LexPacifica
Law Corporation

British Columbia Expropriation Association

2007 Fall Seminar

October 26 - 27, 2007

Highest and Best Use
A Legal Perspective

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I. Introduction

It is a generally accepted appraisal principle that the market value of the fee simple interest in real property is to be determined in accordance with its "highest and best" use. In a legal context, the principle is the underpinning for valuations in the fields of *ad valorem* taxation, property purchase tax valuations, and, of course, expropriations to name but three prominent examples.

Section 6.2.14 of the *Canadian Uniform Standards of Professional Appraisal Practice, 2007* ("*CUSPAP*") directs professional appraisers to come to a conclusion of highest and best use in the development and communication of a formal opinion of value. Section 7.15 of *CUSPAP* states as follows:

> **7.15 Highest and Best Use** [see 12.34]
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> 7.15.1 The report must contain the appraiser's opinion as to the highest and best use of the real estate, unless an opinion as to highest and best use is irrelevant. *If the purpose of the assignment is market value, the appraiser's support and rationale for the opinion of highest and best use is required.* The appraiser's reasoning in support of the opinion must be provided in the depth and detail required by its significance to the appraisal, based on the relevant legal, physical and economic factors. As land is usually appraised as though vacant and available for development to its highest and best use, opinions are required both as to:
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> 7.15.1.i. the land, as if vacant, and;
> 7.15.1.ii. the property, if improved.
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> [Emphasis added]

This paper is written in the context of appraising the market value of real property and so the determination of highest and best use is relevant. In the following pages, situations raising a challenge to the determination of a highest and best use are presented. In no particular order the following are discussed:

a. special purpose, limited market properties and highest and best use;
b. land assembly as a potential highest and best use;
c. contaminated properties, rights to recover remediation costs and highest and best use;
d. the principle of consistent use in relation to interim use; and

e. the land residual technique, highest and best use and the appraiser's credibility.

II. "Highest and Best Use" Defined

In his paper entitled *The Concept of Highest and Best Use*[1], Lincoln North wrote that all principles of value are secondary to the "cardinal principle" of utility. He goes on to say that from this cardinal principle has arisen the concept of "highest and best use."

Highest and best use has been described as the foundation on which market value rests.[2] Section 12.34 of *CUSPAP* defines and describes highest and best use as follows:

> **12.34 Highest and Best Use** [see 6.2.14]
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> 12.34.1 May be defined as: "That reasonably probable and legal use of vacant land or an improved property which is physically possible, appropriately supported, financially feasible, and that results in the highest value."
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> 12.34.2 The highest and best use of a property is an economic concept that measures the interaction of four criteria: legal permissibility, physical possibility, financial feasibility, and maximum profitability.
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> 12.34.3 Estimating the highest and best use of a property is a critical appraisal component that provides the valuation context within which market participants and appraisers select comparable market information.
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> 12.34.4 An appraiser considers highest and best use of the property as if vacant separately from the highest and best use of the property as improved. This is because the highest and best use of the site as if vacant and available for development determines the value of the land, even if the property's existing improvement does not represent the highest and best use of the site.

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1 Appraisal Institute of Canada, 1980

2 *The Appraisal of Real Estate*, 2nd Cdn. ed., Vancouver: Appraisal Institute of Canada and the Appraisal Institute, 2002, page 12.1

12.34.5 Highest and Best use of land or a site is the use among all reasonable alternative uses that yields the highest present land value, after payment for labour, capital and co-ordination. The conclusion assumes that the parcel of land is vacant or can be made vacant by demolishing any improvements.

12.34.6 If for valid reason, as explained in the report (e.g. rent review, value in use, insurance coverage,) a highest and best use is irrelevant, no Extraordinary Limiting Condition is required.

III. *Expropriation Act*

The *Expropriation Act*, R.S.B.C. 1996, c. 125, expressly and implicitly incorporates the concept of highest and best use. Implicit reference is in the form of the statute's reliance on "market value." Express references are found in sections 20 and 31.

Section 20 requires an expropriating authority to serve on the owner of the expropriated property copies of the appraisal and other reports on which the advance payment to the owner is based. Section 20(3) further provides that the appraisal report must be reasonably detailed and must include a statement of the highest and best use of the land.

Section 31, the basic compensation formula, refers to highest and best use but here "market value" in conjunction with, and without, "highest and best use" leads to confusion. The wording of the section is set out below:

> 31(1) The court must award as compensation the ***market value*** of the owner's estate or interest in the expropriated land plus reasonable damages for disturbance but, if the ***market value*** is based on a use of the land other than its use at the date of expropriation, the compensation payable is the greater of
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> (a) the ***market value of the land based on its use*** at the date of the expropriation plus reasonable damages under section 34, and
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> (b) the ***market value of the land based on its highest and best*** use at the date of expropriation.

> (2) If not included in the ***market value*** of land determined in accordance with section 32, the following must be added to that ***market value***:
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> (a) the value of a special economic advantage to the owner arising out of his or her occupation or use of the land;
>
> (b) the value of improvements made by an owner occupying a residence located on the land.
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> (3) If there is more than one separate interest in the land expropriated, the value of each interest must, if practical, be established separately. [Emphasis added]

Section 31 speaks of "market value of the land based on its use" and "market value of the land based on its highest and best use." What does this distinction mean? Appraisal and legal authority seem to suggest that value is not "market value" unless it is based on highest and best use. How can there be a "market value" based on a use other than highest and best use? If the appraisal and legal authorities are correct, the "market value based on its use" creates an inherent contradiction if the current use is not highest and best use.

The Appraisal of Real Estate, 2nd Cdn. ed., at page 2.5 contrasts "market value" and "use value":

> The realities of current real estate practice frequently require appraisers to consider other types of value in addition to market value. One of these, use value, is a concept based on the productivity of an economic good. Use value is the value a specific property has for a specific use. In estimating use value, the appraiser focuses on the value the real estate contributes to the enterprise of which it is a part, without regard to the highest and best use of the property or the monetary amount that might be realized from its sale . . .

If the phrase "market value of the land based on its use" in section 31(1)(a) is intended to permit a use valuation, then the reference to market value is unnecessary and confusing. It is further confused by the possibility of recovery under the head of "special economic advantage" in section 31(2)(a).

This confusion is not resolved by section 32 which defines "market value" as ". . . the amount that would have been paid for it [land] if it had been sold at the date of expropriation in the open market by a willing seller to a willing buyer." This is a variant on the definition of

"market value" which has been interpreted to require a determination of value of real property in accordance with its highest and best use.

