B.C. EXPROPRIATION/COMPENSATION DECISIONS 1996-7

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ENTITLEMENT

McEachern v. B.C. Hydro, 01/94/131, January 13, 1997
McEachern v. Nanaimo, 03/94/132, January 13, 1997

Claims for compensation for hydro pole and lines (Hydro) and water lines, meters, and sewer lines (Nanaimo). The board ruled that it had the jurisdiction to determine whether there had been an expropriation and concluded that there had not been one. While various authorities established that *de facto* expropriations can give rise to compensation (*Tener* etc.), in these cases the right in issue were completely and absolutely denied at law within the context concerned. Furthermore, neither Hydro nor Nanaimo had exercised a power of expropriation.

Warlow/Foste v. MoTH, 2/94/133, January 18, 1997

Claim for injurious affection in the absence of a taking for interference with access and visibility against Highways. The board ruled that there was no statutory authority for such a claim against Highways when the present *Expropriation Act* came into force in 1987. Accordingly there could be no such claim now. The board went on conclude that even if statutory liability existed the interference complained of would not have been actionable. The board also considered the appraisal evidence on the quantum of loss. It was critical of the efforts of the appraisers for both sides but ultimately agreed with the quantum of loss determined by the Highways. *Comment*: Of great importance to Highways and those with section 41 claims against Highways. Useful analysis of whether interference with access or visibility is actionable. For appraisers, see comments regarding the cost approach.

McPhail's Equipment Co. Ltd. v. Surrey, Vancouver CA 20832, January 29, 1997

This is the result of the appeal taken from a 1995 board decision which awarded substantial compensation for injurious affection to a *profit a prendre* interest of the claimant in lands of a third party caused by taking of a small amount of the claimant's fee simple land. Surrey appealed. The Court of Appeal was "not persuaded that there was any error of fact or law in the finding of the board that the owner was entitled to that compensation". The Court of Appeal also ruled that interest under what is now s.46(4) of the *Expropriation Act* should not apply to the award for injurious affection. *Comment*: It is easy to see the logic of the Court's ruling on interest - the difficulty in determining

injurious affection. It is not as easy to see how this interpretation flows from section 46(4).

Richmond v. ECB, SCBC Vancouver A962726, March 14, 1997

The owners of a strata plan claimed that Richmond "constructively expropriated" their land by approving development of two condominium projects which accessed parking garages by a lane they say belonged to the strata corporation. The strata corporation filed an application for compensation for that land with the board. Richmond sought an order from the Supreme Court prohibiting the board from determining the application for compensation until the Supreme Court determined whether the land was constructively expropriated. The Court held that the board had jurisdiction to determine whether there was an expropriation and accordingly dismissed the petition.

Captain's Square Holdings Ltd. v. MoTH, 55/95/138, April 21, 1997

Captain's Square used a portion of an adjoining parcel owned by Rastad Construction to provide access for vehicles unloading and unloading goods and materials. Captain's Square and Rastad Construction had common shareholders. Highways expropriated the Rastad lands. Both Rastad and Captain's Square sought compensation. There was no easement in favour of Captain's Square although prior to vesting Captain's Square and Rastad entered into an agreement confirming an existing agreement for an easement. The board held that Captain's Square held an implied easement over part of the land taken and therefore was an owner by virtue of holding an "estate, interest, right, or title in or to the land". *Comment*: Why didn't Rastad simply grant the easement when it entered into the agreement? Perhaps because of the negative effect of an easement on the value of Rastad's land.

Hampton Investments Ltd./Taylor Ventures Ltd. v. MoTH/Nanaimo, 42/94/140, June 11, 1997

Following settlement of its claim against Highways arising from the expropriation of a portion of its lands for the Nanaimo Parkway, the claimants continued with a claim against Nanaimo for compensation for losses arises from the by-law imposing the Nanaimo Parkway development permit area guidelines which allegedly affected the type of development adjacent to the Parkway. The board concluded that there was no entitlement to compensation for a number of reasons:

- The passage of the enacting bylaw could not create a legal expropriation because it was beyond the City's power under that process;

- The actionable rule was not established as the basis of a claim for injurious affection where no land is taken. The board questioned whether a claim could ever succeed where the action complained of was a legislative act of a municipality;
- There was insufficient severe interference with the claimant's property interest and no transfer of property rights to Nanaimo and hence no constructive expropriation;
- Section 972 of the *Municipal Act* afforded Nanaimo a complete defence to any compensation claim. The land within the zone established by the guidelines remained private land.

