B.C. EXPROPRIATION ASSOCIATION ~ 1999-2000 CASE UPDATE

BARRY WILLIAMSON
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1. *Daflos v. School District No. 42 (Maple Ridge)* – ECB – 68 LCR 167

   - The case involved a full taking of a two-acre parcel, adjacent to the property which was the subject of the *Lutsch* decision. The property had been heavily mortgaged to relatives of the owners and a claim for disturbance damages was advanced for mortgage expenses. There was a substantial delay in completing the expropriation giving rise to a claim for additional penalty interest.

   - Market Value - Both appraisers agreed that the Highest and Best use was split between part residential development in the short-term and part service commercial development over a longer period.

   - Although the *Lutsch* decision involved property immediately adjacent to the subject and a similar Highest and Best use, the Board's earlier decision in *Lutsch* merely provided supporting evidence to the direct comparison approach using other comparables.

   - Board favours raw lot value, rather than per acre value but notes the lack of planning evidence to provide a lot yield. The per acre value provides some additional supporting evidence.

   - Board criticizes the lack of quantifiable adjustments in both appraisers reports and proceeds to undertake its own adjustments for changing market conditions, impact of increased DCC's, locational factors, terms of sale and differing densities.

   - Board rejects use of a comparable sale eight months after valuation date but accepts the use of a sale three months after the expropriation as the best comparable for the service commercial valuation.

   - Board rejects claimant's argument that the respondent's delay in completing the expropriation should affect the Board's determination of market value, given a declining market. Board considered it was bound by the statute to value as of the date of expropriation.

   - Board discounted market value of service commercial component for three-year holding period. Board embarked on its own calculation of offsetting rental income during holding period in the absence of any evidence from the parties.

   - Disturbance damages – None were awarded as the Board concluded that the Highest and Best use was different from its existing use as a residential acreage, notwithstanding that the claimants originally purchased the property with a view

to its eventual redevelopment. Of significance to the Board were the improvements that the claimants had made to the property, such as an in-ground swimming pool, balanced against their attempts to rezone and subdivide the rear portion of the property for residential development.

- The Board followed the Court of Appeal ruling in *Bayview Builders Supply* and held that it could take into consideration delay prior to the completion of the expropriation in determining whether to award additional interest (i.e. "proceeding" has a broader meaning than a claim pending before the Board). The Board increased the interest payable by 50 percent for the 11-month period between the completion of the expropriation of the Lutsch property and when the respondent received additional funding from the province to acquire the Daflos parcel.

- The claimants were denied interest for an 11-month period as a result of an unnecessary adjournment request.

2. *Reti v. Sicamous* – ECB - 68 LCR 296

- Claim for pure injurious affection relating to the construction and operation of a sewage treatment facility and public works yard. Claimants' property was 0.59 acre in a rural setting, improved with a single-family dwelling and swimming pool. The sewage treatment plant and works yard were constructed immediately behind the Reti property. They complained of noise, dust, vibration and odour impacts on their personal health and enjoyment of their property.

- Limitation Period - Sicamous argued that the claim was brought outside the one-year limitation period in Section 42 of the Act, given that the treatment plant started operation on June 14, 1996 and the application for compensation was filed on October 14, 1997. The Board held that the Reti's complaint was in the nature of a continuing nuisance, which gave rise to a new cause of action as long as the nuisance continued. The Board then concluded that the claimants did not have "sufficiently clear knowledge" or an "a real apprehension" of the loss in market value of their property as of October 14, 1996. While rejecting the major part of the District's limitation argument, the Board ruled that the Reti's claim for damages of the cracking in walls and ceilings and a leak in the pool was out of time.

- Actionable Rule - the Board rejected Sicamous argument that the actionability rule was not met because of the pre-existing character of the neighborhood and the unusual sensitivity of the claimants. First, the noise and odours from other sources apart from the sewage treatment plant were considered to be of a relatively minor scale. Curiously, the Board declined to take a view of the property, somewhat at odds with the Board's general willingness to take a view in other claims (and see the recently publicized visit of the Supreme Court to one of the plaintiff' s back yards in the nuisance claim currently being tried against the

Vancouver Airport Authority). Second, the Board considered that the claimants alleged unusual sensitivity was immaterial to the main question of the diminution in the market value of the property.

