BRITISH COLUMBIA EXPROPRIATION ASSOCIATION

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ANNUAL CASE UPDATE AND REVIEW

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I. COMPENSATION

Lulu Island Holdings Ltd. v. Greater Vancouver Sewerage and Drainage District [2007] B.C.J No. 1420, 2007 BCSC 938 (BCSC June 27, 2007)

- Injurious affection claim arising out of the expansion of a sewage treatment plant in South Richmond.
- Greater Vancouver Sewerage and Drainage District acquired a temporary SRW in August 1992 for temporary storage fill under a S.3 agreement, which also provided that the authority would compensate the owner for any reduction in value to the remainder.
- Owner acquired the property for $1.2 million in 1989 as vacant farmland, subsequently developed with a major equestrian facility, along with a single family dwelling. The treatment plant expansion was completed in July 1999. The property was sold to a related party for $900,000 in September 2000 (it was agreed this sale would not be considered in determining the after value).
- Highest and Best Use – speculative holding property, with interim use as luxury real estate (plaintiff) vs. single family dwelling and agricultural (authority). Court rejects speculative holding element given location of property as being well within ALR boundary – also rejects luxury estate use given close proximity to treatment plant.
- Market value of date of taking – Authority's value of $1.33 million accepted. Court concludes plaintiff's valuation relied too heavily on1989 purchase price (time adjusted), noting that the purchase was completed without an appraisal. Court concluded 1989 purchase was in excess of market value; there was evidence from the owner the property was purchased for the purpose of driving a land swap for lands the owner needed for the Terra Nova development.

- Injurious affection – Owner was only entitled to claim for loss in value due to the expansion of the treatment plant as the property was purchased in 1989 with knowledge of the existing treatment plant. Evidence of odour levels and unsightliness of the treatment plant was based on subjective perceptions. That evidence established that the new treatment plant was more unsightly than the pre-expansion plant, but that the smell was no worse or perhaps even better.
- Plaintiff's assertion of 38% reduction rejected – Court cites internal contradictions in plaintiff's evidence – smell and unsightliness the basis of claim of stigma for properties adjacent to sewage treatment facilities, yet it was asserted that the existing treatment plant – replete with smell and unsightliness – had no measurable impact on nearby properties.
- Court considers previous cases as establishing ceiling of 30% reduction (*Reti v. Sicamous*) for construction of entirely new sewage treatment plant.
- ECB seen as having more relaxed rules of evidence but "there must be some evidence in support of such statements" (of loss in value).
- Authority's expert opinion that no loss in value also rejected. Court adopts 5% reduction in market, recognizing that figure as "to same extent arbitrary" – contrast this approach with ECB in *Shell Canada v. B.C. Transit.*

Note: The authority argued that unsightliness alone could not be the basis of liability, citing *St. Pierre v. Minister of Transportation and Communications (Ontario)* [1987] 1 S.C.R. 906 (and see *Currie v. Chase)*. Nevertheless, unsightliness was the basis for finding a reduction in value to the remainder. Is there an argument that s.40 has no application where the taking is for a temporary SRW and the injurious affection is said to be a permanent reduction in value?

Okanagan Opal Inc. et al. v. MoTH 2007 BBCSC 754, [2007] BCJ No. 1168

Disturbance Damages

Claim for compensation arising from expropriation of a converted gas station near Vernon used as the headquarters of a vertically integrated opal mining, processing, jewelry manufacturing and sales business. Mineral claims were not affected, and the business was relocated to a nearby location. Real estate was settled early on, and the trial involved claims for a variety of disturbance damages, some of them quite imaginative – including a lost financing opportunity, loss of equity and loss of mineral claims (allowed to lapse by one plaintiff and re-staked the same day by another plaintiff and his son). Most claims were dismissed. Rulings likely to be useful in other cases – claimant has the burden of proving disturbance damages; costs of improvements on relocation will not be awarded where the claimant has been compensated for improvements at the former location, and an award for management time requires proof of a corresponding loss or expense.

