

**BRITISH COLUMBIA EXPROPRIATION ASSOCIATION
1999 FALL SEMINAR**

ANNUAL CASE UPDATE AND REVIEW

This paper deals with the cases of interest, of interest from my perspective, decided by the British Columbia Expropriation Compensation Board, other boards, and the courts since the date of the 1998 British Columbia Expropriation Association Fall Seminar. The cases are set out in chronological order by date of decision with the topic(s) of interest set out beside the case citation. Each case referred to may deal with other issues as well. Only those points of particular interest are set out in this paper. The scoreboard relates to the points of interest only, not to other issues that may be dealt with in the case.

1. Okanagan Transport Ltd. v. Vernon

ECB number 14/91 and 56/91

COSTS

Court or Board: British Columbia Expropriation Compensation Board

Date of Decision: October 23, 1998

- Claimant's counsel put forward what the Board described as the "remarkable proposition" that the Board cannot, on a review of costs pursuant to Section 45 of the *Act* (final review), award anything less than the total of amounts previously awarded pursuant to Section 48 (advance payment of costs). The Board gave short shrift to that argument, concluding that all accounts are to be reviewed at the conclusion of the matter.

SCOREBOARD

CLAIMANT

RESPONDENT

2. Morton v. British Columbia Hydro and Power Authority

65 LCR 161

EXPROPRIATION

Court or Board: British Columbia Supreme Court

Date of Decision: November 9, 1998

- This was an application brought pursuant to the *Judicial Review Procedure Act* for a declaration that an expropriation of land ostensibly for the purpose of the construction of the Arrow Dam was invalid. The expropriation took place in 1965. Apparently after acquiring the land by expropriation (a total taking by agreement - Hydro only

required part of the lands) B.C. Hydro turned the upland portions over to the Crown Provincial for use by the Parks Department as a park. The ex-owner took the position that expropriation for the purpose of acquiring the lands so they can be transferred to another and established as park is not within the statutory authority provided to Hydro. The Court dismissed the petition, on the basis that the lands were not expropriated for the purpose of establishing a park. The Court also took into account, in a general way, the delay in bringing the petition after the date of the expropriation and transfer complained of, in reaching its conclusion. No reference was made to Section 51(2) of the *Expropriation Act*.

3. Interwest Property Services Ltd. v. Pacific Beach Investments Ltd.

BCEA DECISIONS SERVICE 283

COSTS - RELATIONSHIP BETWEEN OWNER'S OBLIGATION AND REIMBURSEMENT AMOUNTS

Court or Board: British Columbia Supreme Court

Date of Decision: November 30, 1998

- The Claimant, who obtained an order for reimbursement of appraisal costs in less than the amount of the appraisal accounts themselves, sought to have its obligation to the appraiser limited to the reimbursement amount. Interwest was found to be entitled to the full amount of its accounts from the owner.

4. Reti v. Sicamous

ECB number 44/97/164

LIMITATION - SECTION 42

Court or Board: British Columbia Expropriation Compensation Board

Date of Decision: January 6, 1999

- This case, involving a claim for injurious affection where no land was taken against a municipality, deals with the issue of the point in time at which the limitation period under Section 41 of the *Expropriation Act* commences. The Board concluded that simple realization that "smells and noises" would emanate from the Respondent's project does necessarily constitute the point in time from which the one year limitation begins to run. The Claimant must have what the Board described as "meaningful knowledge" that there would be a loss in value as a result of the consequences of construction of the sewage treatment plant in issue. The Vice Chair mused, in coming to her conclusion, that the receipt of an appraisal report indicating loss in value as a result of the emanations from the sewage plant, could in fact serve

as the starting point for the running of time.

SCOREBOARD

CLAIMANT

RESPONDENT

5. Ferguson v. British Columbia Minister of Forests

ECB number 34/97/165

COSTS - PRACTICE

Court or Board: British Columbia Expropriation Compensation Board

Date of Decision: January 13, 1999

- Proper practice on Section 48 applications (and presumably Section 45 applications as well) for reviews of costs is for the Respondent to make known, in advance of the hearing, the basis of its objections to the bill.