- There is some ambiguity in the Board's discussion of the actionable rule. On the one hand, in responding to the argument relating to the pre-existing conditions in the vicinity of the subject, the Board stated that noise and odours are factors that can be actionable in nuisance. It then went on to say that the threshold test of being actionable is met regardless of the relative level of these two factors. If by this statement the Board intended to relieve claimants relying on common law nuisance to establish actionability of the need to show an unreasonable interference in the use and enjoyment of the claimant's property, then, with respect, the statement is wrong. However, later in the same paragraph the Board said that it was satisfied from the evidence that the intermittent noise and odours from the treatment plant in the works yard "were sufficiently serious to be the basis for an action in nuisance."

- Construction Rule - Applying the B.C. Supreme Court's decision in *Currie v. Chase* (1986) 35 LCR 293 the Board rejected Sicamous' argument that the claim should be dismissed as it related to the operation and not the construction of the plant. The *Currie* decision interpreted then section 544 of the Municipal Act (essentially what is now Section 324) as abolishing the construction rule by requiring a municipality to make adequate compensation to owners and occupiers real property for injurious affection by the exercise of *any* of its powers.

- Valuation - With respect to the *before* valuation, the Board rejected both appraisers use of the cost approach, particularly on the basis of the subjectivity it introduces in the area of depreciation rates. The Board criticized the lack of a formal adjustment chart and the use of listings in one of the appraisers reports. The Board's final conclusion on the *before* value appears to have been substantially influenced by its consideration of the original purchase of the property by the claimants ($212,000), despite the Board's recognition that it was possible that they paid higher than market value in 1992.

- For the *after* valuation the Board rejected the Oct. 1998 "fire sale" of the property for $110,000 by the claimants as of reliable indication of market value. The evidence was that the price was dictated by counsel for the claimants, resulting in an almost immediate sale. The Board recognized that the task of estimating the loss in value was difficult, particularly with a complete absence of comparable properties directly affected by either a sewage treatment plant or works yard.

- The Board rejected the inclusion of articles relating to pathogens and chemicals in the report of the claimants' appraiser, given the appraiser' s lack of expertise in medical or scientific matters. Having rejected apparently all of the evidence of the claimant's appraiser relating to the after value, the Board nevertheless concluded that the range for its injurious affection award ought to fall between the

"top" end of the range given by Sicamous' appraiser and the 50 percent loss derived from the fire sale value.

- Claim for Lost Improvements - A claim was advanced under Section 31 (2) (b) of the Act in relation to certain improvements, such as the swimming pool, as not being included in the market value of the land. The claim was rejected on the basis that the language of the section was clear that it only applied to improvements made by the owner. The various improvements for which the claim was made were all present when the claimants purchase the property.

- Claim for Loss of Use and Enjoyment - The claimants alleged that the impact of the noise and odours rendered their occupation of the property less valuable. An attempt was made to quantify such a claim on a partial notional rental loss basis. The Board rejected the claim as unrealistic, noting that the claimants were receiving an award for injurious affection as of November 1996, together with interest. The Board reasoned that there was no basis for additional compensation for rent for every month they decided to stay on the property; to do so would result in a duplication of compensation.

3. *Richards v. Maple Ridge* – ECB – 68 LCR 296

   - Final costs review after a settlement. Terms of the settlement were subject to a confidentiality agreement. The Vice Chair found her ability to determine the overall reasonableness of the costs claimed was impaired by the confidentiality agreement which limited the evidence and submissions. Noting that the claimant had not effectively discharged its onus of proving reasonableness due to the confidentiality agreement, a further $1,000 was deducted.

   - Consistent with the previous decisions in *Buchanan v. Surrey School District* and *Garnett v. MoTH*, the VALA survey of legal rates was not determinative of a reasonable hourly rate but was some useful evidence.

4. *Service Corp. International (Canada) Inc. v. Burnaby (City) – BCSC* December 9, 1999 - 9 MPLR (3d) 242 (BCSC)

   - A potpourri of municipal issues.

   - Service Corp. argued that a zoning bylaw amendment increasing a setback area in its cemetery had the effect of sterilizing part of its lands.

   - The Court accepted that the thrust of the setback creation was to provide for a separation between different land uses (a valid planning object) and not to create a linear park.

