BCEA 2016 Fall Conference

Caselaw Update

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Caven v. British Columbia, 2016 BCSC 122

Facts:

- BC Hydro was developing new transmission lines in the Peace Country region
- The substation terminals and the towers were not on Mr. Caven's property; however, the transmission line would swing over the property and BC Hydro needed to expropriate a statutory right-of-way on Mr. Caven's land
- The statutory right-of-way allowed BC Hydro access to lines and limited some uses under the line

Caven v. British Columbia, 2016 BCSC 122

Facts cont'd:

- Mr. Caven was concerned about his property and also about the surrounding lands where the towers and substations were located – Mr. Caven used these lands to graze his cattle per a "handshake agreement" that he had with the landowners

- Mr. Caven rejected offers for settlement and was provided $27,694.44 from BC Hydro

Caven v. British Columbia, 2016 BCSC 122

Facts cont'd:

- Disturbance Damages claimed:
  - Mr. Caven provided substantial evidence showing construction damage on his property – this evidence was contradicted
  - Noise, dust, and dirt caused disruption to his ranching operation and enjoyment of life
  - He was forced to rent other grazing lands (at a cost of between $8,000-$10,000) because he could not access his usual grazing lands during construction
  - The tower placement and fencing placement was also ineffective for running cattle

- Issues: did BC Hydro pay adequate compensation for:
  - Injurious affection
  - Disturbance damages
  - Value of the SRW

Caven v. British Columbia, 2016 BCSC 122

Injurious Affection:

- Much of the litigation focused on calculating injurious affection and whether or not the land covered by the statutory right of way had any value to Mr. Caven
  - Two appraisers provided expert evidence regarding the loss in value of Mr. Caven's property
  - Both appraisers came to similar market values for the property ($288,000 and $250,000)
  - Mr. Caven's appraiser said the reduction in market value was 50%, while BC Hydro's appraiser said the reduction was only 15%
  - However, Justice Sharma also held that BC Hydro had not given sufficient weight to the effect that the neighbouring sub-station would have on the property
  - Held that a 30% market value reduction was appropriate

Caven v. British Columbia, 2016 BCSC 122

Disturbance Damages:

- Modest disturbance damages were claimed; however, it is an important decision for determining who can receive compensation for disturbance damages on what property
- BC Hydro said the Act does not contemplate disturbance damages incurred on the neighbouring property where Mr. Caven grazed his cattle because he was not an “owner” of the property
- Justice Sharma also held that Mr. Caven was entitled to the disturbance damages on the grazing lands, as well as the disturbance damages directly from his lands

Caven v. British Columbia, 2016 BCSC 122

Disturbance Damages cont'd:

- Justice Sharma took a broad approach that the "land" referred to in ss. 40(1) and 40(1)(b) do not have to be the same lands expropriated to result in disturbance damages

- She also took a broad and liberal approach that since Mr. Caven's evidence of his use of the land and his evidence of the "handshake deal" for the land was uncontradicted, he should be entitled to these disturbance damages

Caven v. British Columbia, 2016 BCSC 122

Ratio and Critique:

- This decision could substantially open up the definition of “owner” by allowing plaintiffs to claim disturbance damages on adjacent lands that are being expropriated
- This could expand the definition of “owner” in a way not contemplated by the Act
- This case could also turn on the facts of fairness and the manner in which Mr. Caven occupied/used the adjacent lands

Houle v. Manitoba, 2016 MBCA 76

Facts:

- The respondents and their ancestors operated a dairy and grain farm on property since 1898
- In 2009, Manitoba expropriated a portion of the farm to realign a provincial highway and construct a bridge over the Red River
- Following the expropriation, the respondents purchased new property and moved a house, various farm buildings, and grain bins to the new property (in addition to their livestock and dairy operation)

Houle v. Manitoba, 2016 MBCA 76

Facts cont'd:

- Compensation of $2,735,543 was paid for market value of property, incidental disturbance damages, injurious affection and special economic advantage arising out of their occupation of the property

Houle v. Manitoba, 2016 MBCA 76

Positions of the Parties:

- Manitoba
  - The Commission erred when it determined that the respondents were entitled to both the market value of the expropriated property and payment for disturbance costs to replace the land and relocate the buildings
  - Costs to replace or relocate buildings is intended to be covered in market value of property

- Respondents
  - The Commission properly applied the provisions of the Act and the findings of the Commission were reasonable
  - The Commission properly considered and rejected Manitoba's position regarding double recovery

Houle v. Manitoba, 2016 MBCA 76

Positions of the Parties cont'd:

