BRITISH COLUMBIA EXPROPRIATION ASSOCIATION FALL SEMINAR

October 22 – 23, 2004

2003/2004 CASE REVIEW

By: P.D. (Don) MacDonald
Borden Ladner Gervais

Parties:	Claimants: Respondent:	Sam Sangha and Can-Am Building Supply Ltd. City of Surrey
Before:		Sharon I Walls, Vice Chair Martin A. Linsley, FCA, FCIP, CBV, Board Member B.W.F. Fodchuk, Board Member
Counsel:	Claimant: Respondent:	John A. Coates, Q.C. Anthony I. Capuccinello
Citation:		E.C.B. No. 42/97/241
Reasons for Judgment:		November 25, 2003

Facts:

- This case, the first of two involving Sam Sanga and the City of Surrey, was a claim for compensation for a business loss arising from a partial expropriation of a property, for road widening purposes, occupied by a lumber and building supply business. All other claims were settled. The claimant argued that the project was the main cause of its financial loss. The respondent argued that a significant decline in building activity as evidenced by the reduction in the monthly construction values for dollar amounts recorded on the Greater Vancouver Regional District's single family building permits likely accounted for most, if not all, of the business loss claimed.

Issue:

- Whether the decline in sales of the business was due in whole or in part to the road widening project or due to some other cause.

Decision:

- The Board concluded that the significant decline in construction accounted for most, if not all, of the decline in the claimant's sales and alleged business loss. It awarded nominal damages of $5,000 for loss of customers deterred by preloading of sand.

Points of Interest:

- The danger of accepting a client's assumption as the sole cause of a loss.
- The advantage of looking to boarder causes for business loss suffered.
- That if the amount for which the parties have partially settled a claim is not expressly made part of the amount awarded, then the amount of the advance payment related to the settlement should also be excluded for purposes of determining the amount of interest and costs to be awarded.
- The demise of the Expropriation Compensation Board on rules of evidence such as the acceptance of expert evidence and, in the Sanga case, rebuttal evidence ("We note that the Board, unlike the Supreme Court, continues to operate under the *Evidence Act* and is not governed by Rule 40A. Therefore the discussions on this narrow issue of applicability under Rule 40A are of no relevance to us, although these cases do set out the general principles for rebuttal evidence." [para. 36])

Parties:	Claimants:	Langdale Landing Properties Ltd. and James Greatbanks and TNL Construction Ltd.
	Respondent:	Her Majesty the Queen in Right of the Province of British Columbia as Represented by the Minister of Transportation and Highways
Before:		R.W. Shorthouse, M.R. Grover and S.K. Wiltshire
Counsel:	Claimants:	Nerys Poole
	Respondent:	Reinhart Burke
Citation:		Langdale – ECB No. 09/94/242 James Greatbanks – ECB No. 13/94/242
Reasons for Judgment:		December 3, 2003

Facts:

- LLPL advanced a claim for the market value of its expropriated properties as well as for costs thrown away on failed subdivision applications, for the wasted efforts and services of three directors, and for alleged loss of royalties under the profit agreements with TNLC.

- TNLC claims the market value of its *profits à prendre* over three properties. Alternatively, TNLC claimed for the loss of the competitive advantage it enjoyed with respect to the supply of gravel as a result of owning the *profits à prendre* both in relation to phase 1 and phase 2 of the Gibson's bypass project and in relation to other construction projects and sales opportunities in the vicinity.

- Greatbanks claimed for compensation for the market value of the expropriated eastern and western triangles of its property as well as for the reduction in the market value of the remaining property mainly as a result of an alleged loss of legal and physical access. Alternatively, the alleged injuries affection to the remainder was expressed as a claim for the cost of obtaining legal access as well as the cost of an alleged temporary driveway.

Issues:

- The compensation, if any, which the claimants were entitled to for their respective claims as a result of March 1993 expropriation.

Decision:

- See attached summary of compensation awards.

Points of Interest:

- Whether section 33(d) precludes compensation for interests under *profits à prendre*

- Whether reservation of gravel in original crown grant precludes compensation

- Whether the Ministry's expropriations were carried out for the purpose of obtaining gravel for its project

- Whether the *profits à prendre* were also expropriated
- The duration of a *profit à prendre* interest
- Valuation of gravel claims
- The question of "project influence"
- The loss of implied easements by necessity

8. SUMMARY OF COMPENSATION AWARDS

[984] The following summarizes our determination of the various claims for compensation, excluding interest and costs, made by the respective claimants.