This issue is not simply one of semantics. As will be seen in the discussion of special purpose, limited market properties later in this paper, the confusion makes it unclear what compensation the owners of such properties can hope to obtain in expropriation proceedings.

IV. General Acceptance of Highest and Best Use by the Courts

In *Valley Improvements Co.* v. *Metropolitan Toronto and Region Conservation Authority*, [1965] O.J. No. 1016 (QL) (Ont. C.A.), at paragraph 42, the court emphasized the need to determine highest and best use in expropriation compensation proceedings:

> 42 . . . My difficulty stems from the fact that the Board has not decided the basic question of fact which confronted it at the very threshold of its deliberations, viz., at the moment of expropriation what was the highest and best use to which the lands in question could reasonably be expected to be put? The answer to that question had to be the corner-stone supporting whatever compensation might be awarded to the claimant.

In *Farlinger Developments Ltd.* v. *East York (Borough)*, [1975] O.J. No. 609 (QL) (Ont. C.A.) at paragraph 34, Howland J.A. wrote that "In an expropriation there are really two fundamental steps. The first is to determine the highest and best use of the property expropriated and the second is to fix the compensation to be awarded to the owner based on such use."

A discussion of these and other authorities is found in *Lulu Island Holdings Ltd.* v. *Greater Vancouver Sewerage and Drainage District*, [2007] B.C.J. No. 1420 (QL) (B.C.S.C.), beginning at paragraph 38. Madam Justice Russell accepted that the determination of highest and best use is the cornerstone in estimating market value.

The British Columbia Court of Appeal recently put the following gloss on "highest and best use" in *Shell Canada Ltd.* v. *British Columbia Transit*, [2007] B.C.J. No. 191 (QL) (B.C.C.A.) at paragraphs 12 and 13:

> **12** Since the first three of the four grounds are interrelated, I propose to deal with them together. The starting point is the meaning of "highest and best use". In ***Southam Inc. v. Assessor of Area No. 14 - Surrey/White Rock*** (2004) 28 B.C.L.R. (4th) 317, 2004 BCCA 245, this court stated that "Highest and best use is the use that produces the highest estimate of market

> value and cannot be determined without reference to a competitive market." (At para. 15.) The expert appraisers in the present case proceeded generally on this basis, attempting to estimate the market value of the remaining land, as if vacant, and asking themselves, "[w]hat was the highest and best use to which the lands ... could reasonably be expected to be put?" (*Per* Roach J.A. for the Court in ***Re Valley Improvement Co. and Metropolitan Toronto & Region Conservation Authority*** (1965) 51 D.L.R. (2d) 481 (Ont. C.A.), at 491. See also ***Farlinger Developments Ltd. v. East York (Borough)*** (1975) 61 D.L.R. (3d) 193 (Ont. C.A.), at 204.) In the case at bar, this posed particular difficulty, since neither expert was able to cite any fair market values for "comparable" properties featuring columns and guideways running through them.
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> **13** The authorities make it clear that the highest and best use assessment must be made as at the date of taking - in this case, February 28, 2000. Counsel for B.C. Transit went further and suggested that this equates to the highest and best use "for now", but cited no support for such a qualification. I am of the view that a prudent purchaser would not confine his or her assessment of value to the value "for now." As Mr. Mullan pointed out, such a purchaser, and the valuator, would naturally consider changes that are, as at the date of taking, <u>likely</u> to occur in future and which will materially affect the highest and best use. Thus if the <u>probability</u> of a change that will affect highest and best use is "clearly established", that change is properly considered in determining value as at the date of expropriation: see ***Farlinger Developments***, *supra*, at 206-210. [Emphasis in the original]

Another source of authority for highest and best use is in real property taxation in British Columbia which is based upon a determination of the market value of the fee simple interest in land and improvements.[3] In *British Columbia (Assessor of Area 10 - Burnaby/New Westminster)* v. *Sears Canada Inc.*, [1992] B.C.J. No. 2648 (QL) (B.C.S.C.), Madame Justice Saunders said the following at pages 4 and 5 in the context of highest and best use:

> The classic determination of "actual value" or "market value" starts with a determination of the highest and best use of the

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[3] *Assessment Act*, R.S.B.C. 1996, c. 20, sections 18, 19

> property. After that issue is determined, an evaluation is done estimating the price which property would fetch using the *Bramalea* criteria for actual value. The decision here shows the Board started its considerations in this classic fashion, first reviewing the meaning of highest and best use and moving on to a determination of highest and best use of this property . . .
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> Valuation of property has an ambiguous and subtle nature. Being based on the highest and best use, a valuation for assessment purposes does not include speculative value. Nor does it precisely reflect the price of nearby property which may have a different highest and best use. Although sales of nearby properties may usefully suggest new uses for the property, it is an error to use sales of nearby properties to establish the "actual value" of appraised property before settling on the highest and best use for the property. To do so is to put the cart before the horse.
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> In my view the Assessment Appeal Board correctly interpreted and applied the term "actual value" in the *Act* by first resolving the issue of highest and best use and then, based on that decision, by divining the price a willing buyer and a willing seller would transact for the property by applying the Income Approach rather than the Direct Market Approach.

The Assessor's appeal to the Court of Appeal was dismissed. [*British Columbia (Assessor of Area 10 - Burnaby/New Westminster)* v. *Sears Canada Inc.*, [1995] B.C.J. No. 2531 (QL) (B.C.C.A.)]

In *Petro-Canada Inc.* v. *Assessor of Area 12 - Coquitlam*, [1991] B.C.J. No. 2896 (B.C.S.C.), the British Columbia Property Assessment Appeal Board erroneously concluded that the need for equity among taxpayers in assessment and taxation matters prevented it from valuing property on the basis of highest and best use. Madame Justice Allan stated the following:

> In the case at bar, the Board recognized that its rejection of the Highest and Best Use analysis represented a departure from the accepted principle that market value is synonymous with actual value.
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> I conclude that the Board erred in law by failing to determine the market value of the lands on the basis of Highest and Best Use . . .

An application for leave to appeal Madame Justice Allan's decision was dismissed. [*Petro-Canada Inc.* v. *Assessor of Area 12 - Coquitlam*, [1992] B.C.J. No. 275 (QL) (B.C.C.A.)]

