BRITISH COLUMBIA EXPROPRIATION ASSOCIATION

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ANNUAL CASE UPDATE AND REVIEW

Presented by:

Alan V.W. Hincks
Ministry of Attorney General, Victoria

and

Robert S. Cosburn
Cosburn & Associates, Victoria

B.C. Expropriation Association – 2005 Fall Seminar

RECENT CASES OF NOTE

Holdem v. B.C. Transit – ECB - 9 March 2005

Leave to Appeal granted to Transit, June 10 2005 on following grounds:

1. highest and best use;
2. non-disclosure of financial performance of Chevron;
3. larger parcel;
4. misinterpretation of the SRW

- **B** This is a generally well written decision, containing an interesting and accurate discussion of the nature of the statutory right of way in issue.
- **B** The Board refers in Paragraph 70 to the "larger parcel "concept. It seems to me this is not a useful concept for use in B.C. in light of the clear provisions of Section 40 of the *Expropriation Act.*
- **B** At paragraph 81 the Board finds there to have been a taking entitling the owner Chevron to compensation for Lot 89. Chevron had advanced an alternative claim under Section 41 – injurious affection where no land is taken, which becomes redundant in light of the earlier ruling. A board in my view should simply determine compensation for the taking and leave the matter there. If the board is wrong in its conclusion the Court of Appeal can consider, if asked and if leave is granted, determine whether or not there is entitlement to compensation under Section 41. The Board however deals with whether or not there would be a claim under Section 41 "in the event we are mistaken" but its conclusion is no more than "it is doubtful

whether Chevron's case would satisfy all the requisite tests to be met under Section 41..." (Paragraph 89). These are unhelpful musings. If the Board is going to take it upon itself to "examine this alternative possibility" (Paragraph 81), which in my respectful opinion it should not because it is not helpful, it should do so with finality. The Board also, in paragraph 92, says "we also consider it questionable, but do not purport to decide...." when considering the applicability of a statute to the claim. Jurisprudence is most useful to everybody if it is clear, precise, and related to the claims and findings made. Doing what the Board has done here can be interpreted as an attempt to dissuade a party from appealing, or attempting to trammel the discretion of later adjudicators.

- **B** The Board says in Paragraph 137 that "dedications of land, we were reminded, are often a quid pro quo of the rezoning process." This may be misleading. Dedication may be lawfully required if the results of the rezoning will adversely impact existing public works. Uninformed development approval authorities often appear to treat the making of a development application as being akin to Marco Polo going through the territory of a warlord on his way to the Orient, and attempt to extract tribute no matter what the circumstances. The Marco Polo approach is not a useful adjunct to the legal process and it is possible that statements like this may be read to dignify it.

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- **A.** The properties were difficult to value. There was a big issue over HBU before the taking. While the property operated as a gas station and was zoned for such use, it was smaller than desirable for a modern facility, required an uncertain re-zoning to add ancillary business (c-store, car wash etc) and was not performing particularly well in terms of volume of sales. On the other hand, there were definite locational advantages for the gas station use, this was the

actual use under existing zoning and no other particularly compelling use was apparent. It will be interesting to see how the CA deals with this issue, particularly the Board's use of the phrase "at least marginally probable" in connection with obtaining re-zoning [159, 258].

- **A.** The authority's case was not helped by the plethora of reports by its experts, with inconsistent or evolving opinions. The appraiser had expressed final opinions on the issues on three earlier occasions [229] and the industry expert produced two reports [121-123].
- **A** The taking was by SRW. There was no fee simple taking from either property. The appraiser's approach, as adopted by the Board, was to determine a fee simple value of the land taken, and then to apply a percentage to reflect residual value. The extent of this reduction land value followed from an analysis of both physical and legal factors. For example, part of the SRW was for a concrete column resting on the ground. There the reduction in value was 100% (equivalent to a fee taking). For other areas affected by the SRW (for the elevated guideway), the Board assessed a reduction in value of between 65% and 85% [332].
- **A** This is a long decision (70 pages). The Board considered in great detail the numerous difficult appraisal and legal issues raised One might wonder, in a moment of idle speculation, whether the CA, or in future, the Supreme Court, will be able to deal with these issues in a better way