- As the bulk of the lands remained available for the purposes for which they were zoned, the sterilization claim was rejected.

- The discussion on this point concorded with Justice Bauman's observation that:

> "If the petitioner is right [that the setback sterilizes the lands], the power to regulate the siting of uses would be rendered nugatory."

5. *Morse v. MoTH* – ECB – 68 LCR 245

- The case involved a full taking in August 1995 of a one acre parcel on the north side of Murray Street in Port Moody as part of the Barnet Highway improvement project.

- The claimant asserted that the Highest and Best use for the property was future multi-family residential development, while the respondent contended that it was as a development site for light industrial use, in conformity with the current zoning.

- The first OCP adopted in 1984 by the City of Port Moody for the area designated the subject property as "major public open space" which contemplated the possible acquisition of the subject and other properties for park expansion. The property was zoned light industrial.

- In 1988 Port Moody Council instructed its planning director to prepare studies and bylaws to possibly change the zoning from industrial to the multiple residential. The owner of the subject was advised of Council's actions and responded with a development proposal for two 11 storey apartment buildings.

- The owner incurred consulting and engineering expenses in relation to his development plan but discussions with the City did not progress beyond the level of generalities, with the City's planning director indicating that 11 storey building heights would be excessive.

- In the early 1990s Port Moody Council reversed its earlier resolution to consider high-density residential development in the area of the subject and confirmed, by an update to the OCP, that high-rise residential development should be restricted to the Town Center to be developed to the east of the subject. The "open space" designation within the OCP was confirmed.

- The Board rejected the claimant's argument that the decision of Port Moody Council not to rezone the subject property for multi-family residential use was linked to the respondent's highway improvement project. The only evidence to support such a connection came from the claimant who testified about a conversation he claimed to have had with an official of the city to the fact that the Council had gone back on its decision to consider rezoning the subject property

because of its knowledge of the respondent's proposed highway project. However, the evidence was that this official had left the employment of the city at the time the claimant alleged the conversation had occurred. The Board rejected the claimant's evidence on this point as unreliable.

- The Board accepted MoTH's argument that Port Moody had made independent zoning decisions which were part of an overall municipal plan and which were uninfluenced by the prospect of the highway project. As there was less than a probability that the subject would obtain rezoning, the Board concluded that the Highest and Best use was for light industrial development in conformity with the existing zoning.

- Sales to the Authority -- With respect to one of the comparables, the Board considered that such a sale is acceptable as evidence of value "when its admissibility is not effectively questioned". The Board noted that both appraisers had used this sale and both considered it was their best indication of value. In the circumstances the Board rejected the claimant's submission that the price paid for this comparable may have exceeded market value because of the respondent's desire to avoid "lengthy and costly" expropriation proceedings. The Board drew the inference that the price paid in fact reasonably represented market value without any of the parties to the transaction being called to give evidence.

- Disturbance Damages -- Although the subject property was improved with two older residences which provided rental income, the Board equated the Highest and Best use with the existing use, entitling the claimant to reasonable disturbance damages in addition to the award for market value. However, the Board rejected the claim for costs associated with the claimant pursuing a rezoning in 1989 and 1990 as causally unconnected with the respondent's project. The claim for property purchase tax was rejected in the absence of any evidence that the expense had been actually incurred, the onus lying on the owner to adduce such evidence.

6. *Sequoia Springs West Development v. MoTH* - ECB - 69 LCR 1

- Island Highway taking of a 29-acre strip bisecting the 234-acre parcel located west of downtown Campbell River.

- Valuation – Before and After approach used by both appraisers. Both appraisers also applied the Direct Comparison approach and the Development approach to the property before the taking and for the after taking valuation both used only the Development approach. The Board was clearly reluctant to embrace the Development approach, citing Todd and its previous decisions. However it recognized that where there was either no other evidence or where the property was ripe for subdivision it had accepted the use of the Development approach. In this case the Board had the benefit of an approved plan for the *after* scenario and

"reluctantly" relied on the Development approach to value the property after taking. Presented with the two alternative approaches for the *before* valuation, the Board gave more weight to the Direct Comparison approach.

- The Board's discussion of the array of issues bearing on the valuation question is interesting but of no significant precedent value. Avid readers will note that the issues included the net site size for development purposes, the absorption period and the phasing of development, the ratio of single to multi-family units, when DCC's were payable and site specific servicing costs.