Tucker/Inkster v. MoTH, 45/94/143, June 30, 1997

The board dismissed a claim that compensation was payable for land gazetted for highway in 1976. The plan was not registered in Land Title Office until 1993. Before the passage of the present *Expropriation Act* Highways acquired right of way through publication of a notice in the Gazette. No registration in the Land Title Office is required. A subsequent purchaser acquires no interest in the Gazetted land as a result of the operation of s.23(1)(e) of the *Land Title Act*. A subsequent filing of a statutory right of way for the Gazetted area does not constitute a taking. *Comment*: Apparently some compensation had been paid in 1951 to a Mr. Cleese.

DISTURBANCE DAMAGES

Apland v. MoTH, 45/95/130, November 18, 1996

The board found that an expropriated home owner is not entitled to recover as disturbance damages additional monies paid by him or her to purchase a new residence. Section 34 of the *Act* is a comprehensive description of disturbance damages. There are no disturbance damages beyond those described in s.34 which an owner may recover from an expropriating authority. *Comment*: B.C. did not provide "home for home" compensation, despite the recommendations of the 1971 Law Reform Commission. Such compensation is not recoverable through the back door as disturbance damages

Surrey Animal Hospital Ltd. v. MoTH, Vancouver CA 17664, January 7, 1997

This an appeal from a 1993 board decision. The Court of Appeal agreed with the board that where adequate notice of severance can be given to terminated employees, a claim for severance pay will not succeed. The main issue was whether, given that the board had already awarded the full amount of the goodwill under s.34(4) of the *Act* (termination allowance), a further award for loss of goodwill or for loss of livelihood should also have

been made under s.34(1). The Court rejected this argument holding that such an award would constitute double recovery. It concluded that the Ontario Court of Appeal decision in *Fifield* was not of assistance and that in view of the provisions of s.34(4) no allowance in the nature of disturbance damages should be made under s.34(1) for loss of goodwill. *Comment*: This appears to preclude claims for recovery of lost goodwill under section 34(1).

Hertel v. MoTH, 2/92/144, June 30, 1997

This was a claim for a partial taking from an orchard near Summerland. As a result of the taking, the claimant and her husband were unable to carry on their fruit stand business on the land. The claimant advanced claims for injurious affection, business loss and a termination allowance under s.34(4) of the *Expropriation Act*. The board concluded that evidence of other property in the area suitable for a fruit stand business and other fruit stands which had opened persuaded it that relocation was feasible and that the claimant had chosen not to relocate for personal reasons. Accordingly the claimant was not entitled to a termination allowance under s.34(4). The board allowed compensation for business losses up to the time that it became clear that the fruit stand business could not longer be carried on. The bulk of the claim for business loss after that time was not allowed but the board awarded the claimant a personal loss equivalent to one year's average income on the basis that if operations had ceased and alternative employment sought to mitigate the loss, this would have been there loss. *Comment*: Highway's valuation evidence on the quantum of injurious affection was accepted. The personal loss award, which was not pleaded or argued by the claimant, seems very speculative. The one year of salary was also awarded by the Board in *Meyer* v. *MoTH*, although in that case as a business loss related to the suddenness of the expropriation.

Patterson v. MoTH, Victoria CA V02431, July 8, 1997

This is an appeal from the 1994 board decision. The appellants sought to reverse the board's ruling denying them compensation for personal losses and in particular for nuisance type damages and relocation costs. The Court of Appeal first considered the standard of review and concluded, based in part on the decision of the Supreme Court of Canada in *Dell Holdings*, that the standard of review in this case was one of correctness. The claim for relocation costs was advanced under s.40(1)(b). In rejecting this claim the Court noted that relocation expenses were specifically provided for in s.34 (disturbance damages) but not in s.40(1)(b) (injurious affection). The Court agreed with the board that there could be rare cases where relocation expenses could be claimed in the event of a partial taking but only where the effect of the taking, viewed objectively, was to effectively oust the owners from their home. With regard to damages in the nature of nuisance for the period between the date of expropriation and the date of sale, the Court concluded that such an award would go beyond the principle of economic reinstatement

which was found to underlie the *Act*. In the result the Court dismissed the appeal. *Comment*: A clear statement that "personal losses" are limited to financial losses.

