BRITISH COLUMBIA EXPROPRIATION ASSOCIATION

2010 FALL SEMINAR

NOTEWORTHY DECISIONS – 2009/2010

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***Adroit Resources Inc. v. British Columbia*, 2009 BCSC 841**
***Adroit Resources Inc. v. British Columbia*, 2010 BCSC 457**
***Adroit Resources Inc. v. British Columbia*, 2010 BCCA 334**

I first spoke about this case to the Association in 2003 – when the Plaintiff went under the name of Rock Resources and the Court of Appeal ruled that the Province was liable to compensate it as the holder of mineral claims for losses where creation of a park In 1995 precluded mining.

These three decisions relate to the quantification of those losses. The basis of compensation was "value to owner" – an old formulation derived from judicial rulings in cases falling under the Victorian *Land Clauses Act*. These decisions are of limited precedential value as statutory schemes now govern many of the issues considered here.

The trial before Justice Cullen lasted about three weeks. The claim was for just under $8 million – for claims which had been purchased just before the taking for $60,000 and didn't show a whole lot of promise. The Province's valuer was of the view that the claims were worth about $60,000. Unfortunately she made a serious error in one of the methods, which compromised her entire opinion of value. The owner's valuation was even worse. In the result Justice Cullen valued the claims himself at $300,000. He also awarded about $300,000 in disturbance damage for loss of goodwill/opportunity for an orderly transition. This amount was based on a temporary loss in market capitalization.

The second decision involved the compounding interval for interest – now dealt with in s. 46 of the *Expropriation Act*.

Both sides appealed, and the Court of Appeal allowed the Province's appeal in part – the disturbance damage award was set aside as double counting.

Rock (now involved in antimony in Italy, oil and gas in Texas, and diamonds in Ontario) has applied to re-open the appeal and for leave to appeal to the Supreme Court of Canada. A costs review is scheduled for the end of February.

***Dales Properties Ltd. v. City of Surrey*, Report of Inquiry Officer Mark G. Underhill August 18, 2010**

This inquiry followed the GVDSS one referred to below. The expropriation was for a new civic centre for Surrey. Many of the rulings follow those in the GVDSS inquiry, discussed below.

As this was a municipal expropriation, an issue rose as to what the inquiry officer could look at in order to ascertain the objectives of the project. Mark Underhill, the inquiry offer, ruled that the objectives could be ascertained from the authorizing bylaw, the expropriation notices and evidence presented at the inquiry. There was an obligation on the part of the Authority to adduce some evidence as to the objectives, but the tactical burden of proof rested with the applicant to show how the objectives could be better achieved otherwise.

The inquiry officer was satisfied with the objectives provided by the City, and was unable to find that the objectives could be achieved through an alternative site or by varying the amount of land or the nature of the interest to be taken. Accordingly he recommended approval.

***Del's Machinery Ltd. v. British Columbia (Minister of Transportation)*, 2009 BCSC 1381**

Owner sought to set down a s. 48 hearing before the Registrar. Registrar held that she had no jurisdiction to review advance costs until a compensation action was commenced. Under appeal, no date set.

***Rainbow Country Estates Ltd. v. Whistler (Resort Municipality)*, 2010 BCSC 300**

This compensation claim arose from a 1987 expropriation of 108 acres by Whistler for a park. Owner valued the land at between $1.7 and $2 million. Whistler valuation was $315,000. Court concluded $1.3 million.

This case should be of interest to appraisers in particular, as the court reviews the evidence carefully and critically. The comparable sales approach was relied on and the decision reinforces the obligation on the part of appraisers to really know their comparables. Here many of the comparables used by Whistler were rejected. The court rejected transactions where Whistler was the purchaser – and comes close to suggesting an absolute exclusion of such sales. Apparently owners might give away their land when confronted with a potential purchase from a party with expropriation powers. The court also looked at a number of sales relied on by the owner which took place after the taking. It concluded that such sales could be used as long as they occurred in a "reasonable" period. It was not a requirement, according to Justice Adair, that prices not change dramatically over the period in question. In the result a sale in 1989 could be considered, but a sale from 1999 could not.

***Reeves v. British Columbia (Hydro and Power Authority)*, 2009 BCSC 1285**

This compensation claim arose from takings (by section 3 agreement) of a number of Statutory Rights of Way, temporary and permanent, for the construction of a transmission tower. There was also a trespass claim.

As with the Rainbow Estates case, this case should be of interest to appraisers in particular, as the court reviews the appraisal evidence carefully and critically.

The property, near or in Abbotsford, appears to have been a vacant parcel, used for "recreational purposes and grazing leases". It had been removed from the ALR and was "slated" for future industrial development. There had been a number of offers to purchase the property and its neighbour.

The court rejected Hydro's underlying land valuation which seems to have been substantially based on the sale of the adjacent parcel – to Hydro - which was similar in location, size and future industrial development. The owner's appraiser did not rely on this transaction (or even mention it – which caused Justice Fisher "some concerns"). The learned trial judge chose not to consider this transaction due to her concern over the circumstances of the sale (by an estate) and "environmental concerns" which may not have been considered.

The court also rejected Hydro's position that there was no injurious affection. Based on a development plan prepared on behalf of the owner, and characterized as very preliminary and speculative, the court nonetheless concluded that there was a compensable reduction in value to the remainder of approximately $100,000. The speculative nature of the plan could be addressed, according to the court, by applying contingencies – 30% as a result of one of the SRW's; and 50% as a result of the other two.

On the temporary SRW compensation, the Court rejected a rate of return based on what the owner's appraiser characterized as a typical market annual return (8%). The Court reasoned that the actual income received from the grazing leases should be taken into account, and that this could be done by using a 4% annual return rate.

***Vancouver Fraser Port Authority v. Greater Vancouver Sewerage and Drainage District*, Report of Inquiry Officer Bernd Walter November 27, 2008**

This Inquiry under section 14 of the *Expropriation Act* concerned an expropriation by the Greater Vancouver Sewerage and Drainage District (GVSDD) of a large parcel of land in New Westminster owned by Canfor. Behind the scenes was a contest between the District and the Vancouver Fraser Port Authority over the lands. The Port had entered into a "formal agreement of purchase and sale" with Canfor for the lands some six days before the Expropriation Notices were filed in the Land Title Office. The Port was the applicant for the Inquiry.

The Inquiry Officer, Bernd Walter, concluded that the jurisdiction of the inquiry was limited. The inquiry is required to determine whether the site, size and nature of the interest in the proposed taking is optimal or "necessary" in achieving the Authority's objectives. "Necessity" must be determined or derived from an examination of evidence which satisfies it that the specific alternatives in s. 14(a) (alternative site) and s. 14(b) (amount of land/nature of interest) would "better" achieve the Authority's objectives. While there was no technical burden of proof (this is an inquiry), the applicant has at least a tactical burden to adduce evidence that there are "better" alternatives

On the facts, despite (or possibly because of) the high level of uncertainty as to the Authority's plans and needs for the property, the Inquiry Officer was unable to conclude that there were "better" alternatives to achieving the Authority's objectives. Specifically on the amount of land required, the Inquiry Officer noted that he could not tell with certainty that the entire property was required. He recommended a critical review of the need for the entire property as plans evolved.