BRITISH COLUMBIA EXPROPRIATION ASSOCIATION 2002 FALL SEMINAR

CASE LAW UPDATE

A REVIEW OF DECISIONS IN THE EXPROPRIATION FIELD FROM OCTOBER 2001 TO OCTOBER 2002

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1. *Coquitlam (City)* v. *Gemex Developments Corp.*, [2002] B.C.J. No. 1728, 2001 BCSC 1231

The City of Coquitlam (the "City") wanted to enter into a property owned by Gemex Developments Corp. (Gemex) in order to do a feasibility study for the purposes of building a potential crossing. Gemex denied the City a right of entry. The City argued that it had the right to enter into the property pursuant to section 309.1 of the *Local Government Act*, R.S.B.C. 1996, c. 323 and section 9 of the *Expropriation Act*, R.S.B.C. 1996, c. 125. Gemex argued that section 309.1 of the *Local Government Act* would only permit the City to enter into a private property for existing services. Furthermore, Gemex argued that for the purposes of section 9 of the *Expropriation Act*, the City had to pass a bylaw, and the City had not done so in this case. The British Columbia Supreme Court held that section 309.1 could be used by the City to enter into a private property for intended services, not just existing services. The Court found it unnecessary to deal with section 9 of the *Expropriation Act.*

2. *Williams et al. v. Her Majesty the Queen in Right of the Province of British Columbia as Represented by the Minister of Transportation and Highways*, October 22, 2001, ECB No. 32/97/213

This is a limitations decision, and as such, should strike fear into all lawyer's hearts. Held Section 3 Agreements are subject to the one year limitation set out in Section 25 of the Statute which sets time running from the date of the advance payment. Matters to note in the decision are that the Board confirms that a Section 3 Agreement is not an expropriation and that Section 25 of the Statute amounts to the barring of a remedy, rather than the extinguishments of a right. The application of the limitation period seems relatively straight forward. What continues to be problematic is the somewhat transparent statement that a Section 3 Agreement is not an expropriation, the result of the decision in *Sutherland* in the Supreme Court of British Columbia. For tax purposes, the acquisition of land from an owner is treated as an expropriation if it is clear that the alternative to the consensual transfer is the forcible taking.

If the claimant has failed to commence an action by filing its Form A within the time prescribed, then it is still possible to avoid the result of the limitation period if the conduct of the parties indicates that the Authority has waived the limitation (estoppel).

3. *Daflos* v. *Maple Ridge-Pitt Meadows School District No. 42*, [2002] B.C.J. No. 877, 2002 BCCA 277

Maple Ridge-Pitt Meadows School District No. 42 (the "District") expropriated certain lands from the Claimants. Section 47(b) of the *Expropriation Act*, R.S.B.C. 1996, c. 125 allowed the Expropriation Compensation Board (the "Board") to increase the interest payable by the expropriating party when there was an undue delay of the proceedings. The Board awarded this increase to the Claimants. The British Columbia Court of Appeal held that the Board erred in increasing the interest under section 47 of the *Expropriation Act.* This was due to the fact that,

under section 46, the District did not owe any interest to the Claimants for the period of unreasonable delay, and section 47 applied only to situations where interests were already payable under section 46.

4. *Nicholas Neve Rawcliffe and Barbara Irene Rawcliffe v. Her Majesty the Queen in Right of the Province of British Columbia as Represented by the Ministry of Environment, Land and Parks*, February 6, 2002, ECB No. 31/98/217

This decision highlights the difficulties of claiming for a loss in value as a result of regulatory measures being applied to your property. Four individual parcels of land bordered on an open creek which bore the dreaded label "fish habitat". The claimant argued that the result of set backs (leave strips) rendered undevelopable the remainder unencumbered areas of the lands and that the leave strip areas had effectively been expropriated.

Matters of interest and note:

(a) Who are the correct Respondents? In this case, the Provincial Ministry of Environment, Lands and Parks was the chosen respondent, not the Federal Department of Fisheries.

(b) The forum was the Expropriation Compensation Board, rather than Federal Court.

(c) The Board held that the initiation of the action was premature, or alternatively, that they were unable to establish the *de facto* expropriation argument as the claimants had not pressed forward with their development alternatives, leaving the result of the potential for development uncertain, ie; nobody said "no". It is the actual implications for the land that is relevant, not the potential.