- Manitoba Court of Appeal examines and explains:
  - Disturbance costs contemplated in the Act
  - The distinction between disturbance costs and equivalent reinstatement
  - The relationship between disturbance costs and injurious affection
  - Whether an owner can receive market value for land and disturbance costs for acquiring new property or re-locating building
- Court emphasized the importance of the Commission providing reasons and distinguishing which head of damages each portion the compensation was payable under

Houle v. Manitoba, 2016 MBCA 76

Specific Complaints 1 & 2:

1. $25,613 (seed lawn and improve driveway of relocated house): CA found that the Commission provided a reasonable explanation why these were proper disturbance damages and not a duplicate award

2. $90,000 (premium paid to acquire new property): CA found that the Commission provided a reasonable explanation that the award was a natural and reasonable result of expropriation and/or disturbance

Houle v. Manitoba, 2016 MBCA 76

Specific Complaints 3 & 4:

3. $310,880 (to relocate buildings and improvements from the former property after market value was paid for the buildings): CA found that the Commission erred in paying both the market value of the buildings and disturbance costs to relocate the buildings. The respondents were not entitled to market value of buildings that were kept

4. $1,010,235 (calculation re: new dairy barn and equipment): CA found that the Commission should not have included both the salvage cost and the market value of the old barn in calculating disturbance damages to build new barn

Houle v. Manitoba, 2016 MBCA 76

Specific Complaints 5 & 6:

5. $320,054 (increases in property taxes, utilities, and travel costs): The CA held that these increased costs were reasonable, not too remote, and caused by the expropriation. The Commission was entitled to deference in awarding these disturbance damages

6. $7,200 (for injurious affection): The CA found that the Commission's calculation for injurious affection was reasonable and appropriate

Houle v. Manitoba, 2016 MBCA 76

Specific Complaints 7 & 8:

7. $18,900 (for special economic advantage from the respondents occupying the land): The CA also found that the calculation used by the Commission to determine this market value was reasonable

8. $4,700 (compensation to find another residence): The CA gave the Commission deference that the award was not a duplication of other damages awarded

Houle v. Manitoba, 2016 MBCA 76

Specific Complaints 9:

9. $31,914 (new front-end loader and storage garage for property). The loader was still required to be used on a portion of the former property and another would be required on the new property

   The Commission found this was disturbance damages and awarded the claim. Manitoba said this was injurious affection

   CA found this could be a “grey area”, but held that the damages were reasonable and not double recovery so they should be allowed

Houle v. Manitoba, 2016 MBCA 76

Specific Complaints 10:

10. $15,711(harvesting and spraying costs of corporate resident): The CA found that these were clearly business losses; however, respondents made no claims for business losses under the Act so the Commission's award was unreasonable

Houle v. Manitoba, 2016 MBCA 76

Specific Complaints 11:

11. $32,117 (legal costs): The CA held that the Commission's reasons to provide legal costs were neither transparent nor intelligible

    The legal costs were not incurred for the purpose of determining the appropriate amount of compensation or directly tied to the expropriation as per the Act

    Legal costs can only be awarded as disturbance costs in limited circumstances

    CA also held that legal costs in the Court of Queens Bench should be determined by the court, not the Commission

Houle v. Manitoba, 2016 MBCA 76

Specific Complaints 12:

12. $165,564 (a new driveway on remaining portion of property)

Manitoba says while this was advanced as a disturbance claim, it should be injurious affection. However, the damages were already mitigated by Manitoba's changes to roads

CA found this could be a "grey area" between disturbance damages and injurious affection

CA held that the Commission was entitled to deference - it considered various options for the driveway and found new driveway the only reasonable option

Houle v. Manitoba, 2016 MBCA 76

Ratio:

- CA reduced overall compensation by $363,028
- Commission entitled to deference for damages calculations and whether certain damages were reasonable
- But the courts will be vigilant to ensure that damages are properly categorized and that double recovery does not occur

Shuswap Lake Estates Ltd. and others v. Her Majesty the Queen in right of the Province of British Columbia, as represented by the Ministry of Transportation and Infrastructure, 2016 BCSC 1779

Facts:

- Plaintiffs own and operate Shuswap Lake Estates, near Shuswap Lake, BC

- Plaintiffs and the Defendant entered into an agreement for the sale of certain land for the Trans Canada Highway

Shuswap Lake Estates Ltd. et al. v. HMTQ, 2016 BCSC 1779

Facts cont'd:

- Defendant made certain payments to the Plaintiffs and it was agreed the Plaintiffs only had the right to pursue business losses under the *Expropriation Act*

- The Plaintiffs' property included a golf course and over 1,000 residential lots

- The Plaintiffs' facilities were visible to both eastbound and westbound travellers on the Highway, and were mainly accessed from Centennial Drive which intersected with the Highway (although alternative access further away)