It is clear from the appraisal authorities and case law that the foundation of market value is highest and best use.

V. Special Purposes Properties: Highest and Best Use When There is No Market

The real property assessment appeal in *Southam Inc.* v. *Assessor of Area No. 14 - Surrey/White Rock* (2004), 28 B.C.L.R. (4th) 317, 2004 BCCA 245 has provided the opportunity for the appraisal community and the courts to reconsider market value and highest and best use in the context of special purpose, limited market properties. Although the case arises in the context of assessment law, it is relevant to expropriation law for at least three reasons. First, under the *Assessment Act*,[4] the assessor must determine the market value of the fee simple interest in land and improvements. The assessment cases referred to earlier in this paper note the need to arrive at a conclusion of highest and best use in the assessment exercise. Second, the courts of British Columbia have begun to refer to *Southam* in expropriation cases and this alone makes it useful to understand the case.[5] Third, the case is interesting because it may represent a departure from longstanding case precedent in this country and it has potentially interesting consequences for the application of section 31 of the *Expropriation Act*.

a. Background to the *Southam* Decision

A printing facility owned and operated by the owner of the Vancouver Sun and Province newspapers and located in Surrey, British Columbia was the subject of the assessment appeal in *Southam*. The owner appealed its 2000 - 2001 real property assessment to the British Columbia Property Assessment Appeal Board. The parties filed an Agreed Statement of Facts which included the following facts:

a. The subject property is a state-of-the-art newspaper printing plant specially designed and built.

b. The subject property was designed to accommodate the printing of the Vancouver Sun, the Vancouver Province and to accommodate increased circulation.

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4 Sections 18 and 19

5 *Shell*, supra

c. If the owner did not have the subject property, it would have to build a similar facility to print its two daily newspapers. It would cost more that the assessed value of the facility ($40,535,000) to build a replacement. As a result, the owner would not sell the printing plant even if a prospective purchaser offered it an amount equal to the assessed value of the land and improvements.

d. If the subject property was not required by any owner for the production of newspapers at a similar capacity to its present use, and the subject property was offered for sale in the open market, it would sell for $25,000,000.

The Board confirmed the assessment at $40,535,000. In its decision, the Board held as follows:[6]

a. The Appellant has no intention to sell the plant. Giving consideration to the cost of replacing this facility and the related business disruption costs on a move and to avoid having to move, the Appellant would pay more for the property than it cost to build. The property is worth more to its current owner than to another person who did not have a similar use. The Appellant would replace the building if it had to and would pay at least the construction costs to replace it.

b. The property is a limited-market, special purpose property.[7] The property's current use is so specialized there is no demonstrable market for it except for the owners of the two major daily newspapers. The current use is viable and likely to continue. The current use is legal, probable and physically possible, is appropriately supported and financially feasible, and results in the highest value. The current use is the highest and best use.

c. The best evidence of value is from the replacement cost approach, and the best evidence from that approach was the owner's costs of construction appropriately adjusted.

The decision of the Board was based upon its interpretation of Privy Council, Supreme Court

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6 *Southam Inc.* v. *Area 14* (2202 PAABBC 20026307)

7 *The Dictionary of Real Estate Appraisal*, 4th ed., p. 272 defines a special purpose building in the following terms:

"special-purpose property. A limited-market property with a unique physical design, special construction materials, or a layout that restricts its utility to the use for which it was built. Also called *special-design property*." [*The Dictionary of Real Estate Appraisal*, 4th ed., p. 272]

of Canada and British Columbia Court of Appeal decisions relating to the valuation of special purpose, limited market facilities and to its interpretation of appraisal authorities.

b. The Appraisal Authorities

i. "Market Value"

In *CUSPAP* at paragraph 12.16.1, "market value" is defined as:

> The most probable price which a property should bring in a competitive and open market as of the specified date under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus.

At paragraph 12.16.3, the International Valuations Standards definition of "market value" is set out:

> Market value is the estimated amount for which a property should exchange on the date of valuation between a willing buyer and a willing seller in an arms-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion.

The definition of "market value" created a problem in *Southam*. Both definitions of "market value" quoted above require a seller and a purchaser. On the evidence, there was no market for the subject property. Further, the evidence was that the owner was not prepared to sell at any price. If there is no willing seller, how is the market value to be determined?

ii. "Special Purpose, Limited Market" and Market Value

In *Southam*, the Board relied upon the following extract from *The Appraisal of Real Estate*, 2nd Cdn. ed. at page 2.6 which contains the following discussion in relation to limited market and special purpose properties:

> When appraising a type of property that is not commonly exchanged or rented, it may be difficult to determine whether an opinion of market value can be reasonably supported. Such limited-market properties can cause special problems for appraisers. A limited-market property is a property that has relatively few potential buyers at a particular time, sometimes because of unique design features or changing market

conditions. Large manufacturing plants, railroad siding properties, and research and development properties are examples of limited-market properties that typically appeal to relatively few potential purchasers.

Many limited-market properties include structures with unique designs, special construction materials, or lay-outs that restrict their utility to the use for which they were originally built. These properties usually have limited conversion potential and, consequently, are often called special-purpose or special-design properties. Examples of such properties include houses of worship, museums, schools, public buildings, and clubhouses.

Limited-market properties may be appraised based on their current use or the most likely alternative use. Due to the relatively small markets and lengthy market exposure needed to sell such properties, there may be little evidence to support an opinion of market value based on their current use. The distinction between market properties and limited-market properties is subject to the availability of relevant market data. If a market exists for a limited-market property, the appraiser must search diligently for whatever evidence of market value is available.

