2004 BRITISH COLUMBIA EXPROPRIATION ASSOCIATION FALL SEMINAR

OCTOBER 22 AND 23, 2004

2003/2004 CASE REVIEW AND UPDATE

BY JAMES H. GOULDEN
BULL, HOUSSER & TUPPER

JHG/1239714

1. Sam Sangha and Can-Am Building Supply Ltd. v. The City of Surrey

E.C.B. decision, October 08, 2004

This was an application for a review of the claimants' costs. The respondent had made a 'without prejudice' offer to settle the claimants' business claim loss for $20,000, plus costs. The offer was not accepted. The issues were divided as follows.

What are the consequences, if any, of the claimants' rejection of the offer to settle (Calderbank offer)?

Calderbank offers now play a greatly diminished role in litigation in British Columbia, but have not entirely disappeared. In this case, the claimants, by virtue of having been awarded a nominal amount for business loss, were found by the Board to have surpassed the 115% threshold entitling them to their costs under s. 45(4) of the *Expropriation Act*. However, even where the claimant is found to be entitled to his or her costs, the reviewer of costs must be satisfied that those costs were necessary and reasonable. The respondent's offer should be given some weight and this is one factor to consider under s.45(10) and when considering the reasonableness of the professional accounts.

What affect should the considerations under s.45(10) have on the determination of the claimants' costs?

The Board found that it was clear that the considerations listed in s.45(10) are mandatory considerations, whether or not the claimant has met the 115% threshold.

Business valuation costs

Business Valuator: The subject services were provided by a chartered accountant who specialized in business valuations. The Board reviewed the work completed by the accountant and also considered evidence from the cross-examination of the accountant. The Board found that the services provided by the accountant did not fully justify the fee charged.

Mathematician: The mathematician's report, preparation and hearing testimony did not justify the fee account. It was reduced from $2,600 to $1,700.

2. *Talisman Energy Inc. v. Diane and Larry Fay*

E.C.B. No. 08/04/249, August 27, 2004

The claimant was applying to complete the expropriation of a statutory right-of-way for a natural gas pipeline already constructed beneath the land owned by respondents. The respondents were applying to dismiss the application, alleging that matters were already dealt with by the Mediation and Arbitration Board ("MAB").

The Board began by looking at the jurisdiction of the MAB. The Board found that the claimant's pipeline was not a "flow line" and it fit instead within the definition of a "company pipeline". As a result, it fell outside of the jurisdiction of the MAB over rights of entry and compensation with respect to natural gas pipelines.

The Board then looked at the jurisdiction of the Board and found it had jurisdiction to determine compensation in these circumstances. The Board denied the respondent's request for an order dismissing the action.

3. *Richard and Florence Fritz v. The District of Sicamous*

E.C.B. No. 14/02/248, August 19, 2004

The City of Sicamous acquired a parcel of land across the road from the claimants' property in order to construct a waste water treatment facility and a public works yard. The City expropriated a strip of land as part of the project. The claimants claimed for the land expropriated and reduction in value to the remainder. There was an initial claim by the claimant that the respondent's expert was an advocate of the respondent's cause. The Board found no bias on the part of either expert retained by the parties.

Home severance

The claimants claimed they should get value for potential home site severance. The Board found that "even if home site severance was probable, they had not provided evidence of value."

Decrease in value of remainder

The claimants also claimed for losses attributable to the noise, odour and stigma of waste water facility. The Board stated that although the smell was bad at the beginning, it had become better. However, odours were present and they had a negative impact on the value. The Board referred to the *Rati* decision and found that proximity to the treatment facility had a negative impact on value. This amounted to a 5% diminution in value.

4. Neil Douglas and Denise Catherine Fredericks v. Her Majesty the Queen in the Right of the Province of British Columbia

E.C.B. No. 16/98/247, March 18, 2004

This case involved the expropriation of a strip of land for a road project near Kamloops. The claimants claimed that the remainder's value was decreased due to its proximity to the subject road. They also claimed that they could not use their deck and pool because of a loss of privacy.

The Board stated that the impact of noise on value of property is subjective. It found that in this case, the works were likely to have a negative proximity impact on value of land due to noise and loss of privacy. To determine the detriment, one should look to the appraisal value.

