BC EXPROPRIATION ASSOCIATION
2010 FALL SEMINAR

RECENT CASES OF NOTE

BOB COSBURN

CLOCK HOLDINGS LTD. v. ESTATE OF BRAICH et al
BC Court of Appeal
2009 BCCA 269
June 16, 2009
Practice, appeals

1) A protracted bit of litigation involving members of a large family with land holdings in the Mission area – think Jarndyce and Jarndyce, the court case described in Dickens' *Bleak House*, in which a large inheritance was contested. The Jarndyce case dragged on for so many generations that by the time it resolved legal costs had consumed the entire estate. Dickens was not impressed by the Chancery Court process, saying "Suffer any wrong that can be done you rather than come here!" The Clock facts have resulted in multiple reported decisions in the BC courts going back to 2002. A reminder to all to make sure our wills are clear and do not invite dispute!

2) Clock (a company to which whatever rights he had under the estate of Braich were assigned by a "dissident" family member) lost its application in Supreme Court to block a transfer of land from the deceased's holding company to a company controlled by the other family members. A notice of appeal was validly issued but not served within the time limited by the C of A rules. The family members applied to quash the appeal on the grounds of late service of the notice of appeal.

3) The court took a fairly strict view of the matter and allowed the application to quash, or, put another way, disallowed the intended appellant's counter-application to extend time for service to "perfect" the appeal. Mr. Justice

Frankel held that the failure of the Appellant to apply on its own in a timely way to extend time for service and then worsening that situation by insisting that the responsibility lay with the Respondents to apply to quash the appeal was the pivotal factor in his decision even though he found that the other applicable tests for such a motion (there was a bona fide intention to appeal, the Respondents were advised of the intention to appeal, the Respondents would not be unduly prejudiced by the granting of an extension of time, and there is merit in the appeal) were satisfied. It was not, the judge said, in the interests of justice to grant an order curing the defect by extending time for service under these circumstances.

DALE'S PROPERTIES LTD. V. CITY OF SURREY

BC Supreme Court
2010 BCSC 1196
August 27, 2010
Judicial Review Procedure Act, Expropriation Act, Community Charter

4) This case arises out of objections by the landowner to the expropriation of two parcels of land by Surrey for the Surrey City Centre project. Because the project giving rise to the expropriations was not a linear development Dale's Properties was able to request an inquiry, held before Mark Underhill, which did not result in measurable success for the landowner. The owner then applied to the court pursuant to the *Judicial Review Procedure Act* for orders setting aside the expropriations on the grounds that:

a) the initial resolution passed by Surrey authorizing the takings was defective by reason of vagueness or uncertainty; and
b) the taking was unreasonable in the context of the planning requirements of Surrey, and
c) the taking was illegal as being intended to provide a benefit to a business and thereby infringing Section 25(1)(a) of the *Community Charter*; and
d) the second resolution authorizing the expropriation passed by Surrey Council did not cure the defects in the first resolution.

5) The court dismissed the application by Dale's, on all counts, the reasoning for dismissing the two grounds relating to lack of certainty being essentially practical ones – the required documentation was certain and specific enough in the current statutory context. The judge allowed Surrey considerable

breadth in its ability to plan its project and determine "reasonableness" in dealing with the ground relating to Surrey's planning requirements and took into account the fact that the landowner had access to further information as to those requirements during the inquiry process. The court dismissed out of hand the argument that the fact that private parties will benefit "along the way" from the construction and development of the project contravened the applicable section of the Community Charter – see also in a related sense the 2005 U.S. Supreme Court decision in Kelo v. City of New London. The Dale's case sets out a useful and thorough discussion of the requirements for municipalities to effect expropriations that will pass the scrutiny of the courts, along with a review of earlier decisions going back to the expropriation bylaw days preceding the coming into force of the present *Expropriation Act*, the *Community Charter* and the expanded definition of "bylaw" in Section 260 of the *Local Government Act.*