If a property's current use is so specialized that there is no demonstrable market for it but the use is viable and likely to continue, the appraiser may render an estimate of use value. Such an estimate should not be confused with a market value estimate. If no market can be demonstrated or if data are not available, the appraiser cannot estimate a market value and should state so in the appraisal report. However, it is sometimes necessary to render an opinion of market value in these situations for legal purposes, however (*sic*). In these cases, the appraiser must comply with the legal requirement, relying on personal judgment and whatever direct market evidence is available. Note that the property type, the size or viability of the market, or the ease with which that value can be developed does not dictate the type of value developed. Rather, the intended use of appraisal determines the type of value to be developed. If the client needs a market value opinion, the appraiser must develop an opinion of market value, not use value. [Emphasis added]

In the context of legal proceedings such as expropriation and *ad valorem* assessment of real property, where the legal requirement is to find market value, the appraiser must rely upon personal judgment and whatever direct evidence is available when there is no market for the property.

c. The Hypothetical Sale Price

Prior to *Southam*, the courts had relied upon the "hypothetical sale price as between a willing buyer and willing seller" in determining market value for special purpose, limited market properties. Bonbright described the "hypothetical sale price" definition of "market value" as an approach developed by the law[8]:

> We come now to a concept of market value which, instead of being borrowed from economic textbooks or from language of the street, seems to have been created by the law. Here, as elsewhere, the value of the property is pictured in terms of an exchange transaction. But the exchange is not necessarily assumed to take place at the price at which similar commodities are being sold on the market place. Instead, it is such a price as would be realized on the hypothesis that the owner of the property is a "willing seller," and on the further hypothesis that this owner could find a "willing buyer." Especially in the valuation of real property, the courts have constantly invoked this "willing-buyer, willing-seller" notion . . .

d. The Case Law: Pre-*Southam*

The application of the "hypothetical sale price" model has lead to courts in this country holding that in the case of special purpose, limited market properties:

a. If the property is viable and being used for its intended purpose, then its highest and best use is its current use.

b. The owner can be regarded as a potential purchaser.

c. Market value can be determined by applying the cost approach.

In *Ontario (Assessment Commissioner York)* v. *Office Specialty Ltd.*, [1975] 1 S.C.R. 677; 49 D.L.R. (3d) 472, the subject property was a modern, one-storey building located in a village.

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8 *The Valuation of Property: A Treatise on the Appraisal of Property for Different Legal Purposes*, 1st ed., McGraw-Hill Book Company, Inc. New York, 1937, at p. 59

The assessment panel held that there was no competitive market available for the property but that the owner was using the property to its fullest potential and the operation was viable and efficient. In the circumstances the Supreme Court of Canada held that the replacement cost method was appropriate. The court quoted from the Privy Council decision in *Montreal* v. *Sun Life Assurance Co. of Canada*, [1952] 2 D.L.R. 81:

> Their Lordships would agree that where no sale is contemplated and indeed any sale would be difficult what has been called the higgling of the market is not an element of much if any consequence, but nevertheless the ultimate aim is to find the exchange value of the property, i.e. the price at which the property is salable. In reaching their result the appointed Tribunal must take into account not only the amount which a buyer would give but also the sum at which the owner would sell. What that sum would be is, as the authorities have pointed out, best ascertained either by regarding him as one of the possible purchasers or by estimating what he would be willing to expend on a building to replace that which is being valued. But the owner must be regarded like any other purchaser and the price he would give calculated not upon any subjective value to him but upon ordinary principles, i.e., what he would be prepared to pay, if he was entering the market, for a building to meet his requirements, or would be willing to expend in erecting a building in place of that which is being assessed. [Emphasis added]

Sun Life, involved the assessment of a building constructed over time for the purpose of housing Sun Life's employees. It was grossly overbuilt and, as it turned out, by the time it was completed, Sun Life had made the decision to decentralize. Consequently, only a portion of the building was occupied by Sun Life. It rented out the remainder. The assessor was required to determine market value for the purposes of the assessment roll.

The Privy Council defined value as ". . . exchangeable value - the price which the subject will bring when exposed to the test of competition." It is the price determined by a willing purchaser and a willing vendor. The Privy Council described this approach as the ideal but said it is difficult to apply when a building is ". . . of a unique or exceptional kind erected for a particular purpose and not very suitable for sale or letting."[9]

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9 *Sun Life*, supra, p. 88

The Privy Council said further[10]:

> As they have said, the Board [Privy Council] accepts the view that the true test is what a willing buyer would give and a willing seller take.
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> In many, perhaps in most cases, this figure is not difficult to discover - the first three methods mentioned by the Judge of the Superior Court point out the way. But in a limited number of cases none of these sources of information is available and what such a buyer would give or a seller would take can only be ascertained by indirect means. As has been said those means are to be found by relying upon the replacement value however that term may be interpreted or upon the revenue value, or by a mixture of the two.

The Privy Council expressly stated that actual cost paid less an adequate amount for depreciation is an acceptable method. The Privy Council pointed out that it was not acceding to the suggestion that the subjective value to the owner of the premises is to be regarded.[11] The Court stated that "It is the objective not the subjective value which has to be determined though, as has been said, the owner is to be regarded as one of a possible number of buyers, and subject to careful criticism and a sufficient qualification of price, the cost which he chose to incur is a relevant factor."[12]

Office Specialty, was referred to by the British Columbia Court of Appeal in *Crown Forest Industries Ltd.* v. *Assessor of Area No. 6 - Courtenay* (1987), 10 B.C.L.R. (2d) 145. At issue was the valuation of the Elk Falls Complex owned by Crown Forest. The improvements included a pulp and paper mill, a sawmill and a planer mill. The Board adopted the depreciated replacement cost approach to value the complex. Crown Forest appealed.

The British Columbia Supreme Court found that the Board erred in law in applying the replacement cost in the absence of any evidence that any purchaser of the Elk Falls Complex would, in 1982, have considered such cost in determining what he was prepared to pay. The Assessor appealed that decision.

Mr. Justice Esson in the Court of Appeal wrote that "The basis for accepting replacement cost

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10 *Sun Life,* supra, p. 94

11 *Sun Life,* supra, p. 94

12 *Sun Life,* supra, p. 102

as a measure of actual or market value is not one which rests upon a different evidentiary foundation in each case. It is, rather, a logical assumption based on general experience . . . What is significant at this point is that the basic premise that cost equals value has long been accepted as conferring validity upon the replacement cost approach as a means of arriving at actual value."[13]

Mr. Justice Esson cited *Golden Eagle Canada Ltd.* v. *City of St. Romuald D'Etchmin*, [1977] 2 S.C.R. 1090, wherein the Supreme Court of Canada referred to the proposition that in the case of construction for special purposes, the assessor must necessarily calculate the replacement value in order to determine the real value, and in determining the theoretical market value must consider the owner as a possible purchaser.[14]

In *Crown Forest*, the assessor's expert testified that there were no comparable sales and there was no specific market evidence of value. Mr. Justice Esson commented that there probably never would be "market evidence" for the property. It is generally the absence of reliable market evidence which compels resort to replacement cost as a means of arriving at market value. In respect of a productive facility, cost equals value.