Morriss v. HMTQ 2007 BCCA, [2007] BCJ No. 1294

Interest

Compound interest is payable on an award of compensation for the expropriation of a mineral claim. Compensation was payable pursuant to the "common law" rule of compensation in *Rock Resources v. HMTQ* – the *Expropriation Act* did not apply as a mineral claim is a chattel. At the compensation trial Powers J assessed the market value of the claims and awarded interest under

the *Court Order Interest Act* (simple). The majority at the Court of Appeal ruled that compound interest was part of compensation, and that the *Court Order Interest Act* had no application. In dissent, Madame Justice Saunders adopted the Respondent's argument. No evidence was led during the trial as to applicable interest rates, and the Court of Appeal did not rule on the specifics. The difference between simple and compound interest exceeded the value of the claims themselves. For claims of this nature arising after 1999 a specific compensation scheme exists in the *Mineral Tenure Act* in which no interest is payable.

Shell v. BC Transit 2007 BCCA

The appeal by the authority of an injurious affection award of the ECB was allowed. The Court concluded that the Board had relied on Official Community Plans, which designated the area multi-family residential, and that the Board had determined that there was a conflict between this designation and the actual commercial zoning and use. The Board had also concluded that the OCPs were scheme related and had to be ignored in the before valuation. Shell's appraiser concluded that the after taking highest and best use was holding for multi-family residential development. The Board appears to have accepted this conclusion and assessed injurious affection at 25% of the pre-taking value. The Court held that only a "direct collision" between the provisions of the OCPs and the existing zoning could give rise to a conflict with the effect found by the Board. Based on its interpretation of the OCPs, and of the nature of the land after the taking, the Court concluded that there was no such "direct collision" and that, in effect, the highest and best use remained the same after the taking – commercial. The Court accepted that there had been a reduction in value of the remainder as a result of the OCPs, and, after determining that the Board's choice of 25% was not arbitrary, concluded that the land suffered a 12% reduction in value.

Ottawa v. Wright [2007] O.J. No. 3158 (Ont. Div. Ct.)

Special Adaptability

The Divisional Court upheld a decision of the OMB valuing the lands based on use for storm water management. The lands were expropriated in 2000 for a municipal storm water management scheme. The first version of the scheme came forward in 1992 but was shelved due to high costs. In 1989 developers entered into a purchase agreement with the owners for their valley lands to be used as a storm water detention area. Although that transaction ultimately did not complete due to the developer's financial difficulties, the OMB concluded there was evidence of a market for storm water detention. The highest and best use of the valley lands was for storm water management purposes to facilitate urban development prior to and notwithstanding the expropriation scheme.

Gillespie v. Ontario (Minister of Transportation) [2007] O.J. No. 2359, 2007 ONCA 441 (Ont. C.A.)

Ontario Court of Appeal allowed authority's appeal. In a partial taking the OMB had deducted from the "gross" after value a sum for betterment, arising from the benefit of the road and watermain access constructed by the authority. However, the OMB was found to have erred in further reducing the after value by the amount of the full servicing costs, which included road and watermain construction. This resulted in "double counting" of these costs.

II. PROCEDURE

Van Kam Freightways Ltd. v. Kelowna 2007 BCCA, [2007] BCAA No. 1026

- Appeal from decision of BCSC that expropriation not invalid for failing to deal with unregistered lessee's interest.
- BCSC relied on statement in *B.C v. Schneider* [1996] B.C.J. No. 1977 (BCAA) that authority need not make advance payment or otherwise deal with unregistered lessee's interest and dismissed claim for trespass.
- CA held that the parties to a lease choosing not to record it in LTO must take consequences – if lessee receives less protection under the *Expropriation Act* then so be it – unregistered lessees still have right to claim compensation.
- As to notice, holders of unregistered interests are protected by the requirement for posting notice on the property; the City had met that obligation.
- CA did not accept owner's argument that *Schneider* was wrongly decided. Court interpreted *Schneider* as deciding that advance payment was not a condition precedent to a valid payment. From the analysis of the statutory provisions that followed the CA in saying lack of an advance payment is not a condition precedent to the validity of <u>any</u> expropriation – not just expropriation involving unregistered interests.
- Section 4 of the *Expropriation Act* stipulates only two mandatory conditions to a valid taking:

i. service of the expropriation in accordance with the requirements of s.6(1)(a) and

ii. approval of the expropriation under s.18.