SCOREBOARD

CLAIMANT

RESPONDENT

6. Haughton v. Heffley Creek

ECB number 41/97/166

EXPROPRIATION ACT - LIMITATION

Court or Board: British Columbia Expropriation Compensation Board

Date of Decision: February 5, 1999

- The issue before the Board was whether or not the limitation period is postponed if the advance payment was based on an alleged misapprehension as to the highest and best use of the property. The Claimant's argument in that regard was not accepted, following the principle established in the Rogers case, 58 LCR 141.

7. Reti v. Sicamous

BCEA DECISIONS SERVICE 289

LEAVE TO APPEAL

Court or Board: British Columbia Court of Appeal

Date of Decision: February 10, 1999

- An application for leave to appeal made by the Claimants from the ECB decision referred to as #4 above was dismissed by the Court of Appeal as being an appeal against the reasons, not the determination, of the Vice Chair.

8. 286684 B.C. Ltd. v. Colwood

ECB number 12/97/167

COMPENSATION - UNDERGROUND WORKS
SECTION 33

Court or Board: British Columbia Expropriation Compensation Board

Date of Decision: February 17, 1999

- This case involves the determination of compensation for a statutory right of way for an underground sewer line through commercial lands. Compensation was awarded for the right of way at 75% of fee simple value, along with compensation for injurious affection. Colwood advance paid on the basis of 5% of fee value. The Claimant wanted 100% of fee value. The board found the higher percentage because of the impact on the developability of the remaining lands.
- There is also a good discussion in this decision with respect to the operation of Section 33 of the *Expropriation Act* in relation to planned municipal works set out in official community plans.

SCOREBOARD

CLAIMANT

RESPONDENT

9. Whitechapel Estates v. MoTH
BCEA DECISIONS SERVICE 294

BIAS

Court or Board: Supreme Court of British Columbia
Date of Decision: March 2, 1999

- This decision would appear to be the last gasp of proceedings taken by Whitechapel to have the panel of the Expropriation Compensation Board discharged as a result of bias alleged on the part of certain members of the Board arising out of their participation in the proceedings of the liaison committee of the British Columbia Expropriation Association. The Court dismissed the Claimant's application.

10. Hawk Investors Ltd. v. MoTH
ECB number 20/89/168

ADVANCE PAYMENT
HIGHEST AND BEST USE
DISTURBANCE DAMAGES

Court or Board: British Columbia Expropriation Compensation Board
Date of Decision: March 5, 1999

- This case involves the determination of, among other things, highest and best use of an undeveloped property with gas station zoning. The Board found that highest and best use was for redevelopment to an industrial use.
- Conveyancing costs for a replacement property bought in 1995 (the subject property was expropriated in 1986) were compensable.
- Interestingly the panel found that the portion of the advance payment relating to a mortgage pre-payment penalty incurred by the owner as a result of the expropriation should not be considered part of the advance payment for the purposes of determining entitlement to costs or interest under the *Expropriation Act*. The apparent justification for this conclusion is that "the necessity of the payment was caused solely by the expropriation". It would seem that any compensation entitlement is, in our context, triggered by an expropriation.

SCOREBOARD

CLAIMANT

RESPONDENT

11. Bayview Builder's Supply (1972) Ltd. v. MoTH

BCEA DECISIONS SERVICE 293

COMPENSATION - DISTURBANCE DAMAGES - PARTIAL TAKINGS

Court or Board: British Columbia Court of Appeal

Date of Decision: March 8, 1999

- This is an important case in which the Court of Appeal provides instructions to the Board with respect to the proper application of Section 40 of the *Expropriation Act*.

SCOREBOARD

CLAIMANT

RESPONDENT

12. Ingham v. Creston

BCEA DECISIONS SERVICE 295

GENERAL BENEFITS

Board or Court: British Columbia Court of Appeal

Date of Decision: March 22, 1999

- In this decision the Court of Appeal held that, as at the date of the decision, general benefits to the property, resulting from the project, are not to be deducted from the award. It should be noted that subsequent amendments to the *Expropriation Act* have resolved this issue in favor of expropriating authorities.