(d) It should be noted that expropriation is referred to as the "compulsory transfer or vesting of land in another" and this thinking should be compared to the Section 3 discussion.

(e) It is expected that there is an extinguishments of all reasonable private use so that the lack of development potential is likely not enough. If the land adds some benefit to the remainder parcel, it is likely that it does not meet the requirements of extinguishments.

(f) The case discusses the role of the Respondent. This is important from the point of view of analyzing liability. The language of the Respondent being a "partner" is raised and a determination made that the Respondent does not fit that category with the Department of Fisheries and Oceans. DFO essentially drives the process relating to the imposition of the leave strips and controls any relaxation. This should be compared directly to the Ministry of Transportation and Highway's involvement in set backs from highways and their endorsement of them. Are they complicit in the

further consequences of the set back requirements imposed by municipalities when they have endorsed them, agreed to them or merely supported them.

5. *Reon Management Services Inc. v. Her Majesty the Queen, ECB Control No. 34/91/225, July 25, 2002*

The main issue of this hearing focused on entitlement and quantum of certain witness fees charged by the claimant in support of a section 45 cost recovery hearing. The largest claim was for legal fees charged by counsel to appear as a witness at the hearing. The Board held that the fees could potentially be recoverable; held that most of the subject fees were necessarily incurred and reasonable; and then assessed the legal fees under the tariff, as opposed to actual fees. The Board also held that the claimant was entitled to recover costs from the second hearing and fixed those costs at a set amount.

6. Wayneroy Holdings Ltd. v. Her Majesty the Queen in Right of the Province of British Columbia as Represented by the Minister of Transportation and Highways and the Ministry of Transportation and Highways, February 18, 2002, ECB No. 68/01/218

This is a cost decision on an advance payment basis pursuant to Section 48(2). The case highlights those matters the Board must assess on a determination and payment of costs on an interim application.

(a) The Board will consider in an assessment under Section 48 that the costs were reasonable and whether they were necessarily and properly incurred. This notwithstanding the fact that Section 48 does not contain the word "necessary". The test to be applied is are the costs necessary to conduct the proceeding and whether the expenses have been necessarily incurred in the conduct of the proceeding. This is a repeat of previous decisions by the Board.

(b) Underlying the word reasonable is a comprehensive assessment of factors such as hourly rates, time expended, duplication in the accounts, the amount of the claim and what has been achieved to date.

(c) An evidentiary basis of some sort must be laid, even under Section 48 as the onus is on the Claimant to provide sufficient evidence as to the reasonableness and necessity of the accounts.

(d) The question of the costs being "incurred" implies that they have been paid.

(e) Clarity in the pleadings would assist in highlighting the necessity of certain types of work.

(f) If a report was undertaken or work done that may have applied to other judicial process, not specifically related to the hearing, then it is not compensible.

(g) Assessment of legal costs conforms to the general principles that were a range of units is applicable (1 – 5). One unit is for a matter upon which little time would ordinarily have been spent and the mid point is for matters upon which an average amount of time would have been spent. The maximum being for matters upon which a great deal of time should be spent.

7. *535534 British Columbia Ltd.* v. *White Rock (City)*, [2001] B.C.J. No. 2027, 2001 BCSC 1381

535534 British Columbia Limited (the "Plaintiff"), a developer, entered into a purchase and sale agreement (the "Agreement") with a railway company. The Agreement was subject to several condition precedents. One of the condition precedents was the approval of the City of White Rock (the "City") for a new subdivision. The Plaintiff had a contingent interest to acquire the property in fee simple. The Plaintiff applied to the City for the subdivision, and the City refused the application. The City subsequently changed the zoning of the land. As a result, the Plaintiff could no longer use the land for the intended purpose and brought an application against the City for damages for the breach of contract or for a declaration that the City had expropriated the land, requesting that the City pay compensation. The City brought an application for the summary dismissal of the action.

The British Columbia Supreme Court dismissed the action. The Court accepted that the Plaintiff's interest in the lands was not any different from that of an owner's interest in fee simple. However, the Court held that the bylaws changing the zoning did not constitute an expropriation. Furthermore, although the action of the City was injurious to the Plaintiff, it did not fall within the exceptions of subsection 914(2) of the *Local Government Act*, R.S.B.C. 1996, c. 323, and the City was therefore not required to compensate the Plaintiff. As well, the Plaintiff and the City did not have a contract.

