NOTES FOR CASE COMMENT AT EXPROPRIATION ASSOCIATION MEETING, OCTOBER 1999

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Double Alpha Holdings Corp. v. Centra Gas British Columbia Inc. (1998), 65 L.C.R. 99 (B.C.E.C.B.) Decision date: October 29, 1998

Small taking (1.6 acres) of a large (1,600 acres) development property (Westwood Plateau). The Board determined compensation using the "before and after" approach. The larger parcel for the purposes of section 40 was determined to be a 25.56 acre portion which had "natural" boundaries (roads, a creek and a municipal boundary) and was a discrete parcel intended for separate development. There was no evidence that costs outside this block were affected by the taking, and all valuations used it as the larger parcel (including Centra, which nevertheless advanced the argument that a larger portion of Westwood Plateau was the appropriate larger parcel). The Board rejected the use of hindsight in determination of HABU, deferral period and price appreciation. Very reluctantly, the Board based its compensation decision based primarily on the development approach valuations before it. The Board's concerns over the use of the development approach included: the delay period (three years); rezoning not in place, OCP not amended; no subdivision; only main trunk services in place; no plans (other than for the hearing); difference in number of lots; difference in development costs. In the result, the Board carried out its own before and after valuations using the development approach.

Hanson v. British Columbia (Minister of Transportation and Highways) (1998), 66 L.C.R. 234 (B.C.C.A.) Judgment date: December 18, 1998

Leave granted to appeal Board holding that inadvertent misrepresentation as to effect of section 25 by property agent to claimant's lawyer founded an estoppel precluding limitation defence. Leave to cross-appeal granted on whether section 25 limitation applies where acquisition pursuant to section 3 agreement, and whether section 48 payments are advance payments under section 20. Factums on appeal and cross appeal filed.

Reti v. Sicamous (1999), 66 L.C.R. 57 (B.C.E.C.B.) Decision date: January 6, 1999

Claim for injurious affection with no taking resulting from the construction and operation of a sewage treatment plant and lagoon. Form A filed approximately 16 months after plant started operating. District applied for an order dismissing the claim as out of time under section 42. The Board held that for time to start running under section 42, the onus is on the authority to show that one year had passed since the claimants had meaningful knowledge of the loss in market value of their property. Knowledge of smells and noises affecting the property, and even a probability that the market value would be affected by these smells and noises was not sufficient. The application was dismissed, with leave to re-apply should further relevant evidence arise during the compensation hearing.

Haughton v. Heffley Creek (Waterworks District) (1999), 66 L.C.R. 1 (B.C.E.C.B.) Decision date: February 5, 1999

Form A filed more than two years after the Advance Payment. Application to dismiss claim pursuant to section 25 granted. There is no discretion in the Act to extend the limitation period (*Rogers*). Strict compliance with every requirement of section 20 is not a pre-condition to the running of time under section 25. Disagreement concerning the conclusions in the appraisal report upon which the advance payment was based does not negate the advance payment. A challenge to the expropriation does not postpone the operation of the limitation period. The Board can give effect to waiver by agreement or waiver by conduct giving rise to estoppel (Hansen). Here, however, there was no evidence of any promises, assurances or representations so as to lead the claimant to conclude that he did not have to file his claim within the time prescribed by section 25.

286684 B.C. Ltd. v. Colwood (City) (1999), 66 L.C.R. 148 (B.C.E.C.B.) Decision date: February 17 1999

A statutory right of way was expropriated for a sewer line. In addition to the actual SRW there were leave strips on either side. The OCP identified the area of the SRW as a road. The land value was agreed. The Board concluded that the road contemplated by the OCP and the sewer line were one project and that section

33(g) precluded consideration of any effect of the road in the OCP on value (following Vision Homes). The Board awarded 75% of the market value of the land in the SRW and leave strips as compensation having regard to both the restrictions on use and limitations in site coverage imposed by the zoning bylaw. The "before and after" approach is only addressed in passing in the decision – presumably it was less that the value of the land taken. The land value was apparently based on the existing use. Under an alternative use HABU where re-zoning was required, presumably the free dedication of the road would be taken into account.