Shuswap Lake Estates Ltd. et al. v. HMTQ, 2016 BCSC 1779

Facts cont'd :

- The Defendants considered the Highway in this area to be unsafe and substandard
- As a result, works were undertaken by the Defendant which resulted in access to Centennial Drive from the Highway being eliminated
- The new access was less direct and longer, although some of that was at the Plaintiffs' request, to allow for a future hotel

Shuswap Lake Estates Ltd. et al. v. HMTQ, 2016 BCSC 1779

Decision:

- Court noted that although business losses have been awarded previously, no Canadian Court had previously interpreted the phrase “business losses” in the context of expropriation legislation

- Court reviews in detail the expert evidence called by the parties

Shuswap Lake Estates Ltd. et al. v. HMTQ, 2016 BCSC 1779

Decision cont'd:

- Court reviews the Plaintiffs' 3 claims under business losses:
  - Loss of lot residential sales
  - Costs for relocation of road utilities
  - Costs of installing water bypasses

- Court rejected loss of lot sales primarily on the basis that Plaintiffs did not satisfy their onus of proving the decline in sales was attributed to the taking for the project

- There must be a causal connection between the expropriation and the alleged loss, and that loss must not be too remote

Shuswap Lake Estates Ltd. et al. v. HMTQ, 2016 BCSC 1779

Decision cont'd:

- Plaintiffs argued for a "common sense" approach to finding loss of lot sales
- Court rejected, saying "the problems with these arguments are too numerous to exhaustively mention"
- Court concluded that the loss of lot sales is speculative, at best

Shuswap Lake Estates Ltd. et al. v. HMTQ, 2016 BCSC 1779

Decision cont'd:

- Court notes that the opinions of experts are only as good as the facts upon which they are based
- Court rejected the Plaintiffs' experts as the facts upon which they were founded were not proven
- Court found the Defendant's experts to be objective, sensible and of great assistance

Shuswap Lake Estates Ltd. et al. v. HMTQ, 2016 BCSC 1779

Decision cont'd:

- Court rejected the Plaintiffs' road utility relocation costs under the *Act* and contract (settlement agreement)
- Court awarded the Plaintiffs $76,883.27 for water bypass costs, as a business loss
- Although Plaintiffs awarded a small portion of its claim, it was still awarded costs, subject to submissions

Gautam and others v. Canada Line Rapid Transit Line and others, 2015 BCSC 2038

Facts:

- Class action proceeding seeking damages for nuisance and injurious affection arising out of the construction of the Canada Line on Cambie Street (6th Avenue to 25th Avenue (King Edward) – "Cambie Village")

Gautam and others v. Canada Line Rapid Transit Line and others, 2015 BCSC 2038

Facts cont'd:

- Class action members were either business owners or owners of commercial premises
- Dealing with issues arising from "cut and cover" construction, instead of tunnel boring
- Court reviews difference between this case and "Heyes v. Vancouver" where a claim in nuisance was ultimately rejected on the basis that the Defendants had a defence of statutory authority

Gautam and others v. Canada Line Rapid Transit Line and others, 2015 BCSC 2038

Facts cont'd:

- Plaintiffs argued that the evidence is different in this case and in turn supported a different approach

- Private nuisance requires:
  - Interference must be substantial
  - Interference must be unreasonable

- Even if test is met, Defendants may escape liability if they can demonstrate they were acting under statutory authority and the interference was an inevitable result of the activity

Gautam and others v. Canada Line Rapid Transit Line and others, 2015 BCSC 2038

Facts cont'd:

- Court noted that Court of Appeal previously concluded that "Heyes" was not conclusive of the issues in "Gautam"

- 3 common issues were certified, and proceeded to trial:

A. Did the cut and cover tunnel construction of the Canada Line substantially interfere with the use and enjoyment of property by owners or by business proprietors on Cambie Street From 2nd Avenue to King Edward Avenue?

B. If the answer to Question A is yes, was there statutory authority for the interference with the use and enjoyment of any property in Cambie Village, thereby absolving the defendants of any liability for economic loss resulting from nuisance?

C. If the answer to Question B is yes, did the interference nonetheless result in injurious affection for which compensation may be claimed by any owner or tenant?

Gautam and others v. Canada Line Rapid Transit Line and others, 2015 BCSC 2038

Facts cont'd:

- Court reviewed process for how the Canada Line was built
- Court concluded that question A must be answered yes
- The question of reasonableness would be left for a future date, even though the original conclusion under question A would not yield a finding of whether the Defendants were liable in nuisance
- Court then concluded that the Defendants were entitled to the defence of statutory authority so question B was also answered yes

Gautam and others v. Canada Line Rapid Transit Line and others, 2015 BCSC 2038

Facts cont'd:

- Court then reviews Question C – is a claim for injurious affection still available?