SCOREBOARD

CLAIMANT

RESPONDENT

13. N.Y. Automotive Ltd. v. Richmond

ECB number 03/98

Court or Board: British Columbia Expropriation Compensation Board

Date of Decision: March 30, 1999

- The Board held in this case that when there is a series of cost applications pursuant to Section 48 of the *Act* any costs dealt with in previous applications are not open for review on subsequent Section 48 applications, but only pursuant to Section 45 at the conclusion of the matter. See as well the decision referred to as number 1 above.

SCOREBOARD

CLAIMANT

RESPONDENT

14. Pentecostal Assemblies of Canada v. MoTH

ECB number 42/92/169

DISTURBANCE DAMAGES

Court or Board: British Columbia Expropriation Compensation Board

Date of Decision: April 1, 1999

- a number of issues were dealt with in this case, the most interesting of which is that the authority argued unsuccessfully that the religious purposes of the Claimant and the voluntary nature of the members contributions meant that no "business loss" could be suffered by the church. An award was made by the Board for lost income and some increased costs of operations.

SCOREBOARD

CLAIMANT RESPONDENT

15. Osoyoos v. Oliver

BCEA DECISIONS SERVICE 303

INDIAN ACT

Court or Board: British Columbia Court of Appeal

Date of Decision: May 4, 1999

- This decision contains a detailed consideration of the expropriation procedures found in the *Indian Act*, and another discussion on the nature of easements and statutory rights of way.

16. Berschied v. Ensign

BCEA DECISIONS SERVICE 300

EXPROPRIATION - *WATER ACT*

Board or Court: British Columbia Supreme Court

Date of Decision: May 4, 1999

- This case arises out of a rather unusual fact pattern. There is some discussion, by way of dicta, of the expropriation procedures available under the *Water Act*.

17. Bayview Builder's Supply (1972) Ltd. v. MoTH

BCEA DECISIONS SERVICE 298

COSTS - COURT PROCEEDINGS

Court or Board: British Columbia Court of Appeal

Date of Decision: May 13, 1999

- In this case the Court of Appeal determined that the costs of proceedings in the Court of Appeal arising out of an expropriation, in light of Section 45 (7) of the Expropriation Act (prior to the coming into force of the Tariff of Costs Regulation), be special costs to be assessed by the Registrar.

SCOREBOARD

CLAIMANT RESPONDENT

18. Spur Valley Improvements District v. Checkman Holdings Ltd.

ECB number 02/97/170

EXPROPRIATION - *WATER ACT*

Court or Board: Expropriation Compensation Board

Date of Decision: June 1, 1999

- This is a decision arising out of the expropriation proceedings allowed for under the *Water Act* and the Water Regulation. Pursuant to those provisions an owner of a water licence is entitled to expropriate the land or interest in land necessary to protect its water diversion works and piping. The Board is required to determine the nature and extent of the interest to be registered and compensation to the owner of the lands from which the land or interest in land is expropriated. In this case the expropriating authority, named as the Claimant, is a body entitled to hold an interest by way of statutory right of way, and as such a statutory right of way was the document in fact in issue.
- The Board indicated that as a matter of procedure the hearings should be in two parts - the first dealing with the wording and extent of the interest and the second with the amount of compensation.
- There is the usual confusion in this decision between the nature of an easement interest and that of a statutory right of way. Both a statutory right of way and easement constitute non possessory interests in the land of another. The easement is a common law interest which requires a dominant and servient tenement. A statutory right of way is an interest that can only be created or held by body or agency authorized by statute to hold such an interest (Section 218, of the *Land Titles Act*). In

this case both the parties and, apparently the Board, confused the distinction between the two interests.

- The Board reviewed the location of the statutory right of way, and as well the terms of what the Board describes as the easement agreement. The Board made a conclusion as to necessary amendments to the "easement agreement".
- Presumably at some point in the future we will receive a further decision from the Board dealing with the issue of compensation in this claim.