> In the absence of evidence that the premise is not applicable, replacement cost may be the only reliable criterion of value. The basic premise does not have to be established by evidence. But if the evidence establishes, in a given case, that the premise is unsound, it would not then be right to base the assessment solely on replacement cost and, in some cases, it should be disregarded entirely.[15]

The Court of Appeal noted that facilities such as the Elk Falls Complex are rarely, if ever, the subject of sale on the open market. For that reason, such assets have generally been assessed on the basis of replacement cost.[16]

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13 *Crown Forest*, supra, p. 152

14 *Crown Forest*, supra, p. 152, 153

15 *Crown Forest*, supra, p. 153, 154

16 *Crown Forest*, supra, p. 153

Mr. Justice Esson referred to *Office Specialty*[17]:

> The principle applied in *Office Specialty*, derived from *Sun Life*, is that the replacement cost, although higher than the amount the building would fetch if offered to others on the prevailing market, may represent the actual value where the circumstances establish that the present owner, if entering the market, would be prepared to pay that amount for this building. It is important to note that the case does not lay down conditions which must be met before replacement cost can be used as a measure of value. What it holds is that cost was, in the particular circumstances of the case, the *only* acceptable basis for valuation.

Mr. Justice Esson wrote that in many cases the most appropriate objective test to determine whether the cost approach is appropriate will be whether the owner is using the building or plant for the purposes for which it was built. It may be a particularly appropriate test in relation to a large industrial complex. It is reasonable to assume that, in general, such plants are built at a cost which bears a reasonable relationship to their ability to produce earnings, and therefore a reasonable relationship to their actual value.[18]

The Court of Appeal ruled that the Board's decision employing the cost approach could not stand but the reason was because the Board had failed to make appropriate deductions in applying the cost approach - not because it was wrong to use that methodology.[19]

In summary, the case law referred to above supports the proposition that in the case of limited market, special purpose properties, it is acceptable appraisal procedure to 1) regard the owner as a potential purchaser of the subject property and 2) to determine market value by adopting the actual expenses incurred by the owner. The courts caution that care must be taken to determine a value that would apply to any owner - not the particular owner of the property. It is in this way that "value to owner" and "value in use" are avoided.

e. *Southam*: British Columbia Supreme Court and Court of Appeal

The Board's decision in *Southam* was appealed by the owner to the British Columbia Supreme

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17 *Crown Forest*, supra, p. 155, 156

18 *Crown Forest*, supra, p. 159, 160

19 *Crown Forest*, supra, p. 162

Court.[20] Gray J. allowed the owner's appeal and held that the assessed value should be the alternate use value of $25,000,000. Her judgment includes the following paragraphs:

> [51] The task for the Board was to determine the market value of the plant property. The Board fell into error by following the process of accepting a highest and best use for which there was no market, and then valuing that use of the property using the cost approach. In doing so, it gave higher priority to the concept of highest and best use than to the concept of market value, and it used a narrow concept of use. The statute requires the Board to address the ultimate question of market value.
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> [52] The cost approach may be appropriate for most special use limited market properties. In most cases, either another purchaser may be interested in the special use, or there is no evidence about the selling price in the open market. The property at issue might be better termed "special use" property which, rather than having a "limited market", does not have any market for its present use, but has a market for an alternate use.
>
> [53] The question under the Assessment Act is the actual value of the property, not the value of the use. The effect of the Board's decision was to value the property on the basis of its value to the owner, rather than on the basis of the market for the property.

On appeal to the British Columbia Court of Appeal, the learned Chambers Judge's judgment was affirmed.[21] Levine J.A. writing for the court stated the following:

> [14] Highest and best use is a market-driven concept, as explained in Ford Motor Co. v. Edison, 127 N.J. 290, 1992 N.J. LEXIS 32 (N.J.S.C.). Quoting the Oregon Tax Court in Meyer v. Department of Revenue, Or. Tax, No. 3049, 1991 WL 244494 (November 20, 1991), the New Jersey Supreme Court said (at p. 6 (LEXIS)):
>
> The Tax Court emphasized that the concept of

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20 2003 BCSC 676

21 2004 BCCA 245

> highest and best use is based on market forces. "When the purpose of an appraisal is to estimate market value, highest and best use analysis identifies the most profitable, competitive use to which property can be put. Therefore, highest and best use is a market-driven concept." [Underlining added.]
>
> [15] The Board's finding that the highest and best use was the current use where there was no evidence of a market for that use is contradictory and wrong in law. Highest and best use is the use that produces the highest estimate of market value and cannot be determined without reference to a competitive market. [page 644]

And at paragraphs 22 to 24, Levine J.A. wrote the following:

> [22] It seems to me that if the owner is to be considered a potential purchaser, there must be at least one other potential purchaser for the current use. Otherwise, there can be no competitive bidding and no market. That is this case: there is no market, other than the current owner, for the current use. Therefore, determining the market value of the property based on its current use inevitably leads to determining the value of the current use to the owner, and not market value.
>
> [23] As Gray J. found, this case is distinguishable from the cases relied on by the Board by the fact that there was evidence of the price at which the property would sell in the open market for a less restricted use than the current use. There was also evidence of the market for similar properties for another use -- the sale of the Flexo plant.
>
> [24] The Board ignored the necessity that market value be determined and the evidence of the market in concluding, first, that the highest and best use was the current use, and second, that replacement cost was the appropriate measure of market value.

An application for leave to appeal to the Supreme Court of Canada was dismissed. A request in a subsequent appeal for a five judge panel of the Court of Appeal so that *Southam* could be

reconsidered was denied.

f. *Southam* Aftermath

Southam stands for the following propositions:

1. Highest and best use is driven by the market.

2. Market value is determined by competitive forces in the market. The owner of a special purpose, limited market property can be regarded as a potential purchaser, but only as one in a pool of potential purchasers.

3. If there is evidence of the price at which property would sell in a use other than its current use, that is to be relied upon for determining market value.