- Disturbance Damages -- MoTH argued that none of the claims for costs or losses incurred prior to the taking could be compensated under the B.C. Act and that the decision in *Dell Holdings* was distinguishable. Applying the reasoning of the Court of Appeal in *Bayview Builders* the Board held that disturbance damages or business losses incurred before the taking are still recoverable.

- Residential Golf Course Development expenses - Again applying the Court of Appeal decision in *Bayview* the Board accepted that the claimant did not have to prove that the highway project was the sole reason for it incurring wasted golf course development expenses. In addition the Board ruled that Section 31 did not affect the recoverability of personal and business losses under Section 40. Thus the Highest and Best use determination was irrelevant to the entitlement to recover disturbance damages. However the Board rejected the disturbance damages claim on the basis that some of the expenses were incurred in the eventual residential development that took place after the taking and not necessarily related to the abandoned golf course project. Alternatively, there was "virtually" no evidence to establish that various costs had been thrown away as a result of the respondent's highway project.

- Delay Claim - Under *Dell Holdings* if the development is delayed by the expectation of a partial expropriation then proven losses caused by that delay may be recovered as disturbance damages. The Board broke the entire time frame into discrete segments and analyzed each to determine whether the impending expropriation or actions of the respondent had caused delay. Significant to the Board's conclusion that much of the delay was not recoverable was the requirement by the City of Campbell River that the claimant enter into a Comprehensive Development Plan (CDP) as part of the development approval process. The formulation and negotiation of the CDP with the city involved a lengthy process, the greater part of which, in the Board's opinion, could not be related to the highway project. However for the period following the public meeting on the CDP, the claimant was primarily involved in negotiating issues arising out of the highway and that delay period was compensable. The Board applied at 9 percent discount rate to the after taking value for an 8-month period. The Board made a further reduction in respect of adverse market conditions which it found would have delayed the development in any event.

7. *CMHC v. North Vancouver* (2000) 77 BCLR 14 (BCCA)

- The Court of Appeal upheld the lower court judgment which rejected a challenge to bylaws which down zoned the old Blair Rifle range lands. CMHC argued that the chambers judge erred in relying on the *McMillan Bloedel v. Galiano Island Trust Committee* decision because it was based substantially on Section 3 of the Island Trust Act - the "preserve and protect" mandate. Justice Esson concluded that the scope of the zoning powers of the M*unicipal Act* must be interpreted broadly and the absence of equivalent language to Section 3 of the Islands Trust Act did not mean that a municipality could not use its zoning powers to pursue the object of preserving and protecting the amenities and environment of the area.

- With respect to the evidence that certain members of District Council thought that the impugned bylaws would have the effect of preserving CMHC's lands as park, the appeal court inclined to the view that any such "misunderstanding" as to the effect of the bylaws had been dispelled by District staff before the bylaws were passed. Although the bylaws provided for a more limited range of uses than previously, and in a way that was unpalatable to CMHC, that did not render the bylaws unlawful.

- Finally, Esson J.A. raised, without deciding, whether recent decisions of the Supreme Court Canada indicate a more deferential approach to the review of municipal bylaws, particularly as it relates to going behind the bylaw to determine the motives of councillors.

8. *Reon Management v. MoTH* – ECB – 70 LCR 14

- The claimant challenged the jurisdiction of the Board on the basis of the Court of Appeal decision in *Ocean Port Hotel v. British Columbia* (1999) 174 DLR (4th) 498. In Ocean Port a decision of the Liquor Appeal Board was set aside on the basis that the Board did not have sufficient institutional independence; the members of the Appeal Board being appointed by cabinet and serving at pleasure. Reon claimed that ECB appointees suffered from a similar lack of security of tenure.

- The claimant argued that Section 20 of the Interpretation Act governed ECB appointees. Section 20 provides: "An authority under an enactment to appoint a public officer is authority to appoint during pleasure".

- MoTH and the province argued that the ECB should be at the lower end of the scale of institutional independence as it did not exercise powers of suspension and enforcement similar to the Liquor Appeal Board.