19. Ingham v. Creston

ECB numbers 30/93, 31/93 and 32/93

COSTS - SECTION 45

Court or Board: British Columbia Expropriation Compensation Board

Date of Decision: June 2, 1999

- This case is authority for the proposition that even though the proceedings before the Expropriation Compensation Board have not been completed a review of costs can be made pursuant to Section 45 of the *Act*. The circumstances of this case are, however, somewhat unusual.

20. Ocean Port Hotel v. British Columbia Liquor Control Board

BCEA DECISIONS SERVICE 1999-304

ADMINISTRATIVE LAW

Court or Board: British Columbia Court of Appeal

Date of Decision: July 21, 1999

- The British Columbia Court of Appeal in this matter ruled that execution of an earlier decision of the Court of Appeal be stayed pending the decision of the Supreme Court of Canada. The Court had ruled that the Liquor Appeal Board, because its members serve at the pleasure of the Lieutenant Governor in Council, was not sufficiently independent and could not therefore meet the standard of procedural fairness necessary to exercise the power to impose sanction for violations of statutes comparable to the power by courts of law.
- The decision is of interest in our context because it would appear that the members of the Expropriation Compensation Board are as well appointed at the pleasure of the Lieutenant Governor in Council, and that Board also has powers comparable to those possessed by courts of law. The application made by counsel for the Province was in

fact for a stay of the operation of the Court of Appeal decision with respect to the Liquor Appeal Board (the agency involved in the petition) and as well "all other tribunals, boards and commissions operating under the laws of the Province of British Columbia whose chairpersons, directors, commissioners, or members are appointed at the pleasure of the Lieutenant Governor in Council or a ministry of the Crown". Explicit reference is made to the Expropriation Compensation Board in the reasons.

- In the end result the Court ordered the stay of execution sought, but only with respect to the Liquor Appeal Board. The Court declined to extend the stay to other boards or tribunals not parties to the proceedings.

21. Bollana v. Surrey

ECB number 52/97

PROCEDURE

Court or Board: British Columbia Expropriation Compensation Board

Date of Decision: July 26, 1999

- This case contains a discussion of the principles governing applications for adjournment, demands for particulars, and demands for discovery of documents.

SCOREBOARD

CLAIMANT

RESPONDENT

22. Okanagan Dairy Transport v. Vernon

ECB number 14/91 and 56/91

COSTS

Court or Board: Expropriation Compensation Board

Date of Decision: July 29, 1999

- This is a costs decision involving business valuation fees and disbursements totaling \$77,000.00, reimbursement of which was sought by the claimants. The business valuation issues were founded on an assumption, apparently resulting from instructions from the claimant company, that a contract was lost as a result of the expropriation. It turned out during the course of the compensation hearing that there was no sufficient casual relationship between the expropriation and loss of the contract in question, and as a result the key assumption upon which the business valuation claim and evidence was based failed.

- The Board declined to order reimbursement of the business valuation expenses.

SCOREBOARD ✓
CLAIMANT RESPONDENT

23. Morton v. Ministry of Transportation and Highways

ECB number 81/96/171

INJURIOUS AFFECTION
DISTURBANCE DAMAGES

Court or Board: Expropriation Compensation Board

Date of Decision: August 31, 1999

- This is a somewhat factually complicated case arising out of the taking by MoTH of a two foot slice from the frontage of the two lots in question.
- The focus of the claim was on injurious affection to the remainders of the two lots, one of which was used as a Pizza Hut restaurant and the other of which had been leased to Seaboard Advertising Co. as a billboard location. Interestingly part of the claim was for \$1,000.00 provided by the owner of the remainders to the Pizza Hut tenants to compensate Pizza Hut for replacing the landscaping on the remainder that was lost as a result of the taking. The Board did not award that amount for reasons that are not clear to me, although there did appear to be a difficulty in proof of amount of loss.