It is at least arguable that the court decisions in *Southam* represent a misapplication of the definition of "market value". Market value requires a willing seller and a willing buyer. On the evidence in *Southam* there was no willing seller at the alternate use price of $25,000,000. This point was recognized by the British Columbia Property Assessment Appeal Board in a subsequent appeal involving the same property.[22]

Nevertheless, *Southam* must now be considered in cases relating to special purpose, limited market properties. If *Southam* is correct that the value in an alternate use sets market value for such properties, how will section 31 be applied?

g. *Southam* Facts Applied to *Expropriation Act*

The text of section 31 of the *Expropriation Act* was reproduced earlier in this paper. It contemplates compensation for land under three heads:

a. the greater of
   i. the market value of the land based on its use at the date of the expropriation plus reasonable damages under section 34, and

   ii. the market value of the land based on its highest and best use at the date of expropriation.

b. the value of a special economic advantage to the owner

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22 *Pacific Newspaper Group Inc.* v. *Area 14* (2005 PAABBC 20050284), at para. 57 [but see *Pacific Newspaper Group Inc.* v. *Surrey/White Rock (Assessor) Area #14*, [2006] B.C.J. No. 1417, decision from Court of Appeal pending]

> arising out of his or her occupation or use of the land if that value has not been included in the market value of land determined in accordance with section 32.

The difficulty with sections 31 and 32 and the use of "market value" in those sections was alluded to earlier in this paper. If section 32 provides the definition of "market value" which incorporates the need to determine highest and best use, then recovery under special economic advantage might be possible in the case of special purpose, limited market properties. But if special economic advantage is recoverable even when the property is valued in its use as at the expropriation date, it is hard to say what is intended. The "premium" for use value is conceivably on top of recovery for special economic advantage.

In the circumstances of *Southam*, the owner might argue that the value in use plus disturbance damages provides a higher level of compensation than the highest and best use determined in accordance with the alternate lesser use and that additionally the owner is entitled to compensation for the loss of special economic advantage.

h. "Special Economic Advantage"

In *Campbell River Woodworkers* v. *British Columbia (Minister of Transportation and Highways)*, [2003] B.C.J. No. 502 (QL) (B.C.C.A.), the Court of Appeal considered the meaning of "special economic advantage" in section 31(2)(a). The court equated the phrase to "special value" which was recognized by the common law prior to the enactment of the *Expropriation Act*.

At paragraphs 16 and 17, Smith J.A. delivering judgment for the court stated:

> [16] Special economic advantage, as that phrase is used in the current statute, must, as the statute says, be something that is not incorporated in market value. In my view, it must be something that accrues peculiarly to the owner or to a limited number of purchasers. This provision allows the owner to be compensated for advantages that have no or only a limited market such that their value to the owner cannot be obtained in part or in whole in a sale on the open market.
>
> [17] I am not persuaded that there was any loss of special economic advantage in this case. The property was a commercial property encumbered by a long-term lease. The evidence before the Board was that such properties have a market and, accordingly, a market value. No element of this property was unique or peculiar to the owner or to only a

limited number of purchasers.

There is a hint in paragraph 19 of the judgment that the loss related to the long term lease might have been recoverable under disturbance damages but leave to appeal had not been granted on that issue.

In arriving at its conclusion, the Court of Appeal relied upon its decision in *Apro Developments Ltd.* v. *British Columbia*,[23] where "special value" was defined in terms adopted in *Campbell* for "special economic advantage". In *Apro*, Craig J.A. digressed to contrast "special value" with "special or exceptional adaptability". At paragraphs 18 to 20 and 23 Craig J.A. wrote the following:

> ¶ 18 In giving the judgment of the Ontario Court of Appeal in Re Schooley and Lake Erie and Nor. Ry. Co. (1915), 34 O.L.R. 328, 25 D.L.R. 537, Hodgins J.A. said as follows at p. 541:
>
> ¶ 19 "For the sake of clearness it may be mentioned that 'special value' refers to present use of land, and means its added worth to the owners for the actual and particular use to which it is being put, and for which it is specially fit; while 'special or exceptional adaptability' refers to apparent but future use to which the property may be, but is not now, put, and for which it is particularly adopted (*sic*)."
>
> ¶ 20 Subsequently, the Supreme Court of Canada varied the judgment of the Ontario Court of Appeal in this but did not challenge the statement . . . Since then, several cases have referred to and adopted this statement . . .[cases references omitted]
>
> . . .
>
> ¶ 23 In a case where the owner alleges that the property has a "special value" to him the tribunal must first ascertain the market value of the property and then ascertain whether the property has a "special value," that is, whether the property has a special value to the owner "beyond what it would have in similar use by somebody else." If the property does have a

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[23] [1977] B.C.J. No. 1073 (QL) (B.C.C.A.); appeal dismissed [1978] 2 S.C.R. 718

> "special value" this "special value" is added to the market value. However, in a case where the owner alleges that the property has "special adaptability" or "potential" - such as a proposed subdivision - the tribunal must consider this aspect when determining the market value of the property. When considering whether the property has "special adaptability" or "potential," the "special value" test is not applicable.

In light of *Campbell River*, the difference between the $40,535,000 assessment in *Southam* and the $25,000,000 in the alternate use value would presumably be recoverable on the basis of special economic advantage since the features of the subject property provide special advantage only to the owner and the value of the features is not reflected in the market value. However, as Coates notes, in British Columbia no claim for special economic advantage has succeeded[24] - cool comfort to an owner of special purpose, limited market property.

i. Conclusion

If *Southam* is incorrectly decided, or distinguishable on its facts, then there will be no need to resort to "value in use" or "special economic advantage" because the highest and best use of special purpose limited market properties will result in a market value approximating the value determined under the cost approach. On the other hand, if *Southam* is correctly decided or not capable of being distinguished, then the only hope for the owners of special purpose, limited market properties is to buck the trend which has prevailed in British Columbia since the enactment of the *Expropriation Act* and persuade the tribunal that the property should be value in accord with its present use or that there is a special economic advantage to the owner in the ownership and use of the property.

VI. Assemblage and Highest and Best Use

Can an appraiser consider the possibility of land assembly as a potential highest and best use for property subject to expropriation. In some jurisdictions the answer is "no". In other jurisdictions, the answer is "yes" if the parcels which could be assembled are under common ownership. In British Columbia, it appears that the possibility of assemblage can be considered and it is not dependent on common ownership.

Definitions relevant to assemblage as a highest and best use of land are "assemblage", "assemblage cost" and "plottage":

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24 Coates & Waque, *The New Law of Expropriation*, (Toronto: Thomson Carswell, 1986), p. 35-112

> "assemblage: 1. The combining of two or more parcels, usually but not necessarily contiguous, into one ownership or use; the process that creates plottage value . . .[25]
>
> "assemblage cost": The excess cost incurred to acquire individual adjacent parcels of real estate in a single ownership beyond the estimated cost of acquiring similar sites that do not form a specifically desired assemblage.[26]
>
> "plottage": The increment of value created when two or more sites are combined to produce greater utility.[27]

In *The Appraisal of Real Estate*, 2nd Cdn. ed., it is recognized that the highest and best use of land may be as part of an assemblage and that the possibility of assembly must be taken into account.[28] Section 6.2.20 in *CUSPAP*, 2007 requires the effect on value from assemblage to be considered.