- The Chair accepted that the ECB's lack of power to impose sanctions for violations of statute distinguished the legal and factual framework from that of the tribunal in the *Ocean Port* decision. However, given that takings of private land usually involve bodies in the executive branch of government it was apparent that the Board had to have actual and perceived independence from the executive. Relying on the comments of Macdonald J. in *Whitechapel Estates*, the Chair accepted that its procedures, being similar to a court, made it a quasi-judicial, rather than a purely administrative tribunal. Accordingly, the ECB had to have a high level of institutional independence.

- The Chair declined to ignore the *Ocean Port* decision on the basis that it was based on cases involving the Charter of Rights.

- For the purposes of determining security of tenure three kinds of tribunal appointments were recognized: (1) appointments at pleasure such as the Liquor Appeal Board, (2) appointments for fixed terms specified in statute such as the ECB, and (3) appointments to bodies where the governing statute is silent as to the term of appointment. The chair concluded that it was only the latter category to which Section 20 of the Interpretation Act applied.

- Having fixed terms specified by statute gave members of the ECB sufficient security tenure to make the Board a tribunal independent of the executive branch.

9. ***Reti v. Sicamous*** **(costs) - ECB - 69 LCR 74**

- Sicamous argued that the Board should exercise its discretion against awarding the claimants 100% of their costs. The Board determined first that, in light of the amount of the award and the small pre-hearing offer from the District, it was reasonable for the Reti's to proceed to a hearing. The claimants were awarded 90% of their costs.

- The Board felt it was not proper or appropriate for the claimant's appraiser to include in his report a number of scientific articles in areas where he had no expertise to support an implication that sewage treatment plants create health risks.

- Further, the claim for loss of value to improvements not reflected in market value should never have been advanced in the Board's opinion given its clear statement on the issue in *Branscombe v. MoTH* 51 LCR 241

10. ***Horsley and Jones v. MoTH*** **– ECB – 70 LCR 29**

- Full taking of two large residential parcels (1.14 and 1.16 acres) in North Nanaimo for the Nanaimo Parkway.

- Highest and Best use was the sole issue

- RS 1 Zoning as of the time of taking provided for minimum lot sizes of 600 square meters for service lots and two hectares for a service lots. The subject properties were connected to the city water supply but not to sanitary sewers.

- The Claimant's planning consultant unfortunately misread the OCP designations for the subject properties, attributing to them a Single Family designation, which may have permitted rezoning to a higher density. However the actual designation of the properties was Rural, with no suggestion of any type of multi-family use.

- The Claimant's appraiser's opinion of Highest and Best use of medium density multi-family residential development based on the opinion of the planning consultant.

- The Board preferred the planning appraisal evidence presented by MoTH. The planning evidence concluded an analysis of the previous rezoning applications in the surrounding area and found that most were unsuccessful and that those that succeeded occurred in more urbanized neighbourhoods.

- In his Highest and Best use analysis MoTH's appraiser, while relying on the opinion of the planning consultant, also considered the factors in the Appraisal Institute definition of Highest and Best use. The appraiser also did a cross check Development Approach which suggested that a possible subdivision was not currently economically viable. His conclusion that the Highest and Best use was its existing use as a residential property was accepted by the Board.

- The Board considered Section 33 (g) of the Act and the Court of Appeal decision in *Vision Homes*. Although the most recent OCP made reference to the Nanaimo Parkway, the Board concluded that it was not adopted "with a view" to the development of the Parkway, i.e. there was not a sufficient nexus between the acquisition of the subject properties and their Rural designation in the OCP. Rather, the OCP designation was a recognition of the existing nature of the neighbourhood, which the plan sought to preserve.

- Ultimately, the Board applied the *Farlinger* standard that, in the absence of a probability or reasonable expectation of a change in the OCP or zoning, the Highest and Best use had to accord with existing land use regulations.

- The Board rejected an argument that an adverse inference ought to be drawn against MoTH as a result of its failure to call the appraiser who prepared the report that was the basis for the advance payment. In the words of the Board, "there is no basis for requiring the expropriating authority to continue to rely on its initial expert opinion at a compensation hearing several years later", particularly where there is no suggestion that the appraiser alone possessed additional facts requiring him to be called as a witness.