Decrease in value

The claimants' appraiser, in one of his two alternative methods, stated that there was just more than a perceptible difference in value in the marketability of the homes on the northern v. the southern side of Durango Road and the difference was about 5%. The Board accepted this as the correct level of compensation.

Disturbance Damages

The claimants had to drive 0.6 kilometres further. The Board applied s. 40 of the Expropriation Act and *Patterson* and held that this claim did not represent double compensation because it was not related to market value of the property. The Board also looked to *Sequoia Springs* and found that the phrase contained in s. 90 "directly attributable to the taking" means providing that cost can be claimed if they have been caused by the expropriation or taking. The Board concluded that there was a relationship between the increased travel distance and the closure of direct access and the incorporation of controlled accesses in the overall design of the project. However, the Board also factored in the respondent's assertion of general benefit because of increased safety provided by the controlled accesses. The Board made a nominal award of $600 to the claimants.

Landscaping

The Board stated that the claimants' real reason to landscape was "a conflict between the realities of rural living and the claimants' more urban lifestyle". This claim was denied.

5. *Spur Valley Improvement District v. Checkman Holdings (Calgary) Ltd.*

E.C.B. No. 02/97/246, January 15, 2004

This was a claim under s. 19 of the *Expropriation Act* involving an expropriation that was subsequently abandoned. The respondent raised a preliminary objection regarding jurisdiction of the Board. The Board divided the issues as follows.

Jurisdiction in light of Supreme Court judgments

The Board began by looking to McEwan J.'s findings in *Spar Valley* (1998) 80 A.C.W.S. (3d) 67 where he stated:

> There is no question that there are alternatives that might improve the plaintiff's situation, including expropriation proceedings…"

The Board found jurisdiction must be determined with reference to the expropriation proceedings rather than the Supreme Court proceedings.

Jurisdiction under s. 19(4) of the Act

The Board stated that if s. 31(1) of the *Water Regulation* is read together with s. 2(3) of the *Expropriation Act*, it becomes clear that the Board has not been given the power to award damages and costs following the abandonment of an expropriation under the *Water Act*.

Jurisdiction under s. 41 of the *Expropriation Act*

For a successful claim under this section ("injurious affection if no land taken"), a claimant needs to satisfy the following conditions:

(a) the damage must result from an act rendered lawful by statutory powers of the person performing the act;

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

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

(d) the damage must be occasioned by the construction of the public work, not by its use.

In the circumstances the Board was not persuaded that this case raised a claim under s. 41.

Jurisdiction under s. 32 of the *Water Regulation*

The Board found that this section was not applicable because in the present case the respondent discontinued expropriation proceedings before matters had reached the stage where the Board has jurisdiction under this section.

The Board concluded that it did not have jurisdiction in this case.

6. Clements, Ferguson, James, Penfold and Potter v. The Corporation of the City of Penticton

E.C.B. No. 57-66/01/245, January 7, 2004

Application by the claimants for a review of a bill of costs and final award of costs. The hearings for the multiple claimants were consolidated and the claimants claimed that actual reasonable costs should have been awarded instead of using a standard that applies fixed units no matter how long an activity takes.

The Board stated that the issue was how much work was done separately. One must review what was actually done and determine whether it was done separately, and whether it was reasonable to do it separately.

7. Pay Less Gas Co. (1972) Ltd. and Shell Canada Products Ltd. v. B.C.

E.C.B. No. 08/91/244, December 11, 2003

The issue in this case was whether the Board can revisit its compensation decision and vary the determination as to entitlement to additional interest under s. 46(4). The Board had originally determined that the claimant was not entitled to additional interest because the advance payment was more than 90% of the compensation awarded.

The Board stated that it had previously considered the principle of *functus officio* in a number of cases. The following guiding principles were extracted:

(a) It is inherent in the majority judgment in *Chandler* that the principle of *functus officio* as applied in the courts can also apply to administrative tribunals.

(b) There are two recognized exceptions to the general rule that a final decision of a court cannot be reopened after the formal judgment has been drawn up, issued and entered: first, where there was a slip in drawing it up, and second, where there was an error in expressing the manifest intention of the court.

(c) The principle of *functus officio* should not be strictly applied to an administrative tribunal when there are indications in the enabling statute that a decision can be reopened.