In *Sternig* v. *Kamloops*, [1983] B.C.J. No. 2382 (QL) (B.C.Co.Ct.), at paragraph 51, the court held that in determining highest and best use in relation to an expropriation of land, it is open to an appraiser to consider the possibility of assemblage. The Property Assessment Appeal Board has taken assemblage potential into account in determining market value. [See *R.G. Stacey* v. *Assessor of Area #14 - Surrey/White Rock*, P.A.A.B. Decision No. 19563, Dec. 8, 1995; *Boroudjerdi* v. *Area 09* (2003 PAABBC 20030978). So has the Alberta Land Compensation Board. [See *Pace* v. *Calgary (City)* 1981 CarswellAlta 521; *Advance Holdings Ltd.* v. *Calgary (City)* 1998 CarswellAlta 1346.]

An often cited American example of assemblage as highest and best use is *Clarmar Realty Co., Inc.,* v. *Redevelopment Authority of the City of Milwaukee* 129 Wis. 2d 81 (Wisconsin S.C.). In the expropriation proceedings, the owner argued that the fair market value of its property should be determined on the basis of an integrated use with the adjoining property. The court wrote the following:

> We hold that [HN1] a court may determine the fair market value of a condemned parcel of land in combination with the

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25 *The Dictionary of Real Estate Appraisal*, 4th ed., p. 19

26 *Ibid.*, p. 19

27 *Ibid.*, p. 214

28 *The Appraisal of Real Estate*, 2nd Cdn. ed., p. 12.9

> land of another in a prospective, integrated use if: 1) the prospective use is the "most advantageous use" of the condemned land; 2) the "most advantageous use" of the land can be achieved only through combination with another parcel or parcels; 3) combination with another parcel or parcels is "reasonably probable" and 4) the prospective, integrated use is not speculative or remote.

The court held that the possibility of removing restrictions in the way of assembly is a question of fact and that the real issue is whether on the facts assemblage is "reasonably probable".

VII. Contaminated Property

The *Environmental Management Act*, S.B.C. 2003, c. 53 together with *B.C. Reg. 375/96 - Contaminated Sites Regulation* provide a legislative scheme for property owners to recover remediation costs from "responsible parties", i.e. those deemed by the legislation as parties responsible to contribute to the costs of remediating a contaminated site.

How is the conclusion of highest and best use for contaminated property affected by any rights a potential purchaser may have to recover the costs of remediation against "responsible parties". Take the example of a contaminated industrial site in a transition area that has been designated multi-family residential in the applicable Official Community Plan and approval of a re-zoning application is a high probability. It is entirely possible that the costs to remediate the contaminated property to residential standards under applicable environmental legislation would not justify redevelopment. However, if the costs of remediation are recoverable against a "responsible party" under the applicable environmental legislation, does the conclusion of highest and best use change? What sort of investigation and inquiry would be necessary for this possibility to be incorporated into and affect the determination of highest and best use?

VIII. Principle of Consistent Use and Interim Use

The Dictionary of Real Estate Appraisal, 4th ed., defines the principle of consistent as "The concept that land cannot be valued on the basis of one use while the improvements are valued on the basis of another." The definition further explains that concept must be addressed when properties have interim uses. Improvements which do not represent the highest and best use of the property may have an interim use that has value, no value or a negative value.[29]

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29 *The Dictionary of Real Estate Appraisal*, 4th ed. (Chicago: Appraisal Institute, 2002), p. 60

The principle of consistent use can be illustrated by reference to *Toronto (City)* v. *Ontario Jockey Club*, [1934] S.C.J. No. 11 (QL). The Ontario Jockey Club owned land it was using as a race course. The local assessor assessed the land on basis of its potential use as a subdivision and also assessed the buildings on the basis of their use for race course purposes. The Supreme Court of Canada upheld the valuation of the land on the basis of use as a subdivision but the court held that the buildings could only be assessed at their value for the purpose of being wrecked and removed because the buildings added nothing to the value of the land as a subdivision. Smith J. writing for the court stated the following:

> I am unable to find any evidence from any witness as to the actual value of this property for race track purposes, and it is evident that the value fixed by the Board was on the evidence offered as to its potential value as a subdivision, there being no evidence that would justify the finding of value arrived at on any other basis. The Board, therefore, having arrived at its valuation of these lands on the basis of a subdivision, which involved the destruction of all the buildings before the land could be used and disposed of in lots as a subdivision, the buildings added nothing to that potential value of the property beyond their value for the purpose of being wrecked and removed . . .
>
> It is manifestly improper to value the land for the purpose of a subdivision, which would involve the destruction of the buildings, and then value the buildings on the basis of their being used for the purposes of a race track. If the buildings were to be valued on that basis, the land would have to be valued on that basis also.

Ontario Jockey Club was followed in *Arbutus Club* v. *British Columbia (Assessor of Area 09 - Vancouver)*, [1980] B.C.J. No. 1944 (QL) (B.C.S.C.), paragraphs 23 to 28.

This general rule has to be reconciled with the determination that highest and best use is an interim use pending future development of the land. *The Appraisal of Real Estate*, 2nd Cdn. ed. provides the following explanation:

> The principle of consistent use, which holds that land cannot be valued on one use while improvements are valued based on another, must be considered when properties are devoted to temporary, interim uses. The use value of a site under an interim use may differ substantially from the market value of the same site as though vacant and available for redevelopment

> under its long-term highest and best use. Many outmoded improvements clearly do not resemble the ideal improvement, but they do create increments of value over the value of the vacant land. These improvements may appear to violate the principle of consistent use, but in fact the market simply acknowledges that, during the transition to a new use, the value contributed by old improvements to an improved property make the land and the existing improvements worth more that the vacant land.[30]

Two examples of interim use valuations are found in *IPSCO* v. *Area #12* (20012 PAABBC 20027258) and *Broadway Properties Ltd. et. al.* v. *Assessor of Area #09 - Vancouver* (2004 PAABBC 20040493). In *Ipsco*, the British Columbia Property Assessment Appeal Board accepted the assessor's position that the highest and best use of the land was redevelopment for mixed-use residential but that there was contributory value in the interim from the industrial improvements on the site. The Board referred extensively to *The Appraisal of Real Estate*, Cdn. Ed., 1992. In *Broadway Properties* the Board accepted that property use was in transition, that the improvements provided an interim use and that they contributed value to the land and that value should be added to the value of the land determined in accordance with its highest and best use as vacant.