GARY GAUTAM (CAMBIE GENERAL STORE) et al v. CANADA LINE RAPID TRANSIT et al
BC Supreme Court
2010 BCSC 163
February 5, 2010
Nuisance, Defence of Statutory Authority, Class Proceedings Act, Expropriation Act S 41 - Injurious affection in the Absence of a Taking

6) This decision resulted from an application for certification of a class action arising out of the construction of the Canada Line rapid transit rail line down Cambie Street in front of the proposed class action participants' properties. The claim was in nuisance, and alternatively for a somewhat exotic remedy called "waiver of tort" - a species of equitable restitution claim – essentially for the money the defendants are said to have saved by using the cut and cover approach to tunnel construction rather than the apparently less intrusive (on the proposed class action participants) method of boring the tunnel, and in the further alternative for compensation for injurious affection in the absence of a taking. The defence was advanced on the ground that the interests of the proposed members of the class were not sufficiently common with respect to the claims made to allow for certification. Certification was granted by the court, saying that all the members of the class were affected in the same way even though the amounts of their claims may differ.

7) The class action issues are the main subjects of this decision, the other listed topics being touched upon only briefly for the purpose of assessing whether a "class" could advance the claims made.

WILDTREE HOTELS LIMITED et al v. LONDON BOROUGH OF HARROW
UK House of Lords
2001 2 AC 1
June 22, 2000
Injurious affection in the absence of a taking

8) Another sequel to the long-running series in the drama the English courts have imposed upon themselves in attempting to establish, for the purposes of the law of injurious affection in the absence of a taking, who is entitled to claim, and to what extent. This remedy is only scantily codified in BC by Section 41 of the *Expropriation Act* – scantily codified because the section omits the most important and difficult part – determining when an owner is entitled to claim it - and leaves that to the courts to determine. The English courts have wrestled with this issue since 1845, and Canadian courts, based on similar statutory foundations, on numerous occasions as well and both jurisdictions continue to do so. As do our neighbours in the U.S. when considering the remedy of compensation for "regulatory takings" in what is clearly a stronger constitutional context in terms of protection of property rights.

> **41**
> (1) In this section, **"injurious affection"** means injurious affection caused by an expropriating authority in respect of a work or project for which the expropriating authority had the power to expropriate land.
> (2) The repeal of the *Expropriation Act*, R.S.B.C. 1979, c. 117, and the amendments and repeals in sections 56 to 128 of the *Expropriation Act*, S.B.C. 1987, c. 23, **are deemed not to change the law *[whatever it might be!!]* respecting injurious affection if no land of an owner is expropriated**, and an owner whose land is not taken or acquired is, despite those amendments or repeals, **entitled to compensation to the same extent, if any, that the owner would have been entitled to had those enactments not been amended or repealed**.
> (3) An owner referred to in subsection (2) who wishes to make a claim for compensation for injurious affection must make his or her claim by applying to the court, and **the court must hear the claim and determine**
> i. **whether the claimant is entitled to compensation, and**
> ii. **if entitled to compensation, the amount of the compensation**.

(4) Without limiting any other provision of this section, the BC Transportation Financing Authority has no greater liability to compensate an owner for injurious affection than does the minister responsible for the administration of the *Transportation Act*

9) Appraisers will tell us that determining the value of injurious affection, whether resulting from a taking or in the absence of a taking, is not a big deal. The difficult part when this remedy is being considered is the lawyer's side - trying to reconcile the cases in the context of unhelpfully unclear legislation, to determine when such loss is compensable and when not. Wildtree continues the tradition in the English courts, starting some 160 years ago, of making efforts to find and establish clear principles. With no more apparent success than the predecessor cases.