8. *Danny James Topping and Tina Marie Topping v. Her Majesty the Queen in Right of the as Represented by the Minister of Transportation and Highways*, April 9, 2002, ECB No. 40/99/219

This case essentially involves the dispute by the Authority over what reimbursement should occur to an owner where he is relocated from his residence in Cobble Hill to Cranbrook. The total claim in this case was less than $14,000.00. The Board allowed approximately 2/3 of it or $9,000.00. The Ministry had paid a total of $4,500.00. The Board observes that it is "disheartening" that a claim involving so little compensation should be the subject of so lengthy and detailed a review. It would appear the Ministry still wasn't done in that they still wished to argue a Calderbank Letter going to costs and other evidence. The total advance payments were $176,420.00 whereas total compensation awarded was $180,790.00 or just under 102.5%. One has to ask where is judgment being applied in cases of this nature.

9. *Kismet Enterprises Inc. v. City of Nanaimo* April 22, 2002, ECB No. 75/01/220

This case adds nothing to the long list of proceedings before the Courts and this Board relating to the Rascal v. The City of Nanaimo line of decisions. The Board determines that the case is *res judicata* and costs are awarded against on Scale 2 for a massive recovery of $700.00.

10. *TFL Forest Ltd.* v. *British Columbia*, [2002] B.C.J. No. 218, 2002 BCSC 180

TFL Forest Ltd. (the "Plaintiff") had tree farm licences in certain parcels of lands (the "Lands"). The licenses were granted under the *Forest Act*, R.S.B.C. 1979, c. 140. The Province of British Columbia (the "Crown"), by enacting the *Park Amendment Act*, S.B.C. 1995, c. 54, created two parks. These two parks encroached upon a significant portion of the Lands. The Plaintiff argued that its licences constituted an interest in the Lands, and the Crown had expropriated this interest. The Crown argued that there was no expropriation, and there was no compensation under the *Expropriation Act*. The Crown also argued that any compensation should be payable under the *Forest Act*.

The British Columbia Supreme Court held that there was a constructive expropriation, but that it did not fall under the *Expropriation Act*. Since the Crown had granted the licence under the *Forest Act*, the best mechanism for determining the compensation of the Plaintiff was under the *Forest Act*.

11. *Whitechapel Estates Ltd., Piccadilly Estates Ltd., Delsom Estates Ltd. and Norman Dennis Elsom v. The Minister of Transportation and Highways* June 4, 2002, ECB No. 74/92/221 and 48/96/22

It seems, as with all the Elsom cases, they go on interminably. Somewhat innovatively, Mr. Elsom represented himself for personal claims and had counsel appear for the corporate entities. Some useful practice points come from the decision.

(a) It remains the appraiser's task whether a planner is involved or not, to determine highest and best use, taking into account factors such as market demand and potential profit.

(b) The owner's evidence and position with respect to highest and best use, where it constituted opinion rather than factual matters was disregarded.

(c) There were 19 separate parcels or legal titles under review. The Board determined that although they provided a hypothetical vendor with flexibility in their utilization, appraisal techniques do not require that the individual parcels be valued separately and their contiguous nature called for them to be valued in this case as part of the whole and from one overall plan.

(d) If you are going to use a subdivision residual approach in a complex, large parcel development, where the project will be spread over the time, you must apply some consistent standards to the before and after in order to maintain the consistency of the mix and the housing in the before and after scenarios. To do otherwise results in an inequitable comparison and either a minimizing of the before and after loss or possibly an extension of it. In this case, the subdivision residual was rejected.

(e) The Board reviews the before and after valuation and considers the application of the benefit set off provisions, given the after site appeared to have the benefit of a new commercial site.

(f) Both appraisers adjusted lots values in the after for noise level from a major highway being adjacent the development.

(g) The Board was faced with complex evidence regarding the impact of the noise in the before and after scenarios, but did make an adjustment discounted of some consequence for a decreased valuation of $375,000.00.