Whitechapel Estates Ltd. v. British Columbia (Ministry of Transportation and Highways) (1999), 66 L.C.R. 193 (B.C.S.C.) Judgment date: March 2, 1999

A number of allegations of bias against members of the Board were advanced by the claimants. These included participation in the Expropriation Association Liaison Committee of counsel and agent for Highways and members of the Board; strong language used by the Vice Chair in connection with the failure of the claimants to comply with an order to produce documents; comments made by the Vice Chair about the demeanour of one of the claimants before her as a witness. The application was rejected. There was no basis for a perception of bias arising from the committee (Court agreed with Highways' characterization of such an allegation, in the absence of any further evidence, as a slur on the reputation of three members of the committee). The "strong language" was a statement of obvious fact by an experienced adjudicator, and could not give rise to a finding that there was a reasonable apprehension of bias. The final allegation was rendered moot by the fact that the Vice Chair was no longer a member of the Board. Compensation claim in process of being set down for hearing.

Hawk Investors Ltd. v. British Columbia (Minister of Transportation and Highways) (1999), 66 L.C.R. 94 (B.C.E.C.B.) Decision date: March 5, 1999

The $70.77 case. Land zoned for gas station use taken. Advance payment paid in part to mortgagee to pay down mortgage. HABU advanced by claimant was for redevelopment as a gas station. Board accepted evidence of a gas station development expert that location not suitable. Respondent's valuation accepted. The payment to the mortgagee of the balance outstanding was part of the advance payment to the registered owner of compensation for land value, not a payment for

a loss suffered by the mortgagee. Various disturbance damage claims were considered and for the most part rejected, with the result that the Claimant was found to have been overpaid by $70.77. Recognizing the "unwarranted optimism" in the Claimant's assertion of the gas station HABU and some specious and unfounded other claims, the Board awarded the claimant 80% of its costs.

Bayview Builders Supply (1972) Ltd. v. British Columbia (Minister of Transportation and Highways (1999), 66 L.C.R. 176 (B.C.C.A.) Judgment date: March 8, 1999

A small area was taken from a retail building supply business. As part of the project, there was a potential future interference with access. At the date of the hearing, there was a moveable barrier across the access. The Board awarded injurious affection based on 20% reduction in value to the remaining land, and 40% reduction in value to the depreciated replacement value of the improvements. It also awarded a business loss during the construction phase of the project. A claim for relocation costs was denied. The Court allowed the appeal, set aside the injurious affection award, and remitted to claim to the Board to "reconsider the applicability of s. 39(1) to Bayview's claim, and in particular whether relocation costs should be awarded as business losses 'that result from the construction or use of the works for which the land is acquired'". In the appraisal evidence before the Board, substantial depreciation was recognized as a result of functional obsolescence brought about by the Highways project. The Board in its decision recognized this as injurious affection. The Court focuses on an award of damages for the possible future relocation without giving any clear direction as to how this should be done (despite a request from the claimant) and without saying a word about the injurious affection award it set aside. The Court also allowed an appeal on penalty interest and awarded an increase of 50%. Re-hearing set for April 2000.

Ingham v. Creston (Town) (1999), 66 L.C.R. 161 (B.C.C.A.) Judgment date: March 22, 1999

Use of an after sale in the before and after method permitted by section 40(3) incorrectly took into account benefits to the remaining land due to general benefits of the completed project. In reaching this decision, the Court did not refer to section 40(3) which preserves minimum compensation for the land taken and

hence precludes the penalty to the expropriated owner compared to unexpropriated neighbours (which the Court concluded would occur). The Court relied on commentary in Professor Todd's text, and a mis-interpretation of a decision under the federal *Expropriation Act* (where general benefits are offset against injurious affection). The previous interpretation of the Board has since been re-instated by amendments to sections 40 and 44.

Pentecostal Assemblies of Canada, in Trust et al. v. HMTQ (1999), 66 L.C.R. 275 (B.C.E.C.B.) Decision date: April 1 1999

Election of equivalent reinstatement under section 35 does not preclude a claim for disturbance damages under section 34. This is the first finding on this issue. Disturbance damages were awarded for loss of income (offerings) during time spent in temporary premises.

Spur Valley Improvement District v. Checkman Holdings (Calgary) Ltd. (1999), 67 L.C.R. 106 (B.C.E.C.B.) Decision date: June 1 1999

Expropriation by holder of a Water Licence under the *Water Act* for a water system. Board has jurisdiction to settle the terms of the expropriation and to determine compensation. Here the Board settled the terms of the expropriation by determining the type of interest (statutory right of way), the locations of the rights of way, and the terms of the instrument. A compensation claim may come later. The process is of interest, as the Board is given a role usually undertaken by the Expropriating Authority.