Roadmaster Auto Centre Ltd. v. Burnaby, 21/93/145, July 31, 1997

This claim arose from the expropriation of a tenant operating a service garage business. The landlord was the expropriating authority. When the leasehold interest was expropriated the term of the lease had about one and a half years to run. There was no renewal clause. Claims were advanced for business losses up to the end of the term of the lease and beyond and for a variety of other damages including a termination loss under s.34(4). The board concluded that as Burnaby intended to terminate the lease at the earliest opportunity, there was no reasonable prospect of renewal under section 39(c). Accordingly the board's assessment of disturbance damages was premised on an expiration of the leasehold interest at the end of the term. On the question of relocation, the claimant lead evidence intended to show that relocation was not feasible. Burnaby did not lead evidence on available sites for relocation, and the board concluded that relocation was not feasible. In assessing the business loss the board was faced with two factors which had caused the decline in the fortunes of the business before the expropriation. One was the bad relationship between Burnaby as landlord and the claimant. The other factor bore no apparent relationship to Burnaby or the expropriation. The board concluded that it would be reasonable and fair to split the observed downtrend in pre-taking earnings equally between these factors. On this basis the board calculated and determined compensable business loss for the period between the expropriation and the end of the lease term. With regard to the claim for the termination allowance it was conceded that the business had no saleable goodwill if management wages were deducted from maintainable cash flow. The claimant's argued that the *Plouffe* exception should apply but the board concluded that as its financial loss award included management wages and benefits, an award in the nature of a termination allowance would constitute double recovery. The acceleration principle from *Frankel Steel* was applied to the moving expenses. *Comment*: The ruling of the absence of reasonable prospect of renewal with Burnaby as landlord flows from and reflects the vulnerability of a tenant compared to a registered owner. In giving account to the effect of the pre-taking bad relationship between Burnaby and the tenant, the board appears to have indirectly awarded some pre-taking disturbance damages.

PROCEDURE

Oceanside Village Developments Ltd. v MoTH, SCBC Victoria 4878/96, February 3, 1997

Mr. Justice Hutchison ruled that an expropriating authority must make its advance payment under s.20 in compliance with an appraisal report from a person designated

under s.8 of the practice and procedure regulation. That person must be independent of the expropriating authority. *Comment*: There is nothing in the Act that precludes an expropriating authority from basing an advance payment on the report of a person with the required qualifications employed by the expropriating authority. However, most expropriating authorities do not rely on internal valuations for the purposes of advance payment.

Okanagan Dairy Transport Ltd/Kootenay Dairy Transport Ltd. v. Vernon/ECB, Vancouver CA21003, February 26, 1997

Here the Court of Appeal dealt with a number of motions which had been brought before the board by Vernon in what it called a Rule 18A application. The most interesting issue, whether Rule 18A applies to hearings before the board was not answered by the Court of Appeal as it "would make no difference to the outcome".

B.C. Packers Ltd. v. MoTH, 94/95/136, March 7, 1997

Highways sought particulars of the claim for compensation. The Vice Chair ruled that particulars of the amount claimed under each element of compensation, the basis on which each claim is calculated, and the facts in support of each element of compensation claimed must be provided.

Sutherland v. Langley, SCBC Victoria 97/1855, July 18, 1997

The petitioner applied to Supreme Court to resolve a dispute relating to the location of a structure on the remainder of land a potion of which had been transferred to Langley pursuant to a s.3 agreement. The petitioner wished to locate the structure within a lot line set back and claimed the "deemed conformity" under s.912(1) of the *Municipal Act*. The Court dismissed the petition, holding that an agreement under s.3 of the *Expropriation Act* was not an expropriation and therefore s.912(1) did not apply.