10) Wildtree is noteworthy for allowing a claim for injurious affection in the absence of a taking to include temporary business losses incurred during the period of construction disruption. In that respect it is, in my opinion, wrong in principle and such a conclusion flies in the face of the definition of injurious affection – a permanent loss of value resulting from the taking/project. The court had the option to follow settled existing law and hold that such temporary losses fell in the category of "parasitic" uncompensable (when there is no taking) consequences of a project, to be distinguished from compensable "actual" injurious affection (permanent as a result of the existence and operation of the project works), but chose not to do so. This will open another Pandora's Box unless reconsidered and reversed by the House of Lords or other senior and authoritative court in a subsequent case or, as the situation calls for in an obvious way, clear and definitive legislation clarifying the rights of affected landowners who suffer loss of value from a project without land being taken from them. Remember that this remedy is "injurious affection in the absence of a taking". It is not "treat a loss of value suffered as a result of a nearby project by a landowner from whom no land is taken as if it were an expropriation and compensate accordingly".

11) You can find a paper (somewhat dated, although presently in the process of revision) on the history of the development of this remedy in the Anglo-Canadian legal contexts on the Expropriation Law Centre website if you are interested in following (or are forced to by file demands!) the trail starting with the English *Lands Clauses Consolidation Act* of 1845.

VAUSE v. SPECTRA ENERGY MIDSTREAM CORPORATION AND MEDIATION AND ARBITRATION BOARD

BC Supreme Court

2009 BCSC 916

July 6 2009

P & NG Act, right of entry, Judicial Review Procedure Act practice, Mediation and Arbitration Board, Pipelines – Flow lines

12) Another extension of time case – in this situation involving a proposed JRPA (*Judicial Procedure Review Act*) application seeking to have decisions of the Mediation and Arbitration Board (MAB) granting right of entry to Spectra reviewed by the court. The MAB is constituted by the *Petroleum and Natural Gas Act*. Section 57 of the *Administrative Tribunals Act* is incorporated by reference in Section 13 of the P & NG Act - providing that a JRPA application must be commenced within 60 days of the date of the decision to be reviewed. Section 26 of the P & NG Act gives the Board the right, even on its own initiative (without application by a party being necessary), to review, rescind, amend or vary an order previously made by it. No time limit is set out for the period in which the Board can revisit its own earlier decisions in that regard and that raises the question of when a decision may be considered to be "final" for the purposes of a limitation such as that in the *Administrative Tribunals Act*. Vause had applied to the board under this section after the hearing and decision seeking reconsideration of the board's orders with respect to the flow line/pipeline issue, compensation, and the award of costs. The first two claims were denied and the third allowed with the award of costs being increased. As well the board issued amending orders after the first order (which had been made on December 11, 2007) on December 22, 2008 and January 30, 2009 correcting errors in the legal description of the lands affected in the first and second orders. In December 2008, after the original MAB decision and the reconsideration applications and the first correcting order, Vause advised Spectra of his intention to bring a JRPA application seeking court review of the MAB's exercise of its statutory power of decision conferred by the P & NG Act. At that point the *Administrative Tribunals Act* limitation became an issue.

13) The court determined that it is the date of the original decision (December 11, 2007 in this case), whether later reconsidered or amended or not, that establishes the starting date for the running of the limitation and as such the proposed JRPA application was out of time.

14) The substantive foundation issue raised in the proposed JRP application was the definition of "pipeline" and "flow line" – an unnecessarily complicated and long standing debate in BC created in my opinion by the MAB tending in many matters before it (including this case as I read it) to ignore the clear definition (and rationale for that definition) of flow line in the *Pipeline Act* then in force (repealed on October 4, 2010), which reads:

> **"flow line"** means a pipeline serving to interconnect wellheads with separators, treaters, dehydrators, field storage tanks or field storage batteries

15) The *Oil and Gas Activities Act*, which came into force on October 4, 2010, contains a somewhat expanded definition of flow line which one assumes was drafted to try to clarify the issue further (although as stated above there was nothing unclear about the *Pipeline Act* definition) and reduce the possibility of the MAB seeking to expand its own jurisdiction by making findings such as those in Vause:

