

BRITISH COLUMBIA EXPROPRIATION ASSOCIATION

2008 FALL SEMINAR

ANNUAL CASE UPDATE AND REVIEW

This paper sets out cases of interest decided since the 2007 British Columbia Expropriation Association Fall Seminar, along with some comment on two statutory developments of significance to those in expropriation practice in BC.

BAIRD V. SALLE

BCSC

Date of decision – 11 Sep 07

Topic areas – *Water Act* expropriation, nuisance, trespass, bad neighbourly relations, crown grants, *Land Act* and *Land Title Act*

Good discussion of rights under water licences, and the impact on land rights when water licences have been issued prior to the issue of crown grants for the parcels on which the water source is located. The conclusion is that water licences held over other land before crown grants issue with respect to that land are excluded from the grant, along with necessary rights to access and service the source of water the subject of the water licences. The crown grant “front page” provisions in *Baird* are standard reservations and exceptions for water privileges and the rights of “carrying water through or under any parts of the hereditaments hereby granted....”. The back page notations operate in this case to exempt the holders of the water licences from an obligation to pay compensation to the owners of the land on which the water source is located. This case also highlights the range of conflicts that are a natural result of our approach which reserves water (and minerals) to the crown rather than having ownership of those resources vest in the fee simple owner.

KODILA V. BC MIN OF TRANS.

BCSC

Date of decision – 28 Nov 07

Topic area - expropriation compensation determination by the court, h & bu and valuation issues - subdivision, costs reimbursement when the 115% “trigger point” is not reached

It is attention-getting, when compared to our experience in similar matters before the ECB in its later years, that this decision was rendered only seven months after the hearing, and the decision itself is only ten pages long even in the large font used on the website. The time

frame may as well have been lengthened by written submissions, referred to in the decision, having been filed after the date of trial. Short to-the-point decisions make better jurisprudence. And timely delivery of them is in everyone's interests. The two factors are of course interrelated.

The court held that a partial taking does not effect a subdivision, and that the acquired lands were not likely to have been subdivided from the parent parcel had an application been made to do so, by the owner. As such the taken lands were properly valued as an undifferentiated part of the parent parcel, value to be determined pursuant to S. 40(3) of the *Expropriation Act* on a pro rata basis. There was no claim for injurious affection advanced and, the judge opined, no such claim would have been successful under the circumstances.

With respect to costs the court made an award of reimbursement to the Plaintiff notwithstanding that the compensation ordered was "equal to the advance payments of compensation". The reasoning was that "it was reasonable for the plaintiff to pursue compensation in this Court, and that in doing so he did not take a broad approach to the issues but rather confined his claim to the narrow issues before me. Thus the trial lasted less than three days and was fairly and fully argued."

PACIFIC NEWSPAPER GROUP V. ASSESSOR AREA 14 – SURREY

BCCofA

Date of decision – 27 June 08

Topic area – highest and best use, assessment valuation, stare decisis

The land in question was assessed, in the years 2000 and 2001, on the basis of value to the owner rather than on the basis of its market value. The owner objected and the issue ultimately went to the Court of Appeal where the court, in dealing with the 2000 and 2001 assessments, firmly pointed out the correct approach to determining highest and best use (see 2004 28 BCLR 317).

The assessor declined to follow the C of A conclusion and blithely proceeded to assess the same property, for 2002 through 2005, on the same erroneous (as determined by the Court of Appeal) basis as had given rise to the earlier court proceedings. The PAAB agreed with the assessor and the matter again went to the SCBC on appeal by stated case. The SC judge held that the PAAB had erred. The Court of Appeal, on appeal from the SC, upheld the trial judge's conclusion in a majority decision.

Good and in-depth discussion of all of the topic areas.

PAYLESS GAS AND SHELL CANADA V. BC MIN. OF TRANSPORTATION

BCSC (Registrar)

Date of decision – 21 Feb 08

Topic areas – costs, practice

The end (hopefully) of a long saga - the taking took place in 1990.

The landowner's claims for costs reimbursement were the subject of proceedings before Master Bolton, starting in 2006, supplementary reasons issued later in 2006, an appeal of the 2006 decision and now further reasons resulting from the appeal.