Item	Amount Claimed	Amount Awarded
8.1 The TNLC Award		
• Market Value of Profits à Prendre	$ 1,400,000.00	$ 150,833.00
8.2 The LLPL Award		
under Profits à Prendre	$ 330,000.00	$ 62,741.00
• Market Value of Expropriated Lots 1 and 10	1,865,800.00	1,400,000.00
• Disturbance Damages:		
• Subdivision Development Costs	36,023.84	34,574.64
• Directors' Fees	216,000.00	0.00
Total:	$ 2,447,823.84	$ 1,497,315.64
8.3 The Greatbanks Award		
• Loss in Market Value of Rem. DL 1401 through Partial Taking:		
• Value of Eastern Triangle	$ 415,000.00	
• Value of Western Triangle	150,000.00	
• Reduction in Value to Remainder	954,460.00	
	$ 1,519,460.00	$ 370,000.00
• Personal Losses:		
• Driveway Construction Costs	470,228.00	65,665.00
• Cost of Access through YMCA Property	435,000.00	0.00
	$1,470,228 to	
Total:	$ 435,665.00	1,519,460.00

(* Alternative claim to reduction in market value of remaining land.)

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Parties:	Claimant: Respondent:	415528 B.C. Ltd. Greater Vancouver Sewerage & Drainage District
Before:		Sharon I. Walls, Vice Chair
Counsel:	Claimant: Respondent:	L. John Alexander Robert McDonell
Citation:		E.C.B. No. 48/95/243
Reasons for Judgment:		December 5, 2003

Facts:

This case involved a review of bills of costs and a final award under section 45 resulting from a partial taking for a sewer pipe. The claim involved both pre- and post-tariff accounts.

Issue:

Whether the costs incurred were excessive.

Decision:

Total costs of $114,084 allowed.

Points of Interest:

- Whether claimant was entitled to treat application to amend an award as a new matter to which a separate bill of legal costs under the tariff would apply (held not entitled to a separate bill of costs)
- The effect of repeated adjournments, and who requested them, on a cost award
- Whether costs of a claimant's second lawyer and appraiser are duplicative
- Bills of costs belong to clients, not to specific lawyers
- Disbursements not agreed to must be strictly proven
- Whether the attendance of a principal of a corporate claimant at a compensation hearing, is a necessary attendance

Parties:	Claimants:	Pay Less Gas Co. (1972) Ltd. and Shell Canada Products Limited
	Respondent:	Her Majesty the Queen in right of the Province of British Columbia as represented by the Minister of Transportation and Highways
Before:		Robert W. Shorthouse, Chair Michael R. Grover, AACI, P.App., Board Member Suzanne K. Wiltshire, Board Member
Counsel:	Claimants: Respondent:	S. Dev Dley Alan V. W. Hincks
Citation:		E.C.B. No. 08/91/244
Reasons for Judgment:		December 11, 2003

Facts:

- On September 21, 2001 the Board determined that Pay Less was not entitled to additional interest under section 46(4) of the Acts since the total amount of the advance payments was more than 90% of the compensation awarded. Although deciding all other issues, the Board adjourned the issue of Pay Less' entitlement to costs under section 45 of the Act. The Panel reconvened to consider submissions on Pay Less's cost entitlement. On June 20, 2002, the panel released its decision. The majority concluded compensation awarded to Pay Less was greater than 115% and therefore Pay Less was entitled as a right to its costs. The dissenting member concluded the compensation awarded was less than 115%. In its June 20, 2002 reasons, the majority noted the question of additional interest was not before the panel and that it was arguable whether the panel was *functus officio*. The dissenting member, deciding the panel had a discretion as to costs, concluded that no additional interest would be payable.

Issue:

- Whether the Board was *functus officio* having already rendered its final decision on additional interest.

- If not *functus officio*, whether the Board should vary its decision and, among other things, award Pay Less additional interest pursuant to section 46(4).

Points of Interest:

- Good summary of guiding principles whether or not Board is *functus officio*.

