

**BRITISH COLUMBIA EXPROPRIATION ASSOCIATION**

**2010 FALL SEMINAR**

**New Developments in Litigation: Claims for Wrongful and Excessive Taking**

*New Heads of Damage Resulting from Expropriations?*

1. British Columbia's *Expropriation Act* has historically been treated as a complete code in the determination of claims for compensation as a result of expropriation. However, some property owners are taking a different perspective on how to frame their claims - challenging both the scope and nature of compensation for expropriations.
2. While these new claims have yet to be fully tested in court, the British Columbia Court of Appeal, in June 2010, upheld the ruling of a lower court judge which allowed several novel civil claims to be added to an ongoing expropriation compensation action. In *Camp Development Corporation v. Greater Vancouver Transportation Authority*<sup>1</sup> [*Camp Development*] the expropriated landowner had commenced a traditional compensation action as contemplated by the *Expropriation Act*, but upon deciding that the expropriating authority had taken far more land than it actually needed, and that it was making use of the surplus for purposes the landowner viewed as unrelated to the stated reason for the taking, the landowner decided to seek civil damages arising out of alleged bad faith dealings and "excessive expropriation".
3. The expropriation notice in *Camp Development* had specified that the taking was for the construction of the Golden Ears Bridge, that the taking was for a "linear development", and that as a consequence the landowner was not entitled to request an inquiry into the necessity or wisdom of the taking. The landowner's entire 89 acre property was expropriated for the "linear development", but later it was revealed that much of the land was going to be used for a heavy maintenance repair facility and a training center.

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<sup>1</sup> 2010 BCCA 284, affirming in part 2009 BCSC 819.

4. While the landowner failed to convince the courts that the inaccuracy in the expropriation notice should nullify the expropriation entirely, it did succeed in obtaining an order allowing amendments to its Statement of Claim, to add claims for novel civil damages. In order to do so, the landowner had to have convinced the Supreme Court chambers judge, and later a three judge panel of the Court of Appeal, that these novel claims were not so outrageous that they had to fail at trial. *Camp Development* has not yet gone to trial, but it should be closely monitored by everyone with an interest in expropriation law.

*The Traditional Approach to Contesting the Necessity and Scope of a Taking*

5. Where the owner of land is served with an expropriation notice, and they want to argue that the proposed expropriation is unnecessary, the associated improvement should be located elsewhere, or the taking is excessive, that owner has the ability to request an inquiry of the government minister charged with the administration of the Act under which the expropriating authority purports to expropriate their land. (*Expropriation Act*, ss. 10-17)

6. If the inquiry is granted, an inquiry officer is appointed by the applicable minister to hold a public hearing for the purpose of examining whether the proposed expropriation of the land is necessary to achieve the objectives of the expropriating authority with respect to the proposed project. The inquiry officer has the ability to consider whether the objectives of the expropriating authority could be better achieved by the use of an alternative site, or by varying the amount of land to be taken or the nature of the interest in the land to be taken. Subsequently, the inquiry officer must deliver a written report making recommendations to the approving authority. However, the recommendations are not binding on the approving authority, which after considering the report may approve, approve with modifications, or reject the proposed expropriation. (*Expropriation Act*, s. 18)

7. An example of an approving authority disregarding an inquiry officer's findings can be found in the Supreme Court of Canada case *Walters v. Essex County Board of Education*<sup>2</sup>, where an inquiry officer found that a proposed expropriation was "indefensible, that it was neither fair nor sound and that on the merits it should not be approved", but the expropriation was approved regardless. The Supreme Court decided that it was only necessary for the approving authority to consider, rather than follow, the report of the inquiry officer, which they did in that case. As a result, the expropriation was deemed valid and the property owner had no further remedy.

*The Exception for "Linear Developments"*

8. The *Expropriations Act* states that if the proposed expropriation is said to be for a "linear development", as it is in *Camp Development*, the landowner has no right to request an inquiry (*Expropriation Act*, s. 10(2)). Linear developments are defined by the *Expropriation Act* to include highways, railways, hydro or other electric transmission or distribution lines, pipelines or sewers, water or drainage lines or mains. (*Expropriation Act*, s.10(1))

9. Traditionally, if an expropriating authority chooses to define their taking as being for a "linear development", an inquiry will not be ordered and/or an inquiry officer will refuse to rule on whether the proposed expropriation is necessary to achieve the objectives of the expropriating authority with respect to the proposed project. An example of this is found in *Pacific Forest Products Limited v. British Columbia (Minister of Transportation and Highways)*<sup>3</sup>, where the landowners argued that land being expropriated for a supposedly "linear development" of a highway was not truly linear. The taking involved lands adjacent to the highway, but also lands sitting at right angles to the highway; running hundreds of metres perpendicular to the highway. These lands were said to be needed for dumping surplus fill, which would be generated by the highway project and the construction of an overpass. The owners requested an inquiry, but the Expropriation Compensation Board decided that it

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<sup>2</sup> [1974] S.C.R. 481.

<sup>3</sup> (1994), 53 L.C.R. 198 (B.C.E.C.B.).

lacked jurisdiction to go behind a clearly stated purpose of the taking. The owner in *Pacific Forest Products*, like all owners facing expropriation for "linear developments" in the days prior to *Camp Development*, would have had no other recourse but to accept the taking and seek compensation through the mechanism created by the *Expropriation Act*<sup>4</sup>. This compensation is generally based on the fair market value of the land taken, disturbance damages, injurious affection in the case of partial takings, and those other heads of compensation found in the legislation. There has never been a recognized additional head of civil damages compensation available for allegedly "excessive expropriation" or for bad faith dealings by the authority. That may change when *Camp Development* goes to trial.

#### *The "Take-Away" Message*

10. The claims that have been recently allowed to be advanced by the Court of Appeal in *Camp Development* offer a potential new remedy to owners who have had their property expropriated in situations in which they believe bad faith or improper purposes motivated the taking. All this means today is the Court of Appeal did not find that these novel arguments in *Camp Development* are without legal foundation. Whether the landowner in *Camp Development* will ultimately be successful in receiving damages for the tort of bad faith or for "excessive expropriation" remains to be seen. However, the fact that the Court of Appeal has allowed these claims to proceed seems to indicate that there must exist some factual context in which they could be successful. This is an important development that expropriating authorities must consider when they determine what portion of properties should be expropriated for a particular project.

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<sup>4</sup> See also *Jamaica Development Ltd. v. Corporation of Delta* (November 25, 2002, E.C.B. Control No. 22/02/228), where a landowner opposed an expropriation that it asserted was not for a "linear development", but was in part for the construction of a fish ladder that was not in-line with the highway improvements identified as the reason for the taking. The Board accepted the authority's position that the fish ladder was part of the "linear development", demonstrating the generally broad view that inquiry officers will take of what may reasonably constitute an ancillary use to a "linear development".

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