IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Atco Lumber Ltd. v. Kootenay Boundary (Regional District),* 2014 BCSC 524

Date: 20140327
Docket: S48641
Registry: Kamloops

Between:

Atco Lumber Ltd.

Petitioner

And

The Regional District of Kootenay Boundary and Shirley Bond in her capacity as Minister of Justice

Respondents

On judicial review from: An order of the Ministry of Justice dated March 25, 2013.

Before: The Honourable Madam Justice Donegan

Reasons for Judgment

Counsel for the Petitioner:	J.G. Frame
Counsel for the Respondent, Shirley Bond in her capacity as Minister of Justice:	R. Warburton
Counsel for the Respondent, Regional District of Kootenay Boundary:	A.G. Atherton
Place and Date of Trial/Hearing:	Kamloops, B.C. November 19, 2013
Place and Date of Judgment:	Kamloops, B.C. March 27, 2014

INTRODUCTION

[1] The petitioner, Atco Lumber Ltd. ("Atco"), owns land within the Regional District of Kootenay Boundary (the "Regional District"). In 2013, by way of a single notice, the Regional District expropriated two statutory rights of way over Atco's land.

[2] Upon receiving notification of the proposed expropriation, Atco asked the Minister of Justice (the "Minister") to appoint an inquiry officer to conduct a public inquiry pursuant to the provisions of the *Expropriation Act*, R.S.B.C. 1996, c. 125 [*EA*]. The appointment was ultimately denied, but while the decision was pending, the Regional District proceeded with the expropriation.

[3] As against the Minister, Atco seeks relief pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*] with respect to only one of the two statutory rights of way - the one over its road. Specifically, Atco asks the court to find that the Minister's decision to deny Atco's application to appoint an inquiry officer was either incorrect or unreasonable. If so, it seeks to have the expropriation declared a nullity and the Minister ordered to appoint an inquiry officer to conduct a public inquiry. Atco does not seek costs against the Minister.

[4] As against the Regional District, Atco challenges the validity of the expropriation, seeking to have the expropriation notice set aside on a number of grounds:

1. the impermissible combining of two expropriations;
2. the right of way agreement contains impermissible positive and personal covenants; and
3. the right of way agreement is vague and overly-broad.

THE EXPROPRIATION

[5] Atco owns land within the Regional District legally described as:

> PID 016-032-691
> Lot 253, District Lot 1236, Kootenay District, Plan 785B
> (the "Lands")

[6] On November 20, 2012, the Regional District issued Expropriation Notice CA2919583 (the "Notice"), advising of its intention to take two permanent statutory rights of way over the Lands, specifically:

1) over a portion of the Lands where the Regional District had previously installed a water line (the "Water Line Right of Way"); and

2) over an existing private road (the "Access Road Right of Way").

[7] While both rights of way are included in the Notice, the purpose for each taking is different.

[8] The Notice states that the Water Line Right of Way is required for the purpose of:

> …accessing, operating, inspecting and maintaining a water utility pipeline and related ancillary works owned and operated by the Expropriating Authority and situated within the parcel affected by the expropriation.

[9] The Access Road Right of Way is required for the purpose of:

> …obtaining access to and egress from the Beaver Water Treatment Plant, which is owned by the Expropriating Authority and situate on lands adjacent to the parcel affected by the expropriation.

[10] On December 27, 2012, the principal of Atco was served personally with the Notice.

[11] On January 16, 2013, Atco asked the Minister to appoint an inquiry officer pursuant to the provisions of the *EA*. A copy of this request was sent to the Regional District.

[12] On or about January 31, 2013, the Regional District resolved to approve the expropriation.

[13] On February 19, 2013, counsel for the Minister requested submissions from Atco and the Regional District on whether the expropriation is for "the construction, extension, or alteration of a linear development". If found to be so, the Minister has no authority to appoint an inquiry officer.

[14] The Regional District was given until February 27, 2013 to provide submissions on this issue. Atco was given until March 6, 2013 to reply.

[15] The Regional District provided its submissions to the Minister on February 27, 2013.