IX. The Dangers of the Land Residual Technique

This section of the paper is presented as a cautionary note for appraisers. The land residual technique is one of the processes available to appraisers to come to a conclusion of highest and best use.[31] But it is a process that is fraught with difficulty. This section provides a brief description of the technique and then illustrates the potential pitfalls by reference to a Supreme Court of Canada decision in which the process was employed.

The Appraisal of Real Estate, 2nd Cdn. ed., describes the technique as follows:

> The land residual technique assumes that the value of the building (or buildings) can be estimated separately. In land residual applications, an appraiser will often consider a new highest and best use assuming a building that does not exist. Thus, building value is usually estimated as the current cost to

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30 *The Appraisal of Real Estate*, 2nd Cdn. ed., p. 12.16, 12.17

31 *Ibid.*, p. 12.9

> construct a new building that represents the highest and best use of the land or site.
>
> The building capitalization rate is applied to the building value to obtain the amount of annual net income needed to support the value of the building. The amount is then deducted from the net operating income to indicate the residual income available to support the investment in the land. The residual income is capitalized at the land capitalization rate to derive an indication of the value of the land. Finally, the building value is added to the land value to derive an indication of total property value.

Determining building costs is likely to be the least challenging of the data inputs needed for the land residual technique but it will not be without its obstacles. It might not be that difficult a job to determine market rents, vacancy rates and operating expense ratios. More problematic is the derivation of capitalization rates. If the rate of return for the building component is meant only to be sufficient to recover the costs of development and construction of the improvements then one could argue that this becomes a mathematical exercise. But if the capitalization rate on the building income is intended to include a "return on" investment as well as a "return of" investment, where can the appraiser find market evidence for building capitalization rates? Similarly, it may be a difficult job finding land capitalization rates for vacant land appropriate for comparison to the subject.

These challenges were evident in *Toronto (Metropolitan)* v. *Loblaw Groceterias Co.*, [1972] S.C.R. 600. In that case, the City of Toronto expropriated a 25.45 acre vacant land parcel owned by Loblaw. The issue was the compensation to the paid for the vacant land. It was agreed by the parties that the highest and best use of the property was development as a shopping center. But since the property was unique and no comparable land sales were available to value the subject parcel, the land residual method was adopted. It should be noted at the outset that the approach adopted by the court is not in accord with the process described in *The Appraisal of Real Estate*, 2nd Cdn. ed. The court did not develop an estimate based on income to the building and income to the land. The court relied upon the overall income from rentals capitalized at a rate presumably reflective of a blended land and building capitalization rate and deducted the overall cost to construct the building and prepare and improve the land.

The proceedings "advanced" through three adjudication levels: a) an arbitration, b) an appeal to the Ontario Court of Appeal, and c) an appeal to the Supreme Court of Canada. The arbitrator rejected the land residual approaches presented by the appraisers. The Court of Appeal reversed the arbitrator's decision and applied the residual income technique to evidence it found reliable. The Supreme Court of Canada maintained the land residual approach but disagreed with the Court of Appeal's application of the evidence.

As noted earlier, there was agreement that the highest and best use was as a shopping center. But there was disagreement among the experts as to the "highest and best" configuration of the shopping center. Evidence was led on this point which attempted to forecast demographics, product supply and consumer preferences and demand. One can only imagine the cost of retaining experts to prepare and speak to this kind of evidence today. It takes no imagination to envision the protracted direct evidence and cross-examination that would result in the course of a hearing. All of this effort would be in furtherance of developing the size and configuration of the building in a highest and best use which in turn would lead to a building cost estimate needed for the land residual approach. In other words, it all relates to only one element in the process.

Of course, expert evidence had to be adduced establishing a cost to construct. The court determined a total cost that included site preparation and land development, building construction costs and development costs. Whether this latter figure included developer's profit is not clear from the decision.

Evidence of market rents for the space in the "highest and best" shopping center was needed to arrive at the net rental income. The net rental income was capitalized at one rate to derive overall value. Total construction costs were then deducted to arrive at the land residual. The land residual was then present valued to account for the fact that as at the expropriation date, development would not have occurred for four or five years.

At the outset of the Supreme Court of Canada decision, the court described the differences in the parties' opinions of value as "startling". Bearing in mind that the valuations were for a point in time in the late 1950's and early 1960's, the land values presented by the appraisers ranged from less than $374,050 for the 25.45 acres to $3,600,000. The court awarded $832,000.

The range of opinions called into question the credibility of the appraisers, in particular, Loblaw's appraiser. The arbitrator at the first level of adjudication made the following comments about Loblaw's appraiser with which the court agreed:

> While I do not question Mr. Comb's veracity as a witness, I do question the weight to be attached to his evidence. He was called as an expert to give his opinion to assist me in determining the value to the owner of this property. It would appear that he has had a long and close association with Loblaws both in a business sense and as an adviser. Mr. Combs gave expert testimony on behalf of this claimant in a previous hearing to determine compensation . . . One looks for independence in a witness called to give expert testimony. I do not feel that there was that degree of independence in Mr.

> Combs that his evidence could be accepted without the closest scrutiny and a consideration of his evidence and any other evidence that might run contrary to it.[32]

At the end of the day, developing highest and best use conclusions through the land residual technique is expensive, time-consuming, perhaps stretching the bounds of probability and has so many variables requiring appraisal judgment and other forms of expertise that it takes a brave soul to embark down this path. It presents another example of the need for appraisers to backup the exercise of their appraisal judgment to avoid the criticisms leveled in *Loblaw* against the owner's appraiser.

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October 2007

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32 For comments in a similar vein see *The King* v. *Edwards*, [1946] Ex. C.R. 311, 322: "It may be said of all expert witnesses that they are men of experience and good standing, but it seems characteristic of real estate experts, according to my experience, that they tend to become advocates for the parties who call them, and their opinion evidence is subject to discount accordingly." [Quoted in *Branscombe* v. *British Columbia (Minister of Transportation & Highways)* 1993 CarswellBC 2734 at para. 19]