(h) The decision discusses hindsight evidence respecting the appraiser's assessment of whether an overpass would be required or not, ie; what was in the mind of a hypothetical purchaser. Their discussion in paragraph 201 should be compared to the discussion in Sequoia Springs. The conclusion is that a potential purchaser would recognize the risk of financial contribution for an overpass and a net risk factor identified as a cost of $500,000.00 in engineering and service was taken into account.

(i) A significant delay claim was advanced by the Claimant. Although even the authority had generated a decrease in return to the developer as a result of delay, the Board, on reviewing all of the factors, ie, the wider picture as to what a developer was faced with in dealing with the property over the period of a delayed development found that in fact there was an increased return of some significance and that rather than a loss, there was an increase in value.

(j) Overall, this would appear to be one of the most complex cases the Board may have had to deal with. For anyone advancing a complex development case, it is a worthwhile and careful read, as it identifies many issues to be considered and how they can be shaped.

12. *McKinnon* v. *Canada (Attorney General)*, [2002] B.C.J. No. 1609, 2002 BCSC 1053

The Plaintiff's predecessor in title had a property, a part of which had been sold to the federal government (the "Government"). The Government purchased the property in order to improve the access to an adjacent park (the "Park"). The Government agreed to provide an easement to the Plaintiff's predecessor in title to the remaining property. The location of the easement was not specified. The Plaintiff's predecessor in title used a route that was not accessible by vehicle. The Plaintiff purchased the property with the intention of logging the

property as well as building a residential subdivision. The Plaintiff brought an action to get access to the land and a declaration that it was entitled to repurchase the previously sold lands in order to access its property.

The British Columbia Supreme Court refused the declaration entitling the Plaintiff to repurchase the property since it was beyond the scope of the proceedings. The Court granted two alternate routes that allowed the Plaintiff to access the property. First, the Plaintiff was entitled to use the trail to reach its property. Second, the Court held that the Plaintiff had entitlement to a second route which the Plaintiff's predecessor in title used before it sold the property to the Government.

13. *Gormon Bros. Lumber Ltd. and Dunfield Holdings Inc. v. Majesty the Queen in Right of the Province of British Columbia as Represented by the Minister of Transportation and Highways*, September 17, 2002, ECB No. 33/99/227

This is a fascinating case, involving not just a compensation claim for loss in value of land, but a claim by the owner for what amounts to costs to cure a problem. The owner, as a result of the "shadow of the expropriation over a period of years" believing that the project hovering over and around his property was going to result in the acquisition of the entirety of the site. As a result of this apprehension, the claimant purchased an adjacent parcel which came available at a price demanded of him by the owner in excess of the market value. Replacement land was apparently needed near the mill site to maintain the business efficiency. The claimant's property in this case was subject to a long period of uncertainty as a result of planning and budgeting problems surrounding the acquisition of the lands by the Ministry of Highways for an intersection. The claimant's land was, in part, operated as a mill site. During the ten year planning process, prior to the taking, it appeared as if a total taking of the subject property by ultimately only a partial acquisition occurred. Some two years prior to the taking, the claimant purchased his neighbour's parcel in an effort to "mitigate", so he maintains, at a price of approximately $800,000.00 more than what would appear to have been market. Other claims for loss of access and accelerated depreciation of an existing office building were included. Some points to be taken from the decision are:

(a) Acknowledgement that the highest and best use in the before must look at market data and not simply the owner's present and existing use, however important that use is to his business. If the parcel's value on a stand alone basis has, as it apparently did here, more than an industrial value in the before, that is the baseline for determining the acreage value.

(b) The Board entertained the claim for the purchase of the adjacent parcel (the differential in value), but dismissed it on grounds of causation. It seemed apparent on the evidence to the Board that the owner had purchased it from a position of weakened bargaining power, nor did the Board accept that the price paid was below market. In this case, the property had a special value to the claimant, being immediately adjacent to the mill site suitable for various industrial uses and as

motivated purchasers, the Ministry intervention played a small part in their overall motivation.

(c) Consideration was given to the accelerated depreciation of the office building for whether it had to be abandoned altogether as a direct attribution to the taking and project. The Board found some accelerated depreciation.

(d) In considering disturbance damages, the Board highlights the necessity as it did in Sequoia Springs for an orderly presentation of accounts and evidence to support them to avoid a multiplicity of hearings.