The present (2008) decision is brief and deals only with the narrow point of the relationship between errors and inconsistencies in accounts put forward for reimbursement and interest payable on amounts subsequently awarded. The 2008 decision concludes and confirms that there is no such relationship. Errors and inconsistencies in the accounts are properly resolved in the process of "taxing" the accounts. Once that has been done interest is applied at the prevailing rates on the resulting balance.

The 2006 decisions (reported in 2007) is a veritable repository of conclusions and commentary as to the way the courts view costs reimbursement claims under the *Expropriation Act*, and are worth keeping handy for reference if you have a reimbursement claim coming up. They deal with issues such as when a claim with contingency elements is or is not a contingency fee arrangement, issues of extravagance, errors in accounts, multiple (serial) counsel on a file, the "team approach", weighing expert testimony not accepted by tribunal when costs reimbursement is determined. The 2006 decisions also contain reference to such nuggets as counsel's "desperate need of good scotch whiskey", the "pot of gold at the end of the rainbow:..glistening in the distance" and counsel for claimants conducting themselves "in an expansive manner such as to suggest an acute awareness that their clients will not be required to pay the bills".

SUTHERLAND V. AG CANADA

BCCofA

Date of decision – 23 Jan 08

Topic area – costs

An interesting discussion and re-statement of costs principles. Not an expropriation case, but one argued in nuisance arising out of the construction of a new runway at Vancouver International Airport. The defence was that of statutory authority, which, if successful, is fatal to the nuisance claim. At trial the court found in favor of the Plaintiffs – finding nuisance to be proven and that the defence of statutory authority failed. The Defendant appealed successfully. So after the appeal the Plaintiffs lost on all counts and the Defendant prevailed, although the existence of the nuisance remained acknowledged but in no useful way for the Plaintiffs - it having been trumped by the statutory authority defence. The matter was remitted to the trial judge for determination of the issue of costs at trial. The trial judge's costs ruling split costs 25/39ths in favor of the Plaintiffs and the balance, 14/39ths, to the Defendant - based on pro rating the number of trial days spent on each of the two key issues. This decision is an appeal from that determination. The Court of Appeal allowed the appeal,

reiterated and confirmed that costs follow the event, and granted costs of all the trial proceedings to the Defendant.

STATUTORY MATTERS OF INTEREST - PRESUMPTION OF RIGHT TO COMPENSATION:

Bill 43, the *Miscellaneous Statutes Amendment Act (2) - 2008*, when first introduced provided for an amendment to the *Law and Equity Act* which states:

32 The Law and Equity Act, R.S.B.C. 1996, c. 253, is amended by adding the following section:

No compensation for property taken unless enactment expressly provides for compensation

69 If a taking of property by or on behalf of the government without the consent of the owner is authorized by an enactment, the enactment must not be construed as

(a) implying an obligation to compensate the owner, and

(b) entitling a person to compensation unless the enactment expressly provides for compensation.

That portion of the bill did not make it through the legislative process, and the amendment was not made. The inclusion of this proposal in the bill does however serve as a heads-up to all of us. It indicates that government thinking is tending in the direction of abrogating the traditionally-considered and almost sacrosanct common law dictates that a taking of property assumes, unless a statute states the contrary, that the owner will be compensated. The amendment if made, would reverse that presumption.

STATUTORY MATTERS OF INTEREST - WHAT ARE OWNERS' RIGHTS TO COMPENSATION FOR ENTRY IN HIGHWAY MATTERS?:

The provisions of the *Transportation Act*, particularly 8 through 11, are also of particular interest these days as we attempt to read the collective legislative mind in relation to entry on or uses or taking of private land. An extract from the *Transportation Act* is attached for reference. Section 9 of the *Expropriation Act* is also attached.

There are a number of interesting elements in these sections, 8 and 9 having come into force in 2005 and 2006. Section 9 (5) is of particular concern re acquisition and entry. It appears, although the wording is both inelegant and imprecise, to allow the Minister to carry out Section 8 powers which are very broadly defined, other than Subsection 2(b) powers, and to pay compensation only if he or she chooses. The exercise of Subsection 2(b) powers under Section 8 gives rise to a right to compensation on the part of the landowner UNLESS the Section 8 activity is condoned by the landowner. What is or is not condonation of an act of the Ministry is open to debate but it may well be that simply allowing the Minister to enter for the purposes requested is sufficient to disentitle the landowner to any right to claim compensation for resulting loss or damage. It is interesting and instructive to compare the rights purported to be given to the Minister under, particularly, sections 8 and 9 of the *Transportation Act* with the rights, apparently inconsistent with them, given to landowners under Section 9 of the *Expropriation Act*.