> **"flow line"** means a pipeline that connects a well head with a scrubbing, processing or storage facility and that precedes the transfer of the conveyed substance to or from a transmission, distribution or transportation line;

16) See also in this regard the amended definition of "pipeline" in the present *Oil and Gas Activities Act* and the changes from the earlier *Pipeline Act* definition - apparently intended to further reinforce the differences in purpose and rationale between flow lines required on a relatively temporary basis for the processes involved in the extraction of oil and gas from the ground, particularly before there is a transmission or transportation line serving the well or field, and long term or permanent pipelines intended to transport the product of oil and gas wells or fields for refining and sale and consumption:

> **"pipeline"** means, except in section 9 [*referring to NEB authorized pipelines*], piping through which any of the following is conveyed:
>
> (a) petroleum or natural gas;
>
> (b) water produced in relation to the production of petroleum or natural gas or conveyed to or from a facility for disposal into a pool or storage reservoir;
>
> (c) solids;
>
> (d) substances prescribed under section 133 (2) (v) of the *Petroleum and Natural Gas Act*,

(e) other prescribed substances,

and includes installations and facilities associated with the piping, but does not include

piping used to transmit natural gas at less than 700 kPa to consumers by a gas utility as defined in the *Gas Utility Act*,

a well head, or

anything else that is prescribed

17) In Vause the application for entry was made by Spectra (an application for entry being within the jurisdiction of the MAB but **only** if the line in question is a flow line and not a transmission, distribution or transportation pipeline) to acquire land rights by way of the statutory licence provided for under the P & NG Act for the purpose of constructing a pipeline across, inter alia, the Vause lands. It would appear to have been open to Spectra to expropriate the required statutory right of way from Vause following the procedure provided by Section 16 of the *Pipeline Act*, however Spectra elected to follow the MAB approach. Vause argued that the pipeline for which right of entry over his land was sought was not a flow line – a pipeline used by the drilling oil company for near-site storage or early basic processing of petroleum or natural gas from a wellhead – but was in fact and law a sales or company pipeline (in the terminology used when the *Pipeline Act* was in force) or a transmission or transportation pipeline (using the wording from the current O & GA Act) taking gas from the producer at the wellsite to the Spectra pipeline network for refining and sale. The decision indicates that the line in question was to pipe natural gas from various wellsites operated by drilling oil and gas companies (but not from the wellheads) to a compressor site on Spectra's transmission pipeline, then on to a processing site some 15 km in another direction. And from there, one assumes, on into Spectra's national and international pipeline and distribution network. It looks pretty much that all the factors, read in light of the statutory framework then in place, call for the conclusion that the pipeline sought to be constructed on the Vause lands is a sales or transmission pipeline and not a flow line and as such was properly to be dealt with under the *Pipeline Act* then in force by expropriation under Section 16, rather than by application for right of entry before the MAB – the MAB having no jurisdiction under those circumstances. The equivalent present expropriation power is found in Section 34(3) of the *Oil and Gas Activities Act*. An expropriation would result in Spectra obtaining a registrable statutory right of way, which runs with the land, rather than the statutory licence obtained by the right of entry process. The right of entry order cannot be registered on title (it is a licence, not an interest in land), although is required by the P & NG Act to be "noted" on title by the Registrar

of Land Titles. "Noting" on title does not carry with it the rights a registered owner of an interest in land enjoys.