11. *Morriss v. HMQ (British Columbia)* [2000] BCSC 535

- Claim for damages for $492 million for constructive expropriation in 1985 of mineral claims in the Stein Valley. The Supreme Court held that even if the claim was governed by a maximum 10-year limitation period, it had obviously been brought well beyond that period. The alternative claim that the Premier and a lands manager had acted in "bad faith" by frustrating the plaintiff's endeavors was so badly pled that it did not disclose a cause of action.

12. *Vancouver Marina (1971) Ltd. v. MoTH* - ECB July 5, 2000

- Competing applications by the claimant for an order that its leasehold interest in a water lot on River Road in Richmond had been constructively expropriated or, alternatively, injuriously affected and by the respondent MoTH dismissing the claim as disclosing no reasonable claim under the Expropriation Act.

- The claimant conducted a marina business on water lots which it subleased from Regent. Regent in turn leased the same water lots from the North Fraser Harbour Commission (NFHC). NFHC leased the water lots from the Province. The claim arose out of the Province's plans for a new connector bridge to Sea Island. NFHC gave notice to Regent that pursuant to a clause in its lease, NFHC would be resuming part of a water lot occupied by the claimant.

- Claimant an Owner? -- MoTH argued that because Regent had not sought the permission of the NFHC before entering into a sublease with the claimant, the claimant was not an "owner" as defined in the Act. The Board rejected this argument, citing a 1917 English King's Bench decision to the effect that a landlord cannot complain of further sub-letting as a breach of covenant by the sub-lessee, given the lack of privity of contract. The Board also suggested, without deciding, that Regent and the claimant would have a successful defence of acquiescence or estoppel against the NFHC.

- Constructive Expropriation -- MoTH argued that the resumption of NFHC's rights under the lease with Regent could not be construed as a constructive expropriation. The Board undertook its analysis of whether there was a constructive expropriation first in relation to the acquisition of the water lot by the Province from NFHC and, second, in relation to the acquisition of the water lot by NFHC from the claimant. In each case it was necessary to establish that there was (i) a taking of property, (ii) under an enactment and (iii) without the consent of the owner.

- Although it would seem highly doubtful that the setting in motion of the resumption by the Province of part of the water lot from NFHC could meet these criteria, the Board declined to decide the issue without the Head Lease between

the Province and NFHC being put in evidence, despite being satisfied that NFHC's exercise of its right of resumption under the lease to acquire the water lot of the claimant was not an expropriation.

- With respect to the injurious affection claim, the Board referred to its earlier decision in *Warlow v. MoTH* where it concluded that the provisions of the Highway Act and the Ministry of Transportation and Highways Act did not provide a statutory basis to pursue injurious affection claims relating to road or bridge construction by MoTH. The Board was clearly troubled by the differing judicial treatment of the relevant statutory provisions and suggested that a further appellate ruling on the issue would be beneficial.

- Although it did not have to address the common law tests in light of its conclusion that there was no statutory basis for the injurious affection claim, the Board doubted whether the claimant could satisfy the "Nature of the Damage Rule", given that the claims appeared to relate to a loss of business income and not to any diminution in market value of the remaining water lot interest.

13. *C.R. All Trucks Ltd. v. MoTH* - ECB – April 11, 2000

- Claimant object to the application of the costs tariff to its interim costs applications and to any requirement that its bill be submitted in a particular format.

- The Vice Chair rejected the argument that the tariff should not be given effect because it conflicted with provisions of the *Act*; the usual rule of interpretation being that in the event of a conflict between the provisions of a regulation and a statute, the statutory provisions prevail. The provisions of s. 45(5)(b) and s. 54 were clear in indicating an intention that any tariff of costs would replace the previous right of a claimant to obtain recovery of actual reasonable costs. The Vice Chair noted that while there might be a presumption in favour of full compensation, that was a principle of construction which could be over-ridden by clear legislative direction.

- Similarly, while the Tariff's provision eliminating a potential claim for interest on costs ran counter to the presumption of full compensation (which was expressed in *Tidmarsh v. Comox-Strathcona*) it did not conflict with any provision in the *Act*.

- The Vice Chair held out some hope for non-appraisal experts when she indicated that "other costs" could continue to be billed as before and recovery was not precluded by the tariff.

- The argument that the tariff should not apply to expropriations occurring before June 28, 1999, because it would interfere with vested rights was also rejected.

The words of Dickson, J., in *Gustovson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)* [1977] 1 S.C.R. 271 were noted with approval:

> "No one has a vested right to continuance of the law as it stood in the past."