SCOREBOARD ✓
CLAIMANT RESPONDENT

24. Wu v. MoTH

ECB number 61/95/172

INTEREST - SETTLEMENT

Court or Board: Expropriation Compensation Board

Date of Decision: September 9, 1999

- This case is authority for the proposition that if you, as Claimant's counsel, wish a legal entitlement to interest pursuant to Section 46 of the *Expropriation Act* as a condition of the settlement, and is the Respondent does not agree to the amount(s) in

the settlement itself, you must have the terms confirmed by a Order of the board, with that Consent Order providing for payment of interest pursuant to Section 46.

- The Board found in this case that there is no entitlement to claim interest over and above the settled amounts, when a matter is settled, even when the release documents specifically allow a claim for interest, because a settlement is not an “award” for the purposes of Section 46 of the *Expropriation Act*.

SCOREBOARD

CLAIMANT

RESPONDENT

25. Human Rights Institute of Canada et al v. Canada (the Nanoose Bay Takings)
BCEA DECISIONS SERVICE 99/309

ADMINISTRATIVE LAW - INJUNCTIONS

Court or Board: Supreme Court of Canada

Date of Decision: September 21, 1999

- The Claimants applied for an injunction against the Registrar of the Land Titles Office. That application was defeated on the basis of Section 11 of the *Crown Proceeding Act* which provides that an injunction does not lie against the Crown. Although this case may not seem to be particularly interesting I mention it because it contains a principle of administrative law that seems to be often overlooked by counsel.

26. Sutherland v. Langley

ECB number 07/97/173

COSTS - 115% RULE

APPRAISAL - DEVELOPMENT APPROACH

Court or Board: Expropriation Compensation Board

Date of Decision: September 23, 1999

- This is a decision involving an expropriation of a holding property, ripe for development. The parties entered into a Section 3 Agreement to convey the land required for road purposes by Langley. Unfortunately the parties fell into the trap of inserting “extra” clauses into the Section 3 Agreement. It has been my experience that whenever that occurs in a matter which proceeds to hearing the extra clauses invariably create more questions than they resolve.

- There was the usual, in a partial taking context, grab bag of issues dealt with by the Board in this case. Of particular interest are the findings of the Board that:
 - a) use of the development approach was not appropriate, as the conditions set out in the Double Alpha decision (1998 65 L.C.R. 99) were not met. On the determination of the before value the board came very close to splitting the difference between the two appraisal conclusions. Injurious affection was not dealt with separately by the Board - the before and after approach being used to determine overall compensation for the land taken;
 - b) the Board followed Husband v. Langley (1996) 59 L.C.R. 221 in determining that disturbance damages would be awarded even though the property, undeveloped as at the valuation date, had a highest and best use for near term development;
 - c) the compensation awarded was 113.75% of the advance payments made. The Board accordingly had a discretion insofar as the award of costs is concerned, and exercised that discretion by awarding 100% of the reasonable legal, appraisal and other costs up to one week after the second advance payment, and 90% of legal costs and 80% of appraisal and other costs subsequent to that date.

SCOREBOARD

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CLAIMANT

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RESPONDENT

27. Harshenin v. Ministry of Transportation and Highways

ECB number 30/94/174

APPRAISAL

Court or Board: Expropriation Compensation Board

Date of Decision: September 30, 1999

- This case has some rather interesting facts. The only legal issue of any interest is some discussion by the Board of the way a life estate interest would be valued. The Board concluded that the appraiser would determine the market value of the property in question as unencumbered fee simple, and as well determine the value of the parcel as encumbered by the life estate. The difference between those two figures would represent the value of the life estate.
- The Board states in this decision that property assessment information, in this case the decision of the Court of Revision, is not a reliable indicator of market value.

TARIFF OF COSTS REGULATION

FOR DISCUSSION DURING SESSION

SCOREBOARD

CLAIMANT

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RESPONDENT

EXPROPRIATION ACT AMENDMENTS

FOR DISCUSSION DURING SESSION

SCOREBOARD

CLAIMANT

___✓___
RESPONDENT

October 18, 1999