- In this case, the Board concluded it was *functus officio* and unable to revisit its determination with respect to additional interest because:

  - its determination that Pay Less was not entitled to interest was a final rather than an initial or preliminary determination;

  - there was no express reservation or jurisdiction over the issue of additional interest and such a reservation cannot be implied;

- the case did not fall into either of two recognized exceptions, that is, a slip in drawing of the decision or an error in expressing the manifest intention of the Board;

- there is nothing in the Act indicating the Board has jurisdiction to reopen its final decision in order to rescind, vary, amend or reconsider it;

- the Board is subject to a stricter application of the principle of *functus officio* because appeals are with leave from the Court of Appeal; appeals not restricted to points of law; and; leave has sometimes been granted on factual matters;

- as well, on the facts in this case, appeal proceedings to the British Columbia Court of Appeal were already underway and could likely be expanded to embrace the issue of entitlement to additional interest.

Parties:	Claimants:	Arthur and Patricia Clements (60/01, 61/01), Edith Ferguson (59/01), Lorne and Irene James (57/01, 58/01), Rodney and Linda Penfold (63/01, 64/01), Kenneth and Eleanor Potter (65/01, 66/01)
	Respondent:	The Corporation of the City of Penticton
Before:		Sharon I. Walls, Vice Chair
Counsel:	Claimant:	Jeffrey G. Frame
	Respondent:	James G. Yardley
Citation:		E.C.B. No. 57/01/245
Reasons for Judgment:		January 7, 2004

Facts:

- Review of bills of costs and a final award under section 45.
- Partial taking from each of five properties for a road widening in Pentiction.
- Post-tariff legal, appraisal and other professional services plus a claim, outside the tariff, for an appraiser to assist counsel in cross-examination.

Issues:

- Appropriate number of units on the five legal and appraisal bills of costs when the five claims were heard together and whether costs outside the tariff were compensable.
- The real issue was how much work was done separately on each of the claims

Decision:

- Main dispute regarded claim for attendance at the hearing, nine days for all versus alleged five days each if done separately.
- Where one solicitor acts for more than one defendant, the parties are restricted to one bill of costs.
- Where different work is done for one or more persons who are plaintiffs or defendants, separate allowances of costs may be allowed since each person has a separate cause of action

Points of Interest:

- Effect of costs claimed that are greatly disproportionate to the amount recovered.
- Assisting counsel on cross-examination of appraiser is work done inside the tariff.
- Board not persuaded there was any reason other than the cost consideration for doing six separate appraisal reports rather than one report with a separate section for each of the six properties.

Parties:	Claimant: Respondent:	Spur Valley Improvement District Checkman Holdings (Calgary) Ltd.
Before:		Robert W. Shorthouse, Chair
Counsel:	Claimant: Respondent:	Bruce F. Fairley Glen A. Purdy
Citation:		E.C.B. No. 02/97/246
Reasons for Judgment:		January 15, 2004

Facts:

- The Respondent sought damages for abandonment under Section 19(4) of the *Expropriation Act* or, alternatively damages for injurious affection under Section 41. The District filed a notice of motion seeking a declaration that the Board had no jurisdiction to award compensation to Checkman under section 19(4) and for an order that Checkman's application be dismissed. The application arises out of a dispute between the District and Checkman over the ownership, operation of and access to a waterworks system near Radium, B.C. used by both parties. The dispute resulted in protracted litigation over seven years during which time the District, as the holder of two water licenses, commenced expropriation proceedings.

Issues:

- Whether the Board had jurisdiction to award compensation in the form of damages or costs following the discontinuance of an expropriation proceeding begun by a licensee under the *Water Act*;

- Whether the Board had authority under section 26(1)(c) of the *Expropriation Act* to determine compensation as "other matter to be determined".

Decision:

- The Board concluded that the judgments in the Supreme Court were not *res judicata* in proceedings before the Board and that the Board's jurisdiction must be determined with reference to the expropriation proceedings. The Board concluded it did not have jurisdiction to award damages for abandonment of this expropriation as the expropriation was one undertaken wholly by the District in its capacity as a licensee under the *Water Act* and not under the expropriation provisions of the *Municipal Act*. Accordingly, the Board's jurisdiction in this case was expressly limited by section 2(3) of the *Expropriation Act* which provided that the Act did not apply to expropriations under the *Water Act* except to the extent provided for in the *Water Act* – and the *Water Act* did not contemplate damages for abandonment.

Points of Interest:

- The Board also decided that section 26(1)(c) standing alone can not be relied upon to confer jurisdiction absent an indication that jurisdiction has been given to it under some other act to make the particular order sought.