- While acknowledging that dealing with the interests of unregistered owners may create difficulties for authorities, especially where these owners do not move forward until after the expropriation has been approved, the CA's view was that that was something for the Legislature to address. The court should not achieve a resolution by a "tortured interpretation" of the statute;
- In any event, none of the difficulties arising from dealing with unrecorded and perhaps unknown interests can render an expropriation invalid, so long as the s.4 requirements are not.

DKS & VW Venturers Corp. et al v. SD 34 (Abbotsford) 2007 BCCA 115 [2007] BCJ No. 496

Chambers judgment of April 2006 affirmed. The transitional provisions substituting the BCSC for the ECB were valid and effectively conferred jurisdiction on the ECB to complete adjudication of cases in progress.

Minister of Forests and Range and Housing v. Coe 2007 BCSC 92. [2007] BCJ No. 96

This decision arises from an application by the authority that a claim for compensation was commenced out of time. The application was dismissed by Justice Macaulay. The expropriation for a Forest Service Road took place in late 2003. An advance payment was made in November 2003, based on an appraisal report dated March 2004. The vesting notice was filed in December

2003. Subsequently, counsel for the owner contacted the Ministry land agent and convinced him to enter into an agreement "similar to an agreement under s. 3 of the *Expropriation Act*". The agreement provided, *inter alia*, that compensation would be determined by arbitration. No further advance payment was made. The owner filed a claim for arbitration in 2006. The Court concluded that compensation arising from expropriation could be determined by arbitration if the parties agreed. If the limitation provision in the Act applied in the arbitration process agreed to by the parties (not decided), the authority was stopped from relying on it as a result of its agreement to determine compensation by negotiation, mediation or arbitration. The Court relied on the 2000 decision of the Court of Appeal in *Hansen v. MoTH*. The arbitration on compensation was held in October 2007, and no decision has been rendered.

Blandford Square Development v. Oxford (County) 2007 ONCA 298

The Ontario Court of Appeal overturned the dismissal of the owner's claim on the County's summary judgment application and remitted the issues for trial.

Blandford owns a shopping mall. The County acquired by negotiation 27 of 28 properties required as a land assembly to provide for the development of a new Toyota plant. The County expropriated the shopping mall, which it had contracted to sell to Toyota at the expropriation price. Blandford's contention was that this agreement amounted to the unlawful provision of assistance to business by selling property at below fair market value. The argument, which the Court of Appeal said there was much evidence to support, was that the requirement that no account could be taken of the proposed development in determining the value of the land would result in Toyota obtaining the property at less than fair market value.

If this argument prevails at trial, municipal authorities may not be able to lend their expropriating powers for the purpose of facilitating a development unless they pay a premium on the market value, as defined under expropriation legislation.

Rainbow Country Estates Ltd. v. Resort Municipality of Whistler 2007 BCSC 77

Document Production

The claimant sought production of documents in the possession of the municipality relating to the development of several other lakefront developments and all major project rezonings between 1988 and 1995. The claimant's intention was that there was a probability that the subject property could have been rezoned from rural resource to a zone allowing for higher density of development. The date of expropriation was August 1987 and the application was resisted on the basis that evidence of development approvals after the expropriation date could not be relevant; hindsight evidence not being admissible after *Premanco Industries v. British Columbia (Ministry of Environment, Lands, and Parks) 2001 BCCA 116.* The Court held that whether the evidence of post-expropriation date approvals was admissible would have to be left for the trial judge. The municipality was ordered to produce the requested documents, as the claimant had satisfied the low threshold test for production in the *Peruvian Guano* case, ie. that the documents may assist the plaintiff in advancing its case.

III. COSTS

<u>Payless/Shell v. HMTQ (BCSC, September 2007)</u>

The continuing saga of Mill Bay Payless costs. Most of the issues were dealt with in Master Bolton's assessment of September 2006. This decision deals with issues arising from or deferred for further consideration from the earlier decision and contains rulings of interest on interest. For section 48 (advance costs) claims, interest will run from 60 days after the date of submission. For section 45 (final costs) claims, interest will run from "the date the expropriating authority had sufficient information to decide whether the bills were substantially proper". Master Bolton's decisions are under appeal.

<u>Pending appeals</u>

Okanagan Opal; PayLess/Shell

<u>Pending decisions</u>

Associated Building Credits (BCCA); Kodila (BCSC); Coe (Arbitration)