18) In any event the Court dismissed the application for extension of time to file the JRPA application. Further discussion of the issues given rise to by the application appear on pages 15 through 32 of the decision. There are some concerning conclusions reached by the court in the reasons that will be of interest to those in natural resources/regulatory practice. For instance there is reliance by the court on "policy" to support a conclusion (para 73) when there are legal factors on the basis of which such conclusions should, in my respectful opinion, be made. As well there is a finding that a transportation pipeline is a "connected or incidental purpose" to exploring for, developing or producing petroleum or natural gas (para 75) – a conclusion that is inconsistent with the reasoning supporting the historical separate treatment of flow lines in the legislation and the differentiation between flow lines and pipelines in the current *Oil and Gas Activities Act*. This finding can be read to mean that any provincially regulated pipeline company, for any purpose, can apply to the MAB for right of entry under Section 16 of the P & NG Act whether the pipeline is a flow line (operated by the producers/oil & gas companies to service their own product) or not. Another Pandora's Box.

CAMP DEVELOPMENT CORP v. BCTA
BC C of A
2010 BCCA 284
June 9 2010
Expropriations, taking in excess of minimum project requirements, practice

19) This case arises from a taking by GVTA (now SCBCTA) of land for the Golden Ears Bridge project. Some three years after the compensation action was filed the Plaintiff landowner discovered (presumably when construction was far enough advanced to see the use of the land taken) that the amount of land expropriated was in excess of what appeared to be bridge project requirements, and the balance of the land (an 89 acre site in total) was to be used for maintenance and training facilities. The expropriation notice stated that the land was required for the Golden Ears Bridge Project Transportation System, a linear development, so the inquiry process was not available to the

Plaintiff on the face of the documents and no issue was taken at the time of expropriation with the "linear" designation.

20) The Plaintiff sought to amend its pleadings to include claims for return of the "excess" land and alternatively damages for bad faith/improper expropriation. As well a claim for "waiver of tort" was sought to be included in the amended pleadings in argument before the trial judge. The Plaintiff is of course faced with Section 51 of the *Expropriation Act* which provides that no challenge to the validity of the expropriation can be brought after the Vesting Notice is registered, and vesting had occurred in June of 2006.

21) The Plaintiff/landowner appeals from the trial court's holding that Section 51 prevents any claim to set aside the expropriation after the date of vesting, arguing that the expropriation was a nullity and as such not subject to the operation of Section 51. The authority appeals the trial court's holding that the Plaintiff could amend its pleadings to claim damages for bad faith and "excessive expropriation".

22) The court of appeal held that the expropriation was not a nullity, and set out fairly narrow grounds on which an expropriation could be considered to be null and void and as such "unprotected" by Section 51. The court also held that Section 51 does not operate so as to prevent a claim for damages being commenced for "wrongful expropriation" after the date of vesting.

23) In the result both the appeal and cross-appeal were dismissed.

24) The trial court decision, found at 2009 BCSC 819 is worthwhile reading for those particularly interested in these issues and contains a useful summary of the authorities underlying the conclusions.

IMASCO MINERALS v. VONK AND MEDIATION AND ARBITRATION BOARD
BC C of A
2009 BCCA 100
March 11 2009
Mining Right of Way Act, Judicial Review Procedure Act

25) The holder of mineral title required continuous road access through a private parcel to service its mine located on other land. Access had been secured from the previous owner by licence agreement over the existing road through the affected parcel, but sale of that parcel to the Vonks extinguished the contractual licence rights (licences are not registrable on their own and do not "run with the land").

26) Imasco made an application to the Mediation and Arbitration Board (MAB) as provided for in the *Mining Right of Way Act*, for right of entry and the fixing of compensation with respect to the existing road. The board ruled that because the road was apparently originally constructed as a private road and had not been proven to have been built under any statutory authority, such an order could not be granted. This decision turns on the specific wording of S. 10 of the *Mining Right of Way Act* which wording applies, according to the Court of Appeal, whether or not the road has since become highway or public road by any of the various mechanisms that could result in that evolution. The BCSC, on a JRPA application to review the board's decision, agreed with the board and dismissed the application. The Court of Appeal agreed with Justice Sigurdson in the BC Supreme Court. The practical result is, barring a negotiated resolution, that Imasco will need to expropriate land from the Vonks (which it can do under the same statute) to construct another road in order to gain access to its calcium carbonate quarry.

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