- The Board rejected Checkman's application for damages for injurious affection under section 41 noting that Checkman did not seek to bring its claim within the recognized four rules developed by the English courts in determining injurious affection.

- The Board concluded that it did not have the jurisdiction under Section 32 of the Water Regulation to award costs as the provisions of the Act were directed at determining costs at the end of a process, not for an abandoned process.

Parties:	Claimants: Respondent:	Neil Douglas and Denise Catherine Fredericks Her Majesty the Queen in Right of the Province of British Columbia as Represented by the Minister of Transportation
Before:		Suzanne Wiltshire, Presiding Member Carol Brown, Board Member Lesley Eames, AACI, P.App., Board Member
Counsel:	Claimant: Respondent:	Lisa McBain Carolyn P. Bouck
Citation:		E.C.B. No. 16/98/247
Reasons for Judgment:		March 18, 2004

Facts:

- Partial taking (0.4 acre strip) for road widening of property east of Kamloops.
- Claim for reduction in market value of the remainder – section 40(1).
- Disturbance damages (section 34) and personal losses (section 40(1)) in respect of increased travel and landscaping to repair, maintain and minimize the impacts of the taking.

Issues:

- Whether there was a reduction in market value to the remaining property directly attributable to the taking or that resulted from the construction or use of the works that comprised the project and, if so, the amount.
- Whether entitled to disturbance damages under section 34 or personal losses under section 40(1) for increased travel to access the Trans Canada Highway or for landscaping.

Decision:

- $12,000 for reduction in market value of remainder.
- $600 for personal losses for increased travel.
- No award for landscaping.

Points of Interest:

- Noise is subjective and its impact, particularly into the market value of a property, will be influenced by subjective consideration [79].
- The agreement of parties on compensation for the part taken does not constrain the Board's consideration of the Board's "before and after" analysis [93].

- Factors causing a reduction in the value of the remainder should not then be used to support a separate head of damage [109].

- The meaning of "directly attributable" [130-133]

Parties:	Claimant: Respondent:	Richard and Florence Fritz The District of Sicamous
Before:		M. Gwendolynne Taylor, LL.B., Presiding Member Firoz Dossa, LL.B., Board Member Diane M. Delves, AACI, P.App., Board Member
Counsel:	Claimant: Respondent:	Jeffrey G. Frame James G. Yardley
Citation:		E.C.B. No. 14/02/248
Reasons for Judgment:		August 19, 2004

Facts:

- This is a valuation case involving the taking by the District of Sicamous of a 22 foot strip of land from the Fritz's property to extend a water line and to allow the widening of a road. The Fritz's property was across the street from a waste water treatment facility. The claimants sought compensation of $15,000 for the strip taken and $80,000 for a reduction in value to the remainder of the property due to the impact of the waste water facility.

Issues:

- Whether this was a claim for injurious affection (section 41) or a partial taking (section 40)?
- The market value of the strip taken?
- Whether the strip taken is to be valued as a stand alone lot or as part of the whole
- Whether the waste water treatment facility had a negative impact on the market value of the remainder and, if so, the loss in value

Decision:

- The Board decided that the claim was a claim for damages for a partial taking; that the strip was to be valued as part of the whole, that the waste water treatment facility did have a negative impact (5%) on market value.

Points of Interest:

- Whether visual loss, noise, odour and stigma reduced the market value of the remainder (in this case, odours and stigma did)
- The value, if any, of homesite severance potential – section 31 of the Act (here, none).
- The weight (little/none) of expert evidence without substantiating facts.
- The weight, if any, to be given to market value based on prior settlements of claims [139].

- Whether a strip to be taken can stand alone as a legal entity or must be valued as a part of the whole [143]

Parties:	Claimant: Respondent:	Talisman Energy Inc. Diane and Larry Fay
Before:		Robert W. Shorthouse, Chair
Counsel:	Claimant: Respondent:	Robert S. Cosburn J. Darryl Carter
Citation:		E.C.B. No. 8/04/249
Reasons for Judgment:		August 27, 2004

Facts:

- Talisman applied to the Board pursuant to section 16(1) and (3) of the *Pipeline Act*, R.S.B.C. 1996, c. 364 and Part 7 of the *Railway Act*, R.S.B.C. 1996, c. 395 for a compensation hearing and an order determining the amount of compensation to which the Fays are entitled under the *Expropriation Act* resulting from the taking of a statutory right of way for a natural gas pipeline. The Fays responded with a notice of motion seeking a dismissal of Talisman's application on the ground that the matter had already been dealt with in the mid-1970s by the Mediation and Arbitration Board ("MAB") acting within its jurisdiction under the *Petroleum and Natural Gas Act (B.C.)* – now the *Petroleum and Natural Gas Act*, R.S.B.C. 1996, c. 361.

