

BRITISH COLUMBIA EXPROPRIATION ASSOCIATION

2001 FALL SEMINAR

ANNUAL CASE UPDATE AND REVIEW

This paper deals with the cases, of interest from my perspective, decided by the British Columbia Expropriation Compensation Board, other Boards, and the courts since the 2000 British Columbia Expropriation Association Fall Seminar. The cases are set out in chronological order by date of decision with the topic(s) of particular interest set out below the case citation. The decisions where no scoreboard appears indicates that the issue of interest has no significant general impact on either claimants or authorities.

TOPPING - MIN. OF T.

ECB number 40/99
B.C. Expropriation Compensation Bd.

COSTS - TARIFF
October 20, 2000

- A Section 48 application for costs reimbursement prior to the conclusion of the claim. The Vice-Chair wrestled with the insoluble problem of trying to transpose time billings to the various categories provided for the tariff, and determining at what point in time reimbursement can be claimed for a particular category of service, in this case, item 7, discovery of documents. The Board also determined, with some emphasis, that a claim for moving expenses only is a scale 1 claim for costs reimbursement. The case is worth reading if you want to get a feel for the vagaries that can arise out of the application of the tariff in a Section 48 application.

SCOREBOARD

CLAIMANT

AUTHORITY

DENAULT - BARCLAY

ECB 41/00/191 71 LCR 185
B.C. Expropriation Compensation Bd.

WATER ACT EXPROPRIATION
RES JUDICATA
November 24, 2000

- Another *Water Act* expropriation case. Interesting discussion of the procedural aspects. No substantive result – the Respondent lost his application to quash the proposed

expropriation on the grounds of res judicata, and the Claimant, it was suggested “editorially” by the Chair, was trying to expropriate the wrong land.

SCOREBOARD

CLAIMANT

RESPONDENT

GONEV, DOUGLAS ET AL – CITY OF RICHMOND

ECB 04/98/192

H & BU, DENSITY,
S. 33,
S. 31
APPRAISERS

B.C. Expropriation Compensation Bd.

December 18, 2000

- A lengthy examination of planning and appraisal issues in a case involving three adjacent parcels in Richmond.
- The Board made findings as to highest and best use, then determined that Section 31 applies to eliminate any claim for disturbance damages under Sections 34 and 38. The traditional rule, and the statutory provisions, being applied to conclude that if the property is valued at a higher and better use than the existing use disturbance damages are not awarded. But what about the Pike and Husband v. Langley line of cases that modify that rule when the existing use is a reasonable holding use? The Board said that the Court of Appeal in Kliman has eliminated that argument in B.C., with complete finality.
- The Board made a relatively strong statement that it is the job of the appraiser to determine highest and best use. The appraiser can be assisted by a planner, but the ultimate responsibility is that of the appraiser.

N.Y. AUTOMOTIVE LTD. – CITY OF RICHMOND

ECB 03/98/193

TOTAL TAKE, DISTURBANCE
DAMAGES, EMPLOYEES
OFFICERS OF BUSINESS

B.C. Expropriation Compensation Bd.

December 22, 2000

- An interesting decision worth reading for the discussion of the way a proprietor, even though operating through a limited company, is to be compensated when the business is shut down as a result of a taking and it is not feasible to relocate.

SCOREBOARD

CLAIMANT

AUTHORITY

RASCAL TRUCKING – CITY OF NANAIMO

ECB 71/00/194

EXPROPRIATION – DEFINITION,
EXP. ACT S. 41, LOCAL GOVT.
ACT CLAIM

B.C. Expropriation Compensation Bd.

December 28, 2000

- A case of some interest as it relates to determining whether or not topsoil moved to a site becomes part of the land, or remains a chattel or personal property.

CHU AND CHU – BD. OF SCHOOL TRUSTEES - SURREY

ECB 35/99/195

COSTS - TARIFF

B.C. Expropriation Compensation Bd.

January 9, 2001

- A useful review of the tariff provisions, as the ~~Vice~~-Chair attempts to explain the unexplainable and reconcile the irreconcilable.

SCOREBOARD

CLAIMANT

AUTHORITY

MISCHEK – MIN. OF T.

ECB 36/98/196

EXPROPRIATION,
CONSTRUCTIVE EXPROPRIATION

B.C. Expropriation Compensation Bd.

