used by the Board with respect to the determination of entitlement to costs, and that the Board should not complicate the issue by incorporating costs entitlement tests from the Rules of Court or general litigation procedures. The Board held that a Calderbank letter "may be one factor in assessing the reasonableness of the owner in pursuing his claim for compensation". In other words if an owner does not achieve the 115% cut-off required by Section 45(5), and the Board is called upon to exercise its discretion as to entitlement to costs, a Calderbank letter may be taken into account in determining the reasonableness of the Claimant's conduct. Presumably, as well, even if the 115% cut-off is met, the Board may take into account a Calderbank letter in determining the "reasonableness" of the costs claimed.

10. <u>Linear Construction Corp. v. Minister of Transportation and Highways</u>
Appeal 1998 63 LCR 1 - DEFINITION OF OWNER, STANDARD ON APPEAL

Court or Board: British Columbia Court of Appeal
Date of Decision: October 30, 1997

- This decision of the British Columbia Court of Appeal reversed the decision of the Expropriation Compensation Board that Linear Construction was an owner as defined in the *Expropriation Act* by virtue of its status as general contractor engaged in the construction of works on the taken land. The court held that the phrase "legal possession or occupation of land" in paragraph (c) under the definition of "owner" in Section 1 of the *Expropriation Act* "connotes something more than a mere right to be on the land in question." There should be an entitlement "that is close or akin to an interest in land...a person cannot be said to be in legal possession or occupation within the meaning of the *Act* unless the person can be said to enjoy some benefit derived from the property itself."

- The court held in this decision that the test to be applied on an appeal from the Expropriation Compensation Board is one of correctness, and that no deference to an Expropriation Compensation Board decision is required. The court states that it relies on the <u>Patterson</u> decision referred to earlier in coming to that conclusion.

11. <u>Pitt and City of Red Deer</u>
1998 63 LCR 113 - STATE OF OWNER'S TITLE

Board or Court: Alberta Court of Appeal
Date of Decision: November 19, 1997

- This case deals with the issue of how the status of the Claimant's title, prior to the expropriation, is to be determined in the context of the Alberta statute which makes specific

reference to those questions. Section 69(1) of the Alberta *Expropriation Act* provides that if there is any lack of clarity as to the title of the Claimant, the authority is to apply to the court to have that issue resolved.

- This case arose when the Claimants took the position that 2.2 acres of land had accreted to their property prior to the expropriation. The necessary surveys and applications with respect to title to that accreted property had not been made prior to the expropriation.

- In British Columbia it would seem likely that the Board would find itself having jurisdiction to make determination as to the state of the Claimant's title. It may well be that making such a determination is a necessary part of determining the market value of the land.

12. <u>Glendale Trading Ltd. v. British Columbia</u>
1998 63 LCR 52 - E.C.B. - INDEPENDENCE OF THE ECB

Court or Board: British Columbia Expropriation Compensation Board
Date of Decision: November 25, 1997

- Counsel for the claimant in this matter appears to be following the same sort of quixotic trail with respect to bias issues that I have been following with respect to constructive expropriation. In this case counsel took the position that the B.C. Expropriation Compensation Board should be disqualified from hearing the claim for compensation brought in the subject action on the grounds that the Board lacked the appearance of independence, and as well the appearance of impartiality, on the following grounds:

  a) that the short-term nature of the appointments under which part-time members of the Board serve create conditions of sufficient uncertainty of remuneration and tenure that the decisions of those members could be coloured by apprehension that their employment would not be continued if their decisions were not favourable to the government;

  b) some members of the Board have from time to time served the Provincial Government in other capacities and thereby would have a greater interest in protecting the public purse than would be the case if they had not had such other employment;

  c) that two members of the panel hearing this case had previously ruled against the claimant in another case in which counsel appeared, with respect to which he had obtained leave to appeal.

- The Board found that none of the three grounds upon which the application was brought warranted the panel disqualifying itself.

13. **Country View Estates Ltd. v. Halifax Regional Municipality**
1998 3 LCR 228 - EVIDENCE - PRIVILEGE

Court or Board: Nova Scotia Utility and Review Board
Date of Decision: November 28, 1997

- In this case the parties agreed jointly to retain an appraiser. The matter did not settle on the basis of that joint report, however, and when the matter proceeded to hearing the owner wished to place that report in evidence. The authority objected. The Board ruled that the report was inadmissible because it was privileged. It was commissioned in an attempt to negotiate a settlement, and was subject to the implied condition that it would not be disclosed to the Board if the matter did not settle.

14. **Wilson v. City of London**
1998 63 LCR 294 - INJURIOUS AFFECTION

Court or Board: Ontario Municipal Board
Date of Decision: December 7, 1997

- This is a decision dealing with the pernicious "Rule in Edward's case" which is made applicable in Ontario by the specific wording of the Ontario *Expropriations Act*.

- The Edward's Rule provides that compensable injurious affection may encompass only losses resulting from the activities of the authority **on the land taken from the owner.** If, for instance, a small piece of land is taken from an owner to construct, for instance, an airport, only the activities of the authority on the parcel of land taken from that owner may form the subject of an injurious affection claim if the Edward's Rule is to apply. The Ontario Board in this decision went further and stated that the Edward's Rule would also apply to what are called personal and business damages under the Ontario *Act*. Interestingly enough the Ontario Municipal Board, in coming to this conclusion, indicates that it followed those portions of the Dell Holdings case which require that the *Act*, being a remedial statute, must be given a broad and liberal interpretation consistent with its purpose.