- Finally, the Vice Chair directed that bills submitted to the Board for review should be presented in roughly the same form as bills presented for review before the Supreme Court registrar, although the bill did not have to be submitted to the authority in that format.

14. *Ingham v. Creston* (Costs) – ECB – May 16, 2000

- Legal fees incurred in relation to successful challenge of first expropriation recoverable in past under s. 45(3), although Vice-Chair suggested they should have been pursued as claims for disturbance damages.

- Solicitor's efforts to negotiate a narrower taking with the authority were reasonable steps on behalf of the claimants. However, work related to collection of traffic studies and consideration of a Charter of Rights challenge was unnecessary and unreasonable given authority's unwillingness to vary taking became clear and given remote chance of success on a Charter challenge.

15. *Ingham and Kowalski v. Creston* – ECB – July 28, 2000 (reconsideration)

- Following the Court of Appeal's decision allowing the owners' appeal, the Board reconvened to revisit the assessment of injurious affection to the remainder and without deduction for any general benefits.

- The Board refused the authority's request to tender new valuation evidence on the basis that the issue of no deduction for general benefits had been raised squarely in the pleadings at the original hearing.

- Responding to the Court of Appeal's apparent criticism of the "before and after" method of assessing reduction in value the Board stated that the problem was not with the "before and after method" but with the absence of after value evidence apart from the sale of the Kowalski property.

- The Board indicated that the cost of mitigative measures, "to the extent that they exceed any actual loss to the value of the remainder " would have to be recoverable as disturbance damages.

- Ultimately, the Board rejected the claimant's estimate of the percentage impact on value as being more appropriate to a freeway project impact. The Board settled

on a figure of 15% of the building value as the claimants' complaint related to the utility of the buildings as residences.

16. *Hansen v. MoTH* – B.C. Court of Appeal - [2000] BCCA 338 – May 25, 2000

- The B.C. Court of Appeal dismissed the MoTH appeal from a decision of the Board which held that Hansen's claim for compensation was not barred even though the application for compensation was filed more than one year after the advance payment.

- The Court agreed with the Board that Moth's negotiator had led the claimant's solicitor to believe that the one-year limitation period would run from the possession date (in which case the application was filed within a year). The representations of MoTH were unambiguous and were intended to be relied upon. Accordingly, the claimant's plea of promissory estoppel succeeded.

- The Court also made the subtle distinction between a provision, such as s. 25, which bars a remedy and one which extinguishes the claim. The former is procedural in nature and can be extended by agreement or estoppel.

17. *Reon Management v. MoTH* - ECB – June 2, 2000 (Reon #2) 70 LCR 29

- ECB has jurisdiction to determine whether a claim for compensation has been settled.

- The claimant and authority differed over whether interest payable as part of a settlement included penalty interest under s. 46(4).

- The Chair properly did not attempt to determine the actual intentions of each party. Rather, the task was to determine their intentions objectively, in the sense of what each party was reasonably entitled to conclude from the attitude of the other.

- The claimant's settlement proposal included a provision that interest would be paid on a specified sum pursuant to s. 46 of the *Act*. MoTH's solicitor purported to accept the settlement offer but provided a detailed interest calculation which omitted any penalty interest under s. 46(4).

- The Chair concluded that a settlement had been reached which included a term that interest would be payable under both ss. 46(1) and (4). MoTH's interest calculations were not seen as adding a new term to the settlement.

- On September 25, 2000, the Court of Appeal granted leave to appeal the decision. Saunders J.A. considered that because the appeal would be the only review of the decision and the settlement erased the opportunity for a hearing, there was

sufficient merit in the appeal to grant leave. She also noted that the issues of whether a settlement was reached and its terms were not issues within the specialized expertise of the Board. The decision to grant leave is consistent with the generous approach to leave applications in expropriation matters.

18. *Casamiro Resource Corporation v. B.C.* – B.C. Court of Appeal [2000] BCCA 407

- Appeal by the claimant from the ECB decision awarding it only $375,000 for market value of Crown granted mineral claims. Casamiro sought an award from the Appeal Court of between $9 million and $25 million.