Jan 10, 2001

- An interesting decision arising out of some unusual facts – the subject property was encroached upon by road works constructed by the neighboring property owner. The Ministry of Transportation did some acts indicating an adoption of the road works. There was no formal expropriation. The issue is whether there is relief pursuant to the principle of constructive expropriation. The Board says no. Leave to appeal to the Court of Appeal has been granted.

TOPPING – MIN. OF T.

ECB 40/99

COSTS – TARIFF

B.C. Expropriation Compensation Bd.

January 16, 2001

- Another chapter in the saga of the development of jurisprudence for issues arising out of the tariff. A point to note from this decision is that the Vice Chair urges authorities to communicate the specific objections, to items or disbursements, to Claimants' counsel

before the costs hearing. This is of course a basic and sensible procedural requirement not having any particular reference to the existence of the tariff.

CHAN – CITY OF VANCOUVER

ECB 72/00/197
B.C. Expropriation Compensation Bd.

COSTS – TARIFF AND PRE-TARIFF
January 22, 2001

- A shot at the tariff issues by the now-departed-from-the-Board Mr. Greenwood. Some discussion of the “usual suspects” in terms of arguments raised by both sides. The important point in this case is the determination that services rendered prior to the tariff coming into force (June 28, 1999) are not subject to tariff considerations, either directly, or indirectly by taking those services into account to determine the reasonableness of the accounts subject to the tariff.

SCOREBOARD

CLAIMANT

AUTHORITY

SEQUOIA SPRINGS – MIN. OF T.

ECB 93/95/198
B.C. Expropriation Compensation Bd.

FUNCTUS OFFICIO - COSTS
January 26, 2001

- When the Board made its decision as to costs, it did so, in determining whether or not the 115% trigger point had been reached, on the basis of an under-calculation by the Respondent of the amount of the advance payment. The Ministry applied to the Board to re-open the costs issue, to reconsider its award of costs in light of the correct information as to the advance payment. The Board held that it could reopen its earlier decision as to costs, and was not functus officio. The result did not change. The Board held that even though the Claimant had not achieved 115% of the amount of the advance payment, it was close enough, and discretion was exercised in its favor.

SCOREBOARD

CLAIMANT

AUTHORITY

CAMPBELL RIVER WOODWORKERS' – MIN. OF T.

ECB 35/97/200
B.C. Expropriation Compensation Bd.

H & BU
February 12, 2001

- A case in which the Claimant asserted that its compensation for the value of land and buildings expropriated from it should be calculated on the basis of the above-market return

provided by a long term lease, instead of the “conventional” appraisal approach to valuation. The Board said no. Leave to appeal has been granted by the Court of Appeal.

PREMANCO INDUSTRIES – MELP

ECB 23/94/201
B.C. Expropriation Compensation Bd.

COSTS – TARIFF
February 15, 2001

- A decision turning on the characteristics of a claim that could merit the award of costs on scale 3 of the tariff. One of the points made is that the Claimant cannot, by overcomplicating matters itself unilaterally, claim that the matter is one of more than usual complexity and justifies scale 3. It will be interesting to see how the Board deals with a claim in which it is alleged that the Respondent has “unilaterally” overcomplicated the proceedings.

MORTON ESTATE – BC HYDRO and MELP

CA025342 Vancouver
B.C. Court of Appeal

SETTING ASIDE EXPROPRIATION
March 20, 2001

- Presumably the end of the long path of litigation (this case was referred to in my 1999 paper for this conference) arising out of the attempts of the Morton heirs to set aside an expropriation, by Hydro, some 30 years ago. The compensation was settled at the time of the acquisition, but the heirs were upset that the land was subsequently transferred to the Province for use as a park instead of being used by Hydro for the power project. The grounds of the attack on the expropriation were “improper purpose”. The Plaintiffs’ claim was dismissed on the finding that the then owner signed a release after compensation was settled, and the fact that too much time had been allowed to pass.

VANCOUVER MARINA – MIN. OF T.

ECB 34/99/205
B.C. Expropriation Compensation Bd.

EXPROPRIATION – DEFINITION
RESUMPTION
LAND ACT
March 28, 2001

- In this decision the Board determines that the “extraction”, from a foreshore lease issued pursuant to the *Land Act*, of certain lands by the Ministry of Transportation for the purposes of the Ministry, is either a resumption or the exercise of non-compensable rights reserved by the *Land Act*.