(d) Where the enabling statute does not purport to confer on the tribunal the power to rescind, vary, amend or reconsider a final decision, it is necessary to consider whether the tribunal has made a final decision and is therefore *functus officio*.

(e) If the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task.

(f) The application of the principle of *functus officio* must be more flexible and less formalistic in respect of the decisions of administrative tribunals which are subject to appeal only on a point of law.

The Board applied these factors to the case and found it could not revisit the determination. The only way this could be done is if the Board had changed their minds, believed they had made an error as to jurisdiction or because of a change in circumstances.

8. 415528 B.C. Ltd. v. Greater Vancouver Sewerage & Drainage District

E.C.B. No. 48/95/243, December 5, 2003

This involved an application by the claimant for a review of a bill of costs and final award of costs.

The Board held that it was necessary to consider the factors stated in s.45(10) as well as the common law criteria for reasonableness as codified in s.71.1 of the *Legal Profession Act*. In this case, the partial taking occurred during the midst of an ongoing subdivision. This meant that the claim for injurious affection to the remainder presented a complex valuation requiring contribution from numerous experts.

There was also an issue of costs due to duplication of work when the claimant changed counsel. The Board said that the claimant is only allowed one bill of costs but this is to take into account the pre-tariff work.

9. Langdale Landing Properties v. Her Majesty the Queen in the Right of the Province of British Columbia

E.C.B. 09/94/242 & 13/94/242, December 3, 2003

The province expropriated land within the Sunshine Coast Regional District in order to improve parking and traffic flow around a ferry terminal at Langdale and to complete a highway project. Three separate but inter-related claims were brought before the Board.

The case was broken into 3 parts.

- The gravel interest under a profits a prendre belonging to TNL Construction.
- The subdivision related claims of Langdale Landing Properties
- The market value, loss to the remainder and personal loss claims of James Greatbanks

Gravel related claim

Section 33(d) of the Act does not preclude a claim for profits a prendre interests. In this case, the original Crown grant had a proviso which stated that the Crown could take without compensation, any gravel...; however, this did not preclude an award of compensation.

The respondent also claimed that the rights were extinguished when the claimant entered into a trust and agency agreement where TNL became the beneficial owner of a portion of the land. The Board did not agree with the respondent and found that the profit a prendre interest was not extinguished. The gravel was valued by determining what a willing buyer at the date of expropriation would have been prepared to pay for the right to extract the gravel.

The Board held that the claim for special economic value could not succeed. The profits agreement did not have a demonstrated special value to TNL that could not have been enjoyed by another owner using the profits in the same way.

Subdivision related claim of LLP

The Board first looked at the issue of whether the "project influence" decreased the market value of the property. If this could be shown, costs would be awarded accordingly.
The Board determined the average lot price for the 27 lots affected, then deducted the cost of development of the lots. The Board held that the market value is the correct approach, and "value to owner" is no longer used.

With respect to disturbance damages, the Board held that the correct analysis is whether the costs incurred were "rendered useless by the expropriation of the property for which they were made." The Board did not allow the claim for directors' fees paid as disturbance damages.

The Greatbanks Claims

The issue here was the amount of compensation to which Greatbanks was entitled for expropriation, reduction in market value to the remainder, and personal losses.

The Board first determined the effect of access to the land before and after the expropriation.

With regard to the highest and best use of the property, the Board held that single family residential development represented this use. However, development potential was severely limited. The Board determined the market value of the property before and after the taking and awarded compensation accordingly.

10. Sam Sangha and Can-Am Building Supply Ltd. v. The City of Surrey

E.C.B. No. 42/97/241, November 25, 2003

This involved a claim for business loss arising out of a partial expropriation of a property owned by a lumber and building supplies company. The taking was to widen a bridge and the claimant claimed that the construction interfered with his business. The claim was based upon construction activity, and reduced visibility.

The Board held that the construction activity did not in itself cause a loss in sales. With respect to reduced visibility the evidence for loss of potential customers was relatively weak; however, some potential customers may have been lost.

At the same time as the decrease in sales, there was a decrease in the construction of homes in the GVRD. This was enough to account for all of the losses; however, the claimant was entitled to nominal damages in the amount of $5,000.