- The B.C. *Expropriation Act*, in defining injurious affection in Section 40, eliminates the possibility that the Edwards disease will be imported into British Columbia.

15. **Comeau v. Nova Scotia**
1998 63 LCR 63 - CONSTRUCTIVE EXPROPRIATION/TRESPASS

Board or Court: Nova Scotia Utility Review Board
Date of Decision: December 19, 1997

- This case involved the construction of a road, by the authority, on the land of the Claimants prior to an expropriation being effected. The decision is authority for the proposition that under those circumstances the value of the works constructed by the authority (in this case a paved road) was a compensable item of claim. The value of the paved roadway in this case was determined on the basis of the cost to construct.

16. **<u>Greatbanks v. Sunshine Coast Regional District</u>**
Kamloops Registry - Action #25493 - DOWN-DESIGNATING BY OCP

Court or Board: Supreme Court of British Columbia
Date of Decision: December 31, 1997

- This case is of interest in that it confirms the earlier B.C. Supreme Court decisions in <u>Hall</u> and <u>Century Holdings</u> providing that an OCP designation of lands to a lower value or use is not of legal effect unless the OCP designation is backed up by proper budgeting, by the authority enacting the OCP, to allow the object of the designation to be achieved.

17. **<u>Hollis v. British Columbia Minister of Forests</u>**
#45/97/152 - - ADVANCE PAYMENT

Court or Board: British Columbia Expropriation Compensation Board
Date of Decision: February 3, 1998

- In this case there were two registered owners of the property in question, against which a mortgage was registered in favour of Royal Bank. A single advance payment cheque was made payable to all three (the two registered owners and the bank). The advance payment cheque was negotiated after which the Claimants then took the position that the advance payment, not having been made to the registered owners only, and by way of separate cheque delivered to each owner, was invalid. The Board gave short shrift to this argument, on the grounds that a Claimant cannot have his/her cake and eat it too.

18. **<u>Devick v. The Queen in Right of British Columbia</u>**
1998 63 LCR 193 - EVIDENCE

Court or Board: British Columbia Court of Appeal
Date of Decision: February 23, 1998

- In this decision the court of appeal used the fact that one of the experts, Mr. Matheusik, had not seen the subject site prior to the taking and construction of the authority's works in order to call into question the probative value of his opinion.

19. Lake Skaha Tent & Trailer Park and B.C. Gas Utility Ltd.
#85/95/154 - LIMITATION

Court or Board: British Columbia Expropriation Compensation Board
Date of Decision: April 8, 1998

- In this case an advance payment was made to the Claimants on October 3, 1994. The advance payment cheque was negotiated by the Claimants. The Notice of Advance Payment was not served with the cheque. On March 7, 1995 the Notice of Advance Payment was served on the Claimants and back-dated "as of September 30, 1994". The Application for Determination of Compensation was not issued until November 29, 1995, within time if the operative date was March 7, 1995, but not within time if the operative date was October 3, 1994. The Board, following Erickson v. Kamloops (50 LCR 81), held that it is the making of the advance payment that starts time running, not the Notice of Advance Payment.

20. Actton Petroleum Sales Ltd. v. MoTH
CA021742 Vancouver Registry - APPEALS - DEFERENCE

Court or Board: British Columbia Court of Appeal
Date of Decision: May 28, 1998

- In this case the British Columbia Court of Appeal again refers to the issue of the extent of deference to be allowed to a specialized tribunal, such as the Expropriation Compensation Board, on appeal. The court confirms what was said by the Court of Appeal in the Patterson case (62 LCR 89) stating that deference is not required when the issue was a pure legal question of interpretation of a provision of the *Act*. The Court goes on to state the standard on appeal with respect to issues of pure law is that of correctness, and the proper standard of review with respect to factual issues or issues of mixed fact in law is that of reasonableness.

21. **Whitechapel Estates v. Minister of Transportation and Highways and Delta**
1998 63 LCR 121 - JUDICIAL REVIEW PROCEDURE ACT

Court or Board: B.C. Court of Appeal
Date of Decision: August 18, 1998

- This case determines that Section 51(2) of the *Expropriation Act* does not bar an application for judicial relief in the nature of prohibition that does not require for its assertion the use of the *Judicial Review Procedure Act.*

22. **Golden Valley Golf Course Ltd. v. MoTH**
ECB Control #35/91/160 - PRACTICE AND PROCEDURE

Court or Board: Expropriation Compensation Board
Date of Decision: September 8, 1998

- This decision of the Expropriation Compensation Board is authority for the proposition that the Board has a supervisory jurisdiction which may allow it to refuse to "accept" a discontinuance of a claim for compensation under circumstances where the discontinuing of a claim would result in an injustice.

23. **Hansen & Carefree Homes Ltd. v. MoTH**
ECB Control #60/96/161 - LIMITATIONS

Court or Board: Expropriation Compensation Board
Date of Decision: October 2, 1998

- The Board ruled that notwithstanding its wording Section 25 of the *Expropriation Act* applies to Section 3 Agreements, and as well that an authority may be estopped from relying on the limitation under appropriate circumstances.

****

October 29, 1998