Carrier Lumber Ltd. v. HMTQ, unreported, B.C.S.C., July 29, 1999

This decision has garnered a large amount of publicity. Carrier obtained a long term Forest Licence to harvest trees on the Chilcotin Plateau. The licence was expressly subject to the *Forest Act*. During the course of the licence, the *Forest Act* was amended twice. The amendments affected the silviculture obligations of licencees, and the calculation of stumpage. Both of these amendments were of general application, and contained explicit "no-compensation" provisions. These amendments significantly affected the Carrier licence, and Carrier refused to post security for the new silviculture obligations. The licence was suspended, then canceled. Carrier claimed substantial damages. Issues were severed, and the

liability issue proceeded to trial. In a lengthy and sometimes confusing judgment, the Crown was found liable. The basis of liability is not clear, but appears to be based on a finding that the licence was not canceled because of the silviculture obligations, but rather to address issues the Crown had with First Nations in the area. This constituted a fundamental breach of the licence. The learned trial judge refers to expropriation principles from *De Keyser's Royal Hotel* and *Manitoba Fisheries*, and seems to flirt with the idea that the amending acts might constitute an expropriation. In the end though expropriation is not the basis of the decision, and it is difficult to see how it could be, in view of the no-compensation provisions of the amending acts, and the *Forest Act* itself. The decision is under appeal.

Morton v. British Columbia (Minister of Transportation and Highways) (unreported), August 31, 1999, E.C.B. No. 81/96/171

Small taking from two parcels - one the site of a Pizza Hut restaurant, the other a sliver with a billboard sign. Eight square feet was taken from the sliver, resulting in a four inch encroachment by the sign on the right of way. Loss in value of Pizza Hut property claimed at $88,000 ($35,000 land value; $53,000). The claim for loss in value of the sliver was $183,100. The overall claim totaled $272,100. Award: $32,100. The Board held that there was no loss in value to the remainder of the Pizza Hut property. Section 912 of the *Municipal Act* deemed continuing conformity. The building was approaching the end of its economic life. There were still opportunities to expand the building in conformity within the set-backs. Any new development would require re-zoning and permit higher density. The use of the sliver before was non-conforming. Apparently no rent had ever been paid to the registered owner by the billboard operator. Highways had issued permits permitting the use and maintenance of the sign. Despite the assertion by the claimant that the sliver was virtually valueless after the taking, negotiations for rent were apparently underway during the course of the hearing. In the result, a nominal $100 award of injurious affection was made for the sliver. Costs after the second advance payment were reduced by 50%. Application for leave to appeal filed.

Wu v. HMTQ (unreported), September 9, 1999, E.C.B. No. 61/95/172

For the purposes of section 46(4) (extra interest), a settlement is not an award. *Richland* (46/66) distinguished because in that case there was an order (by consent) requiring payment of compensation - an award.

Sutherland v. The Corporation of the Township of Langley (unreported), September 23, 1999, E.C.B. No. 07/97/173

Partial acquisition by section 3 agreement of small rural acreage in Walnut Grove. Claims for land taken and reduction in value of remainder and for disturbance damages. Both appraisers used the before and after method. The difference was in the before value. The Board did not accept the development approach, and quoted from Double Alpha. The method was rejected, as development had not commenced, the site layout was not close to approval and lot prices and costs had not been established. In the result the Board determined the before value using direct comparison data. The disturbance damage claim was advanced was in excess of $100,000. Section 31(1) (different HABU from existing use) did not eliminate the claim (following *Husband* 59/221). The claim for the disturbance damages was not documented, and the evidence of the claimant's witness was vague and insufficient. The remedial nature of the Act is no substitute for probative and reliable evidence, despite *Dell*. Costs of Supreme Court proceeding were not allowed, following *Greatbanks* (65/20). In the result, disturbance damages of $1,680 were awarded. A very modest reduction in costs payable was ordered due to the (mis)use of the development approach, and the lack of success on the disturbance damage claim.

Harshenin v. HMTQ (unreported), September 30, 1999, E.C.B. No. 30/94/174

Claim for loss in market value (injurious affection) caused by use of the highway. Other claims had settled. Claimant self-represented. Claimant registered owner of property from which land was taken and had life estate in adjoining property. Claims advanced for both properties. All claims rejected, no order as to costs. Owner called no expert evidence, and the evidence suggested that the problems were self inflicted – floor joists made from wood that had been submerged for 10 years and not dried, no vapour barrier etc. Case distinguished from *Bill's Frontier*. On the life estate, issue of whether part of "larger parcel" due to contiguity not decided. Although life estate had value, no evidence presented of that value(let alone loss of value).