DEVELOPMENT LANDS

Lutsch v. Maple Ridge/Pitt Meadows School District, 37/93/125, October 25, 1996

The claim was for compensation for the taking of a two acre parcel of land in Maple Ridge. Highest and best use was agreed to be short term holding for future residential urban development. The board valued the land by considering a plan of subdivision with two adjoining parcels. Based on comparable sales in the area of land for subdivision the board concluded a raw lot value of $45,000 per lot for the assembly. This then produced

an overall value for the assembly in which the claimants were entitled to share pro rata by area. The board also considered a variety of claims for disturbance damages relating to proposals for development advanced by the claimants before the expropriation. The board held that the highest and best use was the same as the use to which the property was being put by the claimants at the time of expropriation and that they were therefore entitled to disturbance damages. However, they were not able to establish that the claims advanced had been made or were caused by the expropriation. The claimants also sought an interest penalty under s.47 of the *Act* for delay by the school board in expropriating its property. The board rejected this claim concluding that an expropriating authorities' actions or omissions before an expropriation did not come within the scope of the term "proceedings under this Act".

Kliman v. Saanich School District, Victoria CA2546, January 14 1997

This was an appeal from a 1994 Board decision. The Board determined that the fair market value of the land taken (4.9 acres in Saanich) was $1,292,000. It based this on a highest and best use for residential development subject to removal from the ALR and re-zoning. Prior to the expropriation, the Claimants had entered into an interim agreement to sell the property for $1,460,000. This agreement was secured by a $100 deposit and completion was postponed for 15 months subject to removal of the property from the Agricultural Land Reserve and subdivision approval. The Board considered the offer as evidence of value, and in the result discounted it 15% for risk and delay in completion. The main issue on appeal was whether the claimants should recover the difference between the market value as found and the agreed price. The Court dismissed the appeal, holding that the Claimants' lien for the purchase price had no value independent of the land. The Court also rejected the argument that the difference could be recovered as disturbance damages, as disturbance damages were precluded by section 31(1)(b) (the rule in *Horn v. Sunderland*). *Comment*: The ruling on section 31(1)(b) in this case is difficult to reconcile with the *Lutsch* case. Both involved properties being held for the short term pending subdivision. In the result, though, given the risk and delay associated with the agreement, the Board could reasonably have found no reasonable financial loss, and hence no disturbance damages.

River Properties Ltd. v. Richmond, Arbitration, February 7, 1997

This claim arose from the partial taking by Richmond of just over 5 acres of land from a parcel of approximately 128 acres in Richmond adjacent to the south arm of the Fraser River. The compensation claim was arbitrated under the *Commercial Arbitration Act* before C. Edward Hanman, arbiter. The taking was of a strip along the Fraser River. The 128 acre parcel was under one title but was divided up by rights of way, roads and a municipal dyke. It appears that the area taken was physically separated from the balance of the property by the dyke. With the exception of the land taken the property appears to be within the Agricultural Land Reserve and zoned agricultural. The property was

purchased by the claimant in 1992 for $2,550,000. The arbiter concluded that the land taken should not be valued as a stand alone parcel. He then proceeded to establish a per acreage value before the taking of $55,000 for each of the 114 useable acres. This resulted in a total value before the taking in August 1995 of $6,288,700. Mr. Hanman then turned his attention to the injurious affection to the remaining approximately 110 useable acres. Richmond's appraiser concluded that there was no injurious affection to the remainder. The claimant's appraiser assessed the reduction in value of the remainder at 15% over all 114 usable acres. The arbiter agreed. In the result the value of the land taken and loss in value to the remainder was determined to be some $1,115,000. *Comment*: While some reasons are listed, there is no convincing rationale for the cause or magnitude of such a substantial injurious affection award, nor is a market basis for this award disclosed in the decision. It is not clear why the appraisers or the arbiter rejected the 1992 purchase, which gave the arbiter "considerable pause".

Baines/Dowbysh/Froats/Heringa v. MoTH, 21/94/137, April 18, 1997

This claim arose from the expropriation of approximately two-thirds of a 9.19 acre parcel in north Nanaimo for the Nanaimo Parkway. The property was known to be underlain by old coal mine workings and a s.215 *Municipal Act* covenant was registered on title which required any owner applying for a building permit to provide a report from a geotechnical engineer indicating that the property is safe for the proposed building. The board concluded that this would pose a significant risk to a potential purchaser. This conclusion lead the board to agree with the appraiser for Highways that the highest and best use of the property was as a rental mobile home park. The claimants' appraiser had concluded that the most probable form of residential development was subdivision. Highways led evidence that remediation costs for the mine workings for a mobile home park were much less than those required for single family residential development. In addition one of the claimants testified that he was in favour of development as a mobile home park as the demand was there and such a development would not attract development cost charges. The appraisers used the direct comparison approach to value the land. The claimants' appraiser relied on acquisitions by Highways. The board determined that these acquisitions were of no assistance in determining market value. Once again the board rejected the submission that the pattern of voluntary agreements made by the authority with neighbouring land owners set a floor in determining market value of the subject lands.