(e) Costs were awarded on Scale 3 as a result of the multiplicity of legal issues being more than of an ordinary difficulty.

14. Vancouver Marina (1971) Limited v. *British Columbia (Minister of Transportation and Highways)*, [2002] B.C.J. No. 2173, 2001 BCCA 620

The government of British Columbia (the "Government") took 30% of the Vancouver Marina (1971) Limited (the "Marina")'s leased waterlot and required the Marina to remove the improvements. The Marina took the case to the Expropriation Compensation Board (the "Board"). The Board held that the Government's action was not expropriation under section 1 of the *Expropriation Act*, R.S.B.C. 1996, c. 125, and therefore, the Marina was not entitled to compensation. The Marina appealed to the British Columbia Court of Appeal. On appeal, the Government argued that the Board had expertise on the question of expropriation, and the Marina had not met the criteria for leave. The Court held that the clarification of statute and the lease provisions would be beneficial to both the province and the Marina. Furthermore, there was merit to the appeal, and the Court granted the leave to appeal.

15. British Columbia (Minister of Transportation and Highways) v. *Reon Management Services Inc.*, [2001] B.C.J. No. 2500, 2001 BCCA 679

The Minister of Transportation and Highways of British Columbia (the "Minister") expropriated land from Reon Management Services ("Reon"). The parties tried to settle the amount of compensation. At issue was whether or not the parties had made an agreement as to the interest payable to Reon under section 46 of the *Expropriation Act*, R.S.B.C. 1996, c. 125. The Board held that there had been a settlement, and this included interest. The British Columbia Court of Appeal held that there was no settlement between the parties, and therefore allowed the appeal.

16. *Heinz Eckervogt and T.D. Oilfield Services Ltd. and Walter Yates v. Her Majesty the Queen in Right of the Province of British Columbia as represented by the Minister of Employment and Investment*, November 26, 2001, ECB No. 24/95/215, 04/99/215

This is a determination of compensation for three placer gold mining leases. The case continues the pattern of rejecting discounted cash flow analysis in a mining claim unless probable and possible reserves can be made out. The speculation associated with the discounted cash flow is too great and the Board accepts that where the market evidence is that placer leases are bought and sold on a basis other than DCF, then the market data will be applied. The Board adopts the comparative methodology and places somewhat nominal values upon the interests in a fashion previously reflected in *Casamiro* and *Premanco*. Disturbance damages were considered and paid for the costs thrown away by claimants in the development. The Board also ordered a repayment with respect to one of the claimants where compensation in the amount of $250,000.00 had been paid and only $75,000.00 in compensation awarded.

17. *ARA Holdings Ltd.* v. *West Kootenay Power Ltd.*, [2002] B.C.J. No. 17, 2002 BCCA 9

West Kootenay Power Ltd. ("Power") expropriated some of the property of ARA Holdings Ltd. ("ARA") pursuant to section 29 of the *West Kootenay Power and Light Company Limited Act* (the "Act"). The Court applied *Land Clauses Consolidation Act* of 1845 and not the *Land Clauses Consolidation Act* of 1897. These pieces of legislation limited the power of expropriation of certain entities incorporated under legislation. The Act was the only piece of legislation that incorporated a power company, allowed for expropriation and did not include the limitations found in the *Land Clauses Consolidation Act* of 1897. Given the wording and interpretations of the 1845 *Land Clauses Consolidation Act*, the Court held that section 29 of the Act allowed Power to expropriate land as long as it was authorized to supply power to a prescribed area.

18. *Parmjeet Garcha v. City of Abbotsford* June 19, 2002, ECB No. 26/94/222

This is another advance payment of costs hearing, but not pursuant to the tariff as the costs in the claim predate the tariff. There is probably little that can be taken by way of useful guidance from this decision, given its topic, but it is worth noting that interest was charged pursuant to its invoices by Interwest at the rate of 1.5% per month when historically the Board's decisions were that prior to the tariff, it had discretion to award reasonable interest expenses. The Board allowed a simple interest calculation of 12% per annum on the accounts outstanding.