- Court reviews principles from the case on pure injurious affection - "The Queen v. Loiselle":

1) The damage must result from an act rendered lawful by statutory powers of the person performing such act;

2) The damage must be such as would have been actionable under the common law, but for the statutory powers;

3) The damage must be an injury to the land itself and not a personal injury or an injury to business or trade;

4) The damage must be occasioned by the construction of the public work, not the user.

Gautam and others v. Canada Line Rapid Transit Line and others, 2015 BCSC 2038

Facts cont'd:

- Court reviews who can advance claim and determines that the subject owners are entitled to do so under the Act
- Court notes, however, that the owners cannot claim business loss; what they may advance is the "nub of the problem" – what loss can the owners claim?
- Court concludes that a claim for injurious affection (Question C) is still available to the owners

Gautam and others v. Canada Line Rapid Transit Line and others, 2015 BCSC 2038

- An injury to the land was found to be available – a reduction in its rental value, whether temporary or permanent, is available – not the loss of rent, but rather, the loss of value (as this amounts to an injury to land)

- Court then leaves it to the Plaintiffs to prove a recoverable loss, based on the Court's decision

Lynch v. St. John (City), 2016 NLCA 35

Facts:

- The Lynches acquired 15 acres of property in 1917
- 11 acres of the property, still in its natural state, was located within the Broad Cove River Watershed, which was used by the city of St. John's for water supply
- Legislative history of area included the duty of City Counsel to provide wholesome water to the city and allowed for the city to expropriate property for the prevention of pollution if necessary

Lynch v. St. John (City), 2016 NLCA 35

Facts cont'd:

- Provincial and Municipal planning sought to increase watershed security and prohibit development within watershed
- Urban and Rural Planning Act, S.N.L. 2000, c U-8 was enacted and expressly provided that purchase notice provisions did not apply when development was prohibited to protect watershed (upheld in Butler, 2000 NLCA 57)
- Urban and Rural Planning Act also provided no "permitted uses" within watershed. Only discretionary uses: agriculture, forestry, public utilities (municipal discretion)

Lynch v. St. John (City), 2016 NLCA 35

Facts cont'd:

- In 2011, the Lynches retained counsel to inquire about how they could develop the property

- Inquiries included:
  - Residential development
  - Agriculture
  - Forestry and saw milling
  - Public utilities
  - Building an "eco-friendly" home
  - Installing wind turbines or solar panels

- Lynch Family was finally informed that they were not permitted to develop the property in any manner

Lynch v. St. John (City), 2016 NLCA 35

Positions of the Parties:

- The Lynch Family
  - The property has been constructively expropriated
  - The City receives the benefit of wholesome water
  - The Property is rendered useless and valueless
  - The Lynch Family should be compensated

- The City of St. John's
  - There is no expropriation
  - Nothing has been taken from the Lynch Family and the City has not acquired anything
  - This is the lawful regulation of property to protect the public interest, for which no compensation is owed

Lynch v. St. John (City), 2016 NLCA 35

Issue:

- The trial judge held that the regulation of the watershed was not constructive expropriation and that the restrictions were not a de facto transfer of rights to the City of St. John's

- Appeal: whether or not the trial judge erred in concluding the Property has not been constructively expropriated

Lynch v. St. John (City), 2016 NLCA 35

Test for Constructive Expropriation:
***CP Rail v. Vancouver*, 2006 SCC 5**

- (1) Acquisition of a beneficial interest from the property
  (2) removal of all reasonable uses from the property

- High threshold to meet: Mariner Real Estate Ltd. v. Nova Scotia (1999), 177 DLR (4th) 696 (NSCA), Cromwell J.A. rejected constructive expropriation when a building permit was refused on a sensitive eco-system

Lynch v. St. John (City), 2016 NLCA 35

Court of Appeal:

- The trial judge found that not all reasonable uses of the property were taken away, but CA said that trial judge could not identify one permitted use of the property
- Trial Judge erred in asking whether or not all aggregated incidents of owner were deprived
- Court of Appeal held that all reasonable uses were taken away and it resulted in a de facto or constructive expropriation and compensation should be paid

Lynch v. St. John (City), 2016 NLCA 35

Ratio:

- Court of Appeal thought there likely could have been some development on the property, but City provided no guidelines or policies for discretionary uses and merely refused development
- The Lynches' property rights were diminished to merely a right to keep the land "unused in its natural state"
- Constructive expropriation is still a high threshold to meet; however, it is possible where virtually all incidents of ownership are taken away

- Thank-you!