Issue:

- Whether the Board should make an order dismissing Talisman's application for determination of compensation on jurisdictional grounds.

Decision:

- The Board had jurisdiction to hear and determine the compensation issue. The respondent's application was dismissed.

Points of Interest:

- The Fays argued that, *ab initio*, the two tribunals may have concurrent jurisdiction. They requested the Board, on the facts of this case, to decline jurisdiction.

- Talisman argued the law in this area does not recognize concurrent jurisdiction. It argued that the statutory regime, under which the MAB was established, creates interests that are temporary in character, not registrable interests in land and cannot properly be said to involve expropriation; that MAB's jurisdiction extends to "flow lines" (defined as "pipelines serving to the interconnect well heads" with field storage or treatment facilities) but does not extend to other pipelines including those constructed for the purpose of transporting petroleum or natural gas products from various well sites either directly to market or to other pipelines carrying the product ultimately to market.

- Talisman also argued that the second regime, under which the Board derives its jurisdiction, is of a permanent character [no longer!] consistent with need for ongoing use of land to operate, maintain and repair pipelines built to carry petroleum or natural gas from the field to market. The second regime revolves expropriation, registrable interests in land and is primarily concerned with lump sum payments of compensation for permanent takings.

- The Board agreed that the two regimes were not intended to be concurrent; that MAB has jurisdiction over flow lines; that, if the subject pipeline was ever a flow line, it was not now; and, that the Board has statutory jurisdiction in this case by virtue of the combination of the *Pipeline Act* and the *Railway Act*.

- Compliance with appropriate steps in effect at the time of the creation of the pipeline were sufficient as long as the procedural requirements under Part 7 of the *Railway Act* were met at the time of the compensation application.

- A lot of work for Talisman on a claim it valued at $398!

Parties:	Claimants: Respondent:	Sam Sangha and Can-Am Building Supply Ltd. City of Surrey
Before:		R.W. Shorthouse, Chair
Counsel:	Claimants: Respondent:	John A. Coates Anthony Capuccinello
Citation:		E.C.B. No. 4 2/97/252
Reasons for Judgment:		October 6, 2004

Facts:

These reasons involve an application to the Board for a review of costs and a final award of costs pursuant to section 45 of the *Expropriation Act*. Claimant incurred costs of $62,000 pursuing a business loss claim (between $52,000 and $104,000) arising from a road widening in Surrey which business loss the Board determined to be $5,000. The respondent had offered $20,000 to settle and reserved the right to bring the offer (a Calderbank offer) to the attention of a Board at a subsequent section 45 hearing.

Issue:

- The consequences, if any, that should flow from the claimants' rejection of the respondent's Calderbank offer.
- The effect of the mandatory consideration under section 45(10) (number and complexity of issues, degree of success, manner in which the case was prepared and conducted) on the determination of the claimants' costs.
- Effect to be given to legal work performed in the pre-tariff period on matters which were settled.
- Whether the legal costs incurred to advance the business loss claim were reasonable.
- Whether the costs of the business valuator and mathematician retained by the claimants were reasonable.
- Whether the disbursements charged by the claimants legal counsel and business valuator were reasonable.

Decision:

- $45,838.60 awarded on a claim for $62,634.25.
- The considerations of section 45(10), viewed in combination, lead to a global reduction in the order of 25% of the total amount of costs otherwise determined; $35,000 awarded.

Points of Interest:

- The Board may give the effect it chooses to Calderbank offers. [paras. 14-28]. [Applications before the Supreme Court will be subject to different rules.]

- Where entitled to costs, the costs must still be "necessarily incurred", "reasonable" and/or "proper or "reasonably necessary".

- Calderbank offers can and should be given some weight as a factor in assessing the reasonableness of a claimant's costs [33].

- A rejected Calderbank offer is one factor taken into account under section 45(10) when reviewing the reasonableness of professional accounts.

- Percentage approach to disbursements (3% of standard charge out rate) [92] was accepted.