19. *Sutherland* v. *Canada (Attorney General)*, [2002] B.C.J. No. 1479, 2002 BCCA 416

This was an appeal by the Attorney General of Canada (the "Government"). At the trial level, the British Columbia Supreme Court held that the noise of the North Runway of Vancouver International Airport was a nuisance and held the Government liable for the noise of the aircrafts. On appeal, the Government argued that the nuisance was a public nuisance since the nuisance was authorized by the statute. The British Columbia Court of Appeal held that the nuisance was a private nuisance since all the plaintiffs had suffered a substantial interference with the enjoyment of their land. However, the Court of Appeal held that the construction of the North Runway was authorized by a statutory scheme, and the noise nuisance was an obvious

result. Therefore, the Government and the Vancouver International Airport met the onus of establishing the defence of statutory authority, and were therefore not liable to the Plaintiffs.

20. *Pay Less Gas Co. (1972) Inc. and Shell Canada Products Limited v. Her Majesty the Queen in Right of the Province of British Columbia as Represented by the Minister of Transportation and Highways* June 20, 2002, ECB No. 8/91/223

This is another decision in the continuing battle by the Attorney General's Branch to attempt to persuade the Board that if an owner obtains less than 115% (depending on how that calculation is made), but still beats the advance payment overall, that they should be done for some portion of their costs. At issue in this decision is not only the methodology of that calculation (business loss in, business loss out), but what decision would be made even if the Board came to the conclusion that it did have a discretion. It might be remembered that the Patterson decision might rank right up there as the Claimant who advanced one of the least credible claims got vastly less than what he was seeking and still received a substantial portion of his costs, both legal and appraisal. This dispute even ended up in a split decision by this Board as to the principles of how to apply the business loss calculation.

If there are business losses and the authority makes an advance payment with respect to them, the onus is on the authority to demonstrate how that advance payment is made and to what account it should be credited.

One interesting aspect of this claim is the question of the authority assessing the situation on the basis that the claimant did not relocate and the claimant advancing its position on the basis that it did relocate its business. The difference, of course, between the two can be substantial. On the relocation claim, there is potential for significant lost profits over a long period of time as well as a disruption claim while the business is re-established. On a take out basis, there is a one time payment for goodwill and overall business value which arguably can be significantly less. The Board found that in this case, Payless did relocate.

21. *Pacific National Investments Ltd. v. Victoria (City)* [2002] B.C.J. No. 1379 (BCSC)

This is the ongoing (almost ten years now) saga of PNI v. The City of Victoria. The Plaintiff commenced an action in 1993 when the City down zoned in the face of its development of the lands, several parcels. At trial, the Plaintiff was successful on the basis that the City had entered into a services contract which the Plaintiff had implemented at the cost of well in excess of $1,000,000.00 based on the guaranteed zoning it had received. The claim, in other words, was not for damages for down zoning which are precluded under the *Municipal Act* but for breach of the contract. The Court of Appeal overturned that decision and it proceeded to the Supreme Court of Canada. The Supreme Court of Canada, in a split decision 4 – 3 upheld the Court of Appeal decision. At both the Court of Appeal and the Supreme Court of Canada level, reference was made to the unjust enrichment claim which was never argued at trial because of the success of the breach of contract damage claim. Having lost in the Supreme Court of Canada, the unjust enrichment action came on before Mr. Justice Wilson and the City again pointed to Section 972

of the *Municipal Act* which states compensation is not payable for any reduction in value or for any loss or damage that result from down zoning. In short, Municipalities should not pay compensation for the use of their legislative power.

The trial judge determined that the Section does not provide a defence to the Municipality on the basis that it is one thing to contend a recovery for diminished land value or loss or damages for the frustration of the owner's ambitions, it is quite another for the Municipality to receive tangible benefits "parks, roads, services" and then make the development unlawful.

The claim is now back on the route to the Court of Appeal.

22. *Denault v. Barclay et al., ECB Control No. 41/00/226, September 3, 2002*

This was an application to the Board by the claimant pursuant to section 27 of the *Water Act*. The claimant sought a determination that he was entitled to expropriate an easement over a specified portion of adjacent residential property owned by the Barclays. The Barclays opposed on procedural (service defects) and substantive (easement was not reasonably required). The Board held that the procedural defects were not fatal to the claimant's application. However, the Board still rejected the application when it concluded that the claimant had failed to demonstrate that he reasonably required the easement.