Campbell River Woodworkers v. Min of T – ECB Costs Decision – 11 February 2005

- **B** In Paragraph 28 the Board says "Applying the Court of Appeal decision, it follows that the test of allowable costs for both pre-and post- Tariff is that set out in Section 45, reasonable costs necessarily incurred." What is meant by that? Does the Board mean that the Tariff of Costs Regulation is to be ignored? Apparently not because the Board went on to apply it. The

confusion arises from the wording of the unnamed Court of Appeal decision quoted, which is at best not clear. Surely the law is that a reimbursement claim for costs incurred since the tariff came into force is first categorized by tariff item, then the reasonableness test is applied to the tariff total. This part of the decision does not assist with the clarity of the process.

- **B** Issues of the Calderbank offer are resolved again in this case by considering the contents of any such offer from the point of view of overall reasonableness.
- **B** It would appear that the Board has found that the Claimant was entitled (it was reasonable) to proceed to hearing on the two unsuccessful issues because it had expert advice encouraging it to do so. If, as it turned out in this case, that expert advice was incorrect – is it still reasonable?
- **B** In Paragraph 80 the Board, quoting from its decision in Sangha, says "there are policy considerations which militate against a wholesale disallowance of costs in expropriation compensation proceedings". Should there be policy considerations taken into account by adjudicatory tribunals? What are they? Who makes them? Are the parties to know what they are? Are they binding on anybody? Is not applying policy considerations such as those referred to entirely inconsistent with the quasi-judicial function that the Board was constituted to carry out? The Board is after all an adjudicatory tribunal, not a regulatory tribunal which may be expected to have a policy mandate.
- **B** The Board applied a "statutory" reduction factor of only 20% across the board to each of the accounts before it for review, notwithstanding the conclusions of the Board that the market value issues were "fraught with difficulty and highly unlikely to succeed" and that the case was "prepared and conducted in an extravagant manner" although the Respondent had argued for a 50% reduction.

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- **A** Much of the argument here concerned the significant proportion of costs claimed for advancing two compensation issues that were doomed to failure at the outset. They were special economic value to the Claimant as a result of a secure long term cash flow from a commercial lease and disturbance damages for capital gains paid as a result of the expropriation.
- **A** Very experienced counsel for the claimant at the compensation hearing gave evidence at the costs hearing that he had advised the claimant of the risks associated with the above issues, and particularly the risk that that there might not be reimbursement for costs incurred on those issues.
- **A** In the result, a very significant reduction from costs claimed (in excess of 50%) was applied, not only because of the two compensation issues, but also because of general excesses.

Associated Building Credits v. Ministry of Transportation – ECB – 21 September 2005

- **B** This is essentially a special value to owner compensation claim in which the bulk of the compensation claimed by the Claimant turned on the ability of the Claimant to achieve an argued unusually high return funds in its possession. The claim was stated to be a loss of use claim, or loss of return on the value of the subject.
- **B** The evidence with respect to the loss of use claim was given by a business valuator. The Board found that the loss calculations and conclusions in his report were not reasonable and that the scope of his report was excessive. Having found that, however, and awarding no

compensation for the claims based on the valuator's report the Board allowed reimbursement of 50% of the costs of the valuator.