October 15, 2008

Acquisition

7 The minister may acquire, hold and maintain land.

Entry

8 (1) Without limiting Division 4, the minister may, without consent, for any of the purposes in subsection (2) of this section,

(a) enter, remain on and use land, and

(b) do one or more of the following:

(i) take possession of or use timber, stone, gravel, sand, clay and other materials on the land;

(ii) place or store anything on the land;

(iii) construct temporary roads or improvements;

(iv) provide, remove or repair access from the land to a provincial public undertaking and, for that purpose, take possession of, use or move anything on the land.

(2) The minister may exercise the rights, powers and advantages granted under subsection (1) to

(a) acquire, hold, construct, use, operate, upgrade, alter, expand, extend, maintain, repair, rehabilitate or protect any improvement or other work of public utility, including, without limitation, improvements or works referred to in paragraphs (a) to (d) of the definition of "provincial public undertaking" in section 1,

(b) remove, discontinue, close or dispose of a provincial public undertaking,

(c) protect any animal, bird, fish or plant species or habitat, or the environment, from the effects of a provincial public undertaking, or

(d) carry out work connected with planning or designing a provincial public undertaking.

Compensation for entry

9 (1) Except as provided in subsection (4), the *Expropriation Act* does not apply to an entry on land under section 8 of this Act or to any other activity undertaken by the minister under section 8.

(2) Subject to subsection (5) of this section, if any entry or other activity of the minister under section 8 causes any damage, the minister must

(a) remedy the damage, or

(b) if the minister chooses not to remedy the damage, pay compensation for the damage.

(3) If the minister takes possession of or uses any thing under section 8 (1) (b), the minister

(a) must, subject to subsection (5) of this section, pay compensation for the thing, or

(b) may pay compensation for the thing, in an amount determined by the minister, if the minister took possession of or used the thing under the authority of this or any other Act or under a reservation, in a Crown grant relating to the land, that provides the right to take possession of or use the thing without compensation.

(4) If the minister and a person entitled to compensation under subsection (2) (b) or (3) (a) of this section fail to agree on the amount of compensation payable, the amount must be determined by the Supreme Court.

(5) The minister is not required to pay compensation for any entry onto land under section 8 of this Act, or for any other thing done under section 8, including, without limitation, any activity or taking of possession of or using any thing, if the entry, activity, taking possession or use was to deal with a situation that

(a) directly interferes with the minister's ability to exercise the rights, powers and advantages granted under this Act, and

(b) was created or condoned by the owner or occupier of the land.

Expropriation

10 The minister may expropriate land for any of the purposes in section 8 (2) (a) or (c).

Compensation for expropriation

11 If the minister exercises the power under section 10 to expropriate land, the minister must pay compensation as agreed with the owner of the land or, if there is no agreement, in accordance with the *Expropriation Act*

EXPROPRIATION ACT

Entry for limited purposes

9 (1) In addition to any other powers under an enactment, a person authorized by the expropriating authority may, before or after serving an order under section 5 (4) (a) or an expropriation notice under section 6 (1) (a),

(a) during daylight hours, and

(b) after making reasonable efforts to notify the owner or occupier of the land,

enter any land for the purposes of

(c) making surveys, inspections, examinations, soil tests or doing other things that are necessary to determine

(i) the location of proposed works, or

(ii) the description of the land that the expropriating authority intends to expropriate,
and

(d) completing an appraisal of the value of the land or any interest in it.

(2) The person authorized may, on entering the land, cut down any trees or brush that obstructs the running of survey lines.

(3) The expropriating authority must pay compensation for damages that it causes by the exercise of its rights under this section.

(4) When the land entered on is not expropriated, an action does not lie against the expropriating authority for damage caused by the exercise of a right of entry under this section unless notice in writing, signed by the claimant, is given to the expropriating authority who exercised the right of entry, within 6 months after the entry occurred.