



Bull, Houser
& Tupper LLP

EXPROPRIATION USING STATUTORY RIGHTS OF WAY

James H. Goulden
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POINTS OF INTEREST

(1) Individual Assessments

My first point may seem remedial to many of the appraisers in this room. It is important to separate the different areas impacted by the right of way, rather than undertaking a flat across the board assessment. In the Holdom case, two of the appraisers used one flat percentage for the entire right of way area. The Board held that an area by area assessment (e.g. look at the buildable area, non-buildable area, columns) was appropriate. If there other rights of way already registered against title, you must review those documents carefully and see whether the rights impact the owner's use of the property.

The Board has said that a comparison to market value of other lots impacted by similar rights of way could be of assistance in determining the percentage impact on the areas being valued. As well, negotiated settlements and previous decision are relevant to valuation. However, it is important to look at the wording of the various taking documents to see if the comparison is appropriate, or whether adjustments are necessary. As well, one must look at the use of the comparable properties, as, for example, commercial properties may be impacted differently than industrial properties.

(2) Residual Value

In valuing the residual value, one should consider what use could be made of each portion of the right way area prior to the taking, and then determine what is still available after the taking. It is important that appraisers read the document carefully and determine exactly what rights are being taken by the authority in relation to the property in question. In Holdom, the Board found 65%, 85% and 100% of the fee simple value had been taken for the non-buildable, buildable and column areas respectively.

It may also be appropriate to retain a planner to prepare a development plan for the property, pre-taking, and then determine what impact the right of way has on the plan post-taking. In the Mayfair case, the Board found that the right of way taken would reduce the available units and commercial space in a future development of the property, post-taking.

(3) Breadth of terms/ambiguity

What does the Authority need to accomplish its goals? Traditionally, authorities would draft a comprehensive document for an entire project and use the document throughout the project. In light of recent decisions such as Holdom, it may be appropriate to determine what rights are actually required by the Authority and reduce the scope of the document accordingly for different properties along a project.

In Holdom, Transit took the position that the rights of Transit would be confined to a volumetric area contained in a plan to be filed against title to the subject property. In response, the Court commented on the breadth of the language which contemplated future facilities and reconstruction at the time of taking. The Court of Appeal reviewed the wording of Transit's basic SRW and, in the context of the future rights potentially available to Transit at the time of taking (before the volumetric plan was registered) said:

"All these future rights might shrink into the volumetric area once the project is done, as B.C.

Transit suggests, but, in my opinion, it was not wrong for the Board to find that the language of the SRW makes that far from certain. I think a prudent buyer would be left in doubt about B.C. Transit's rights post-completion and that doubt would have an impact on market value."

Not to be forgotten, this uncertainty may in turn also impact the remainder, due to the uncertainty of the authority's future rights and how those would impact what could be done with the remainder.

Value greater than 100% due to uncertainty

I was speaking with Stuart Carmichael a while ago and discussing an authority's use of SRW when very little of the value remains after the taking. Stuart queried whether the value of the actual taking could actually exceed 100%. In yesterday's session, Bill McNaughton commented that appraisers might value contaminated land at 0. Extending that logic, land might be worth less than zero.

For example, if the residual value of a property is minimal after a comprehensive right of way has been taken (e.g. less than 5%), but some potential risk remains with continued fee simple ownership, such as potential environmental responsibility, is there an argument that the loss suffered by the fee simple owner is greater than 100%? For example, if the authority takes a broad comprehensive right of way, fences the area away from the remainder, and basically leaves little or no residual rights to the fee simple owner, does the risk of future hassles (e.g. lawsuits) exceed the residual value, thus resulting in a claim greater than 100%.