- **B** The Board in Paragraph 32 says "Only disturbance damages arising after this time [the date the process of expropriation commenced] can be said to have been caused by the expropriation, and therefore be recoverable" and then deals with the difficult issue of when the "process of expropriation" in fact commences in a useful way.
- **B** The Board finds that the Claimant would have continued to hold the property for future development or sale in the absence of the project, and as such did not award compensation for delay occasioned by the Respondent's long planning process leading up to construction of the project. Then the Board goes on to determine what that loss would have been "if it is wrong". My suggestion is that boards not do this – it presumably delays the production of the decision and if the Court of Appeal reverses the conclusion it can be expected to remit the matter back to the Board or to the Court for resolution. Again this approach makes one think that the Board is taking it upon itself to nudge the parties or the court with respect to the appeal process, or any subsequent adjudicator dealing with the quantum issues. There is no jurisprudential or other value, in my view, in encumbering a decision with dicta of this sort.
- **B** The Board reduced the Claimant's costs reimbursement by 10% for costs incurred after December 5, 2003 and allowed only 50% of the costs incurred with the valuator – again a small reduction when looked at in light of the Board's comments as to likelihood of success – " a significant amount of time and expense has been expended to advance a claim that given the authorities and the evidence that was adduced, had very little chance of success.", and, with respect to the valuator "...loss calculations and conclusions...were not reasonable given

the facts in this case...." and "...the scope of ...report was excessive", and "there was no basis for the claimant to retain....to provide ...calculations far past the date of expropriation".

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- **A** Application for leave to appeal by the Claimant has been delivered, but has not been set down yet. Grounds – everything wrong.
- **A** This case involves an undeveloped parcel of land near Victoria. Part of the property was expropriated for an interchange. The access to the property was changed. Compensation for land taken and injurious affection was settled. The sole issue was a "sterilization claim" based on Dell Holdings.
- **A** Main issue was causation – did the expropriation process prevent the claimant from selling or developing the property? The Board concluded that it did not. Claimant's case was probably not helped by the fact that the remainder of the property remained unsold and undeveloped for the 8 years that elapsed between the expropriation and the hearing.
- **A** It seems from its comments in this case, and in DKS (see below) that the Board, like the Ontario Court in *Bernard Homes* [89, 90] is not going to allow the broad language of *Dell Holdings* to facilitate claims that are "subjective and speculative".
- **A** There were serious problems with the claimant's opinion evidence, both of a fundamental and a technical nature. Most of these are described in the decision.
- **A** Modest (in the circumstances) reductions in costs were applied.

Greger v. Lillace & Riddle & Hawthorne – ECB – 3 June 2005

- **B** This decision arises out of an expropriation under the *Water Act* by a property owner having a water license allowing use of water from neighbouring lands.
- **B** The decision is broken down into numbered paragraphs, 78 in total. Of those 78 paragraphs 71 deal with legal issues relating to the procedure to expropriate the water license and entitlement to expropriate for the purpose of the works to be constructed and the "nature of the instrument" – the terms of the easement interest to be acquired.
- **B** All of the compensation content of the decision is contained on two pages, in seven paragraphs.
- **B** This appears to be a matter that would appropriately be dealt with by the Court pursuant to a judicial review application to set aside the expropriation. If the Court refused the application to set aside the expropriation the matter could then be referred to the Board for a relatively speedy determination of compensation.

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- **A** It is easy to get the parties mixed up here. The claimant was the licensee under the *Water Act*; the Respondent the landowner across whose land an easement was proposed. The respondent argued that the Board should conclude that the easement was not "reasonably required" within the meaning of section 27(2) of the *Water Act*.
- **A** The Board concluded that the proposed easement was reasonably required, approved the form of the easement and assessed compensation at a total of approximately $1,100 [75].
- **A** The Board concluded that its powers under 27(2) were limited. The Board could not go behind the water license issued by the Comptroller of Water Rights. An earlier Board decision on a *Water Act* expropriation, *Denault v. Barclay*, was distinguished on a number of factual bases [63].