MADDOCKS – CITY OF SURREY

ECB 17/97/206, 07/98/206

STAT. R/W COMPENSATION
OWNER
SPECIAL BENEFIT
DISCOUNT RATE – 5%
COSTS – TARIFF SCALE
April 2, 2001

B.C. Expropriation Compensation Bd.

- In this case the Board determines that a lessee, the lease being for a term of under three years, and unregistered, is an owner for the purposes of the *Expropriation Act*.
- It appears that the statutory right of way acquired by Surrey was treated as a fee taking for compensation purposes, as there is no discussion of the terms of the srw nor of any residual rights of the owner to utilize the surface.
- The Board rejected the Respondent's claim for deduction of special benefit finding that unless moneys spent by the authority benefit the remainder, there is no benefit. The Respondent argued that because it spent funds on works intended to reduce the impact of the acquisition on the remainder, the amount of those funds should be deducted from any compensation entitlement.
- Extensive discussion of valuation of fringe ALR agricultural properties.
- The Board determined a discount rate of 5% to be appropriate, for future losses over 20 years.
- The Board awarded some of the costs at scale 3.

SCOREBOARD

CLAIMANT AUTHORITY

GOLDEN VALLEY GOLF COURSE – MIN. OF T.

CA 25117 Kamloops

PROCEDURE
BIAS

B.C. Court of Appeal

June 5, 2001

- This decision brings to an end, presumably, the long saga that resulted from an overpayment by the Respondent when it made its original advance payment. I see earlier decisions arising out of this epic litigation noted in my papers for the 1996 and 1998 Fall Seminars.
- A mortgage was granted by the Claimant to the Respondent to secure the difference between what the advance payment was, and what it should have been. The Respondent's contemplation was presumably that the matter would go to hearing, or there would be negotiations to bring the claim to a final conclusion. The Claimant, apparently realizing that it was unlikely to make more than the advance payment by litigating the claim, chose to file a notice of discontinuance, take its money, and go away. The Court of Appeal ruled that a Claimant under these circumstances cannot just unilaterally discontinue. The

majority said the Act puts an obligation on the Board and parties to have every claim heard. Madam Justice Rowles, in a dissenting opinion, disagreed with that point (so, with respect, do I) but said that in any event the granting of the mortgage estopped the Claimant from unilaterally discontinuing.

- The bias issue arose from a member of the panel, who heard various applications brought by the Respondent after the discontinuance was filed, having taken a job with the Ministry of Attorney General before the reasons of the Board were issued. On the basis of apprehension of bias the Court (2:1) ordered the matter remitted to the Board for rehearing of the last application of the Respondent.

RASCAL TRUCKING - NANAIMO

ECB 41/01/207

LOCAL GOVT. ACT
COMPENSATION PROVISIONS,
RES JUDICATA

B.C. Expropriation Compensation Bd.

June 8, 2001

- The claimant who had brought the claim for compensation referred to earlier in this paper brought proceedings again, arising out of the same facts, but sought to argue that Section 312 of the *Local Government Act*, which had not been argued in the previous "round", allowed for compensation to be paid. The Respondent argued, successfully, res judicata.

BAYVIEW BUILDERS – MIN. OF T.

ECB 73/91/209

BUSINESS LOSSES – PARTIAL
TAKE FROM COMMERCIAL
PREMISES

B.C. Expropriation Compensation Bd.

September 20, 2001

- A lengthy discussion of the principles relating to the determination of various categories of business loss in a partial taking situation.

SCOREBOARD

CLAIMANT

AUTHORITY

✓ PAYLESS GAS – MIN. OF T.

ECB 8/91/210

DISTURBANCE DAMAGES,
RELOCATION

B.C. Expropriation Compensation Bd.

September 21, 2001

- Interesting discussion of valuation considerations when a business is required, as a result of a total taking, to relocate.

CAMPBELL RIVER WOODWORKERS – MIN. OF T.

ECB 35/97/211
B.C. Expropriation Compensation Bd.

ADVANCE PAYMENTS
October 1, 2001

- An interesting factual situation giving rise to the issue of whether or not a further advance payment, not made within 10 days before the commencement of the hearing, should be considered in determining whether or not the Claimant has achieved the 115% trigger point to be entitled as of right to reimbursement of costs.

SCOREBOARD

CLAIMANT

AUTHORITY

October 08, 2001