Mayfair Resources Corporation v. GVWD, 28/91/141, June 13, 1997

The claim arose from a taking of a statutory right of way for a water line over the Claimant's 39 acre parcel in Pitt Meadows. The property was vacant, unsubdivided and zoned agricultural and in the Agricultural Land Reserve. The property was separated from the Lougheed Highway by a 50 foot wide strip owned by B.C. Hydro. The Claimant had been unable to agree with Hydro on a purchase price for the strip.

Assuming it could be acquired, access to the Lougheed Highway would at best, be limited. The Board concluded that the highest and best use of the property was for development of a mixture of urban residential and service/retail uses in the short-term. Compensation was determined on the basis of lost townhouse sites and commercial space on a "conceptual plan" of development for a 9 acre portion in the northerly part of the property where the taking occurred. The value of a townhouse site and of commercial space was determined by direct comparison. This "gross" loss was then reduced to account for fill, and for deferment for development timing (3 years at 11%). Of this, 9% was a base rate where development was a virtual certainty. An additional 1% was attributed to "the general overall risk of obtaining development approval" and a further 1% to the uncertainty of access to the commercial space from the Highway. Because the right of way "actually reduced the number of townhouse or commercial units, no reduction for residual value was deducted. *Comment*: This case illustrates the problems that arise when the wrong conclusion about highest and best use is reached . Both valuers for the Respondent concluded the highest and best use was long term holding. Their valuations were therefore based on large agricultural parcels, with little if any potential for improved use in the near term. The Claimant's approach to valuation, which appears to have been largely adopted by the Board, is unorthodox. Given the finding on highest and best use, the development approach would appear to have been appropriate. Indeed, the principal of the claimant apparently instructed his appraiser to use it. Properly applied, this approach could have more accurately accounted for revenues, costs, timing and risks from and of each component of the overall project both before and after the taking, thereby resulting in a more accurate determination of the loss.

INJURIOUS AFFECTION

Herring v. MoTH, 24/94, February 28, 1997

This claim involved a very small taking of residential land in North Saanich. Injurious affection was claimed to result from an access ramp which had been built some three hundred feet from the claimant's property line. The ramp was a large and visible construction where there had previously been a view of trees and the claimant's property was now overlooked at some distance by traffic using the overpass. From the back of the property traffic could be heard and seen using the ramp. Both appraisers applied a percentage loss to the before value. The board approached the after value and hence injurious affection using the actual sale of the property which occurred some time after the taking, with a time adjustment. Claims for loss of business income, loss of use or benefit of the property, and loss on sale of the property were dismissed.

MINERAL PROPERTIES

Eckervogt/D&B Oilfield Contracting Ltd. v. HMTQ, Arbitration, May 19 1997 and September 10 1997

This arbitration arose from a *de facto* taking of three placer leases within what became the Tatsenshini Park in 1993. The parties agreed to arbitrate the claim (under the *Expropriation Act*) pursuant to the *Commercial Arbitration Act*. The arbitrator is a qualified geological engineer with a doctorate. In the first decision, he offered two choices to the government - allow the claim to be mined or pay an "approximate present value" of the identified leases of $1 million. In the second decision, the arbitrator referred to the first report as a "preliminary draft", which was unfortunately not marked "draft" (even though it was signed). In this decision, the arbitrator awarded just under $4 million, which appears to be the claim advanced by the Claimants. He awarded double interest for delay as the Crown made no advance payment. *Comment*: These decisions are alarming. The basis for the compensation is not revealed to any satisfactory extent in the decisions. There are frequent references to inaccurate or non-existent statutory provisions. Inflammatory language is used throughout - references to the Claimants as "victims", the process as "arbitrary confiscation". The arbitrator appears to have applied his personal methodology to facts which he found. The proceedings themselves have apparently been quite unusual.

UNDER APPEAL

Hertel - by MoTH re penalty interest and personal losses - leave sought to BCCA

River Properties - by Richmond - appeal to BCSC

Eckervogt/D&B Oilfield Contracting Ltd. - by HMTQ - appeal to BCSC and review under JRPA