- **B** The Board states in its analysis "...did not produce compelling evidence to show...", and in another part of the analysis "The panel did not receive solid evidence of how far removed....". As a lawyer looking for specificity and clarity in decision to allow predictability that is one of the functions of jurisprudence, terminology like that does not assist. It is impossible to know what compelling or solid evidence may be under these circumstances, and the relationship between the conclusions by the Board in those two respects and the conventional burden of proof of those elements.
- **B** The Respondent apparently argued that the landowner should be disentitled to some elements of its disturbance claim for works required to be constructed to accommodate the remainder of the property to the impact of the project, because the landowner should have first asked the Ministry to do works of accommodation of that sort as part of its project. The Board "agrees this would have been the ideal situation...". Presumably what the panel means is that the Ministry should have, in an ideal situation, constructed its project in such a way as to minimize the impact on the remainder, and construct such works as would reasonably accomplish that end. I assume that the panel is not holding that failure of a Claimant to do so would affect the claim. Having said that however the panel went on to find that the failure of the Claimant "to attempt to resolve the issue earlier" does not prevent it from seeking compensation before the Board.
- **B** The Board determined that costs should be awarded to the Claimant but on Scale 2, concluding that the issues were not of more than ordinary difficulty or importance. This was a

matter in which there were particularly convoluted sets of proceedings resulting from an apparent alleged initial overpayment in the advance payment. There were attendances by counsel and various formal proceedings before both the Board and the Courts required to resolve those issues so the matter could go forward. There are three reported decisions of the Board listed in its database. It would seem that if the Claimant is put to cost and extra proceedings as a result of the misstep of the authority that, bearing in mind the tariff caps that apply now, increasing the scale of recovery may be an appropriate expression of both reimbursement and recognition that the authority is not immune to "penalty" if it makes errors (or thought it had made an error when it didn't as turns out to be the case) resulting in extra steps having to be taken by the landowner.

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- **A** There is a lengthy history to this claim, full of strange events and ironies.
- **A** The claimant relied on the opinion evidence of the appraiser initially retained by the Respondent. The Claimant tried to settle for a significantly lower amount than the Board eventually awarded by discontinuing its claim, but the Respondent resisted, "successfully" (a Pyhrric victory as it turned out). When this case went to the CA, it determined that while the Board's decision was correct, it should be set aside on grounds of bias (a throwaway argument by the claimant).
- **A** The decision is otherwise unremarkable, although one might muse over the transliteration of costs to disturbance damages, and the ruling on the effect of the additional payment on interest.

DKS & VW Ventures Corp et al v. Board of School Trustees of School District Number 34

– ECB – 11 May 2005

- **B** This is a very well reasoned and laid out decision. The contents are very clear, specific and easy to follow, and it should be a model for other adjudicators dealing with valuation issues.
- **B** A claim for damages for delay (Dell Holdings) was asserted unsuccessfully. The decision contains a useful outline of the applicability of the Dell principles.

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- **A** An application for leave to appeal this decision has been filed by the Claimants, although to my knowledge it has not been heard. The decision is also the subject of a proceeding under the *Judicial Review Procedure Act* challenging the jurisdiction of the Board to issue decisions after March 18 2005 (coming into force of the *Expropriation Act Amendment Act*).
- **A** Another detailed decision (27 pages), of particular interest to appraisers. The HBU was agreed to be short term holding for residential development – surrounding lands either had been or were within the process of development.
- **A** The Board applied its own appraisal, using a summation approach rather than the before and after method. The land was valued overall on a per acre basis. A large adjustment had to be made for topography and riparian factors [102]. Injurious affection consisted of the value of two lost net lot [105].
- **A** Claims for a variety of disturbance damages were denied for the most part, among them a large claim for delay damages on the land taken prior to the expropriation. The Board concluded that, as in its *Associated Building Credits* decision, the failure to commence development could not be attributed to the authority [152].

CONCLUDED APPEALS

Clements v. Penticton (City) 2005 BCCA 212 (April 8 2005)

Appeal by Claimants of ECB decision of February 10 2003 dismissed.

Chivers v. HMTQ 2005 BCCA 305 (June 3 2005)

Appeal by Claimants of ECB decision of August 12 2003 dismissed.

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