- Standard of Review – Casamiro argued on the basis of some language in the Court's judgment in *Devick* that the Court of Appeal was entitled to retry the case. The Court held that it had no greater power to review the decisions of the ECB than it has in reviewing trial judgments from the BC Supreme Court, i.e., errors of law and palpable and overriding errors on factual matters.

- Valuation – The Court held the Board was entitled to reject the claimant's expert evidence as being too speculative. The Court suggested strongly that a discounted cash flow valuation of mine revenues was wholly unsuitable to a property which had never shown any real prospect of commercial production.

- Access to Subject Property – The Board had stated that because the Crown had denied the claimant access to the property after it was expropriated it would err on the claimant's side in valuing the property. The claimant agreed that an adverse inference should be drawn against the Crown for frustrating the claimant's efforts to obtain evidence relating to the presence of minerals on the property. The Court concluded that having expropriated the claimant's interest, the Crown had a legal right to refuse entry. The case on which the claimant relied for the drawing of an adverse inference established a presumption against a wrongdoer. The Crown was not a wrongdoer in insisting on its legal rights.

19. *Sequoia Springs West Development v. MoTH* - ECB – September 1, 2000

- Costs Entitlement.

- The Board awarded total compensation of $1.68 million which was 118% of the advance payment. Of that total amount, $200,000 was classed as business losses by the Board. Less the business loss, the compensation awarded was 104% of the advance payment.

- The Board rejected Sequoia's attempt to reclassify the $200,000 award as disturbance damages instead of business losses. "There is no magic in the labeling of an expense or loss as a business loss".

- The Board drew on its resources in focusing on s. 20(1) as the key to the interpretive issue surrounding s. 45(4) which reads as follows:

> If the compensation awarded to an owner, other than for business losses, is greater than 115% of the amount paid by the expropriating authority under section 20(1) and (12) or otherwise, the authority must pay the owner his or her costs.

- Authorities are excused from including in an advance payment only those types of business losses mentioned in s. 34(3) – those arising from a relocation. Accordingly, the claimant beat the 115% threshold and there was no discretion as to whether it was entitled to costs.

- Although the greater portion of the business losses related to the eight-month delay in the development of the property, which delay commenced two and a half years after the taking, the authority has access to the discovery process to ascertain the scope of the business loss and can increase its advance payment before the hearing.

20. *Yue v. Surrey* - ECB (oral decision) – August 31, 2000

- Interim review of costs under the new tariff.

- Not appropriate to submit separate bills of costs in relation to two owners whose claims were advanced in one Form A and are represented by the same counsel.

- Scale 3 not appropriate where the single issue is Highest and Best use; "at best" Scale 2.

- If claimant wants to claim the maximum number of units for any item, evidence is required to justify such a claim. It is within "counsel's ingenuity" to provide sufficient evidence for the review without prejudicing the claimant's case.

- Maximum entitlement of units for correspondence (20) unlikely to be awarded at early stage on interim bill – claimant awarded 5 units.

- Chair rejected suggestion that the claimant be given leave to submit further evidence to fill any gaps identical in the review. No further assessment permissible on the cost items which were the subject of the review. Does that mean no further claim, for example, in relation to correspondence, irrespective of how much is generated before the hearing?

21. *Premanco Industries v. B.C. (MELP)* – ECB - October 4, 2000

- Claimant was awarded $150,000 for constructive expropriation for loss of its undersurface rights in mineral claims.
- Board rejected Discounted Cash Flow method of valuation, relying instead on the Appraised Value Method and the Corporate Transaction Method.
- Broad declined to make an order that the claimant convey title to its registered interests in the undersurface rights as a condition of payment of compensation.
- A "big" rock case.

22. *Glendale Trading v. MoTH* – ECB – October 11, 2000

- Claim for injurious affection to a retail commercial property arising out of changes in road grade.
- Claim was advanced on the basis of a "cost-to-cure" approach. Appraisal, engineering and planning evidence relating to need to fill and re-pave the parking lot to alleviate problems alleged to have been caused by the grade change.
- Claim rejected as no evidence linking the cost to restore the elevation of the parking lot to a reduction in market value. Business volumes and profits were found to be unaffected by the grade changes. No evidence that a prospective purchaser would pay a lower purchase price due to the impacts of the grade change.
- Referring to its previous decisions in *Ingham v. Creston*, the Board doubted that a cost to cure valuation would be reflective of a loss in market value.