[16] On that same day (February 27, 2013), the Regional District served the principal of Atco with the following documents:

1) a certified approving resolution dated January 31, 2013;

2) Form 5 (certificate of approval of expropriation) dated February 18, 2013;

3) Form 8 (notice of advance payment) dated February 18, 2013;

4) the appraisal; and

5) a certified cheque payable to Atco in the amount of $10,000.00.

[17] By serving these materials upon Atco, the Regional District set in motion a very short limitation period under the *EA*. From the date of service, February 27, 2013, the Regional District had 30 days in which to file a vesting notice with the Land Title Office. Once the vesting notice is filed, the expropriated interest in land vests with the Regional District and is given priority over all other charges that are registered or endorsed against the land. Critically, once the land vests, no legal proceedings to challenge the validity of the expropriation can be brought.

[18] On March 5, 2013, Atco provided its written reply to the Minister.

[19] On March 22, 2013, prior to the Minister's decision, the Regional District submitted the vesting notice to the Registrar of the Land Title Office.

[20] On March 25, 2013, the Minister wrote to Atco and the Regional District advising that no inquiry officer would be appointed. The Minister wrote, in part:

> I have concluded that the proposed expropriation is for the construction, extension or alteration of a linear development within the meaning of Section 10 of the *Expropriation Act* - mainly an access road and a water pipeline.

[21] On April 4, 2013, the Registrar of the Land Title Office sent the Regional District a Notice Declining to Register, pursuant to s. 308 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*]. The registration of the vesting notice was declined because the Regional District had submitted incorrect fees and had chosen the wrong option from the drop-down menu regarding the nature of the charge to be registered.

[22] On April 11, 2013, counsel for the Regional District submitted a corrective declaration to the Registrar.

[23] On that same day, April 11, 2013, Atco filed its Petition before this court.

[24] On April 18, 2013, the vesting notice package submitted by the Regional District to the Registrar was determined to be completed. Land Title documents reflect, however, that the two statutory rights of way expropriated by the Regional District were registered against the Lands as of the date the vesting notice was originally submitted - March 22, 2013.

[25] The Access Road Right of Way agreement prepared by the Regional District for Atco's signature contains many provisions that Atco finds objectionable. For example, the agreement allows the Regional District to use the road unimpeded by the gate that Atco currently has in place to keep it from public use. Other terms of the agreement relieve the Regional District of any obligation to maintain the road, allow the Regional District to perform acts and then enforce repayment of its costs

from Atco, and require Atco to indemnify and save the Regional District harmless in certain circumstances.

ISSUES

[26] Atco brings two distinct applications in this Petition. The first involves judicial review of the Minister's decision to deny the appointment of an inquiry officer. The second involves a challenge to the validity of the Notice itself, requiring consideration as to whether such an application is statute barred.

1. REVIEW OF THE MINISTER'S DECISION

[27] Generally, an owner whose property is considered for expropriation has a right to a hearing. Courts have repeatedly acknowledged the importance of protecting the vulnerable position of owners subject to expropriation: *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 at para. 55.

[28] Sections 11 through 17 of the *EA* set out the procedure for the inquiry process. Section 14 outlines, in part, the purpose of a public hearing:

> **14** (1) Subject to section 11, the inquiry officer must hold a public hearing for the purpose of inquiring into whether the proposed expropriation of the land is necessary to achieve the objectives of the expropriating authority with respect to the proposed project or work, or whether those objectives could be better achieved by
>
> (a) an alternative site, or
>
> (b) varying the amount of land to be taken or the nature of the interest in the land to be taken.
>
> (2) The necessity for the project or work for which the expropriation is sought must not be considered at the inquiry.

[29] Section 10 of the *EA* allows an owner to request such an inquiry. The Minister, upon receipt of such a request, is to appoint an inquiry officer, who then determines whether a public inquiry ought to be held.

[30] However, s. 10(2) of the *EA* imposes a limit on an owner's right to request an inquiry. A request may not be made in respect of an expropriation for the "construction, extension or alteration of a linear development".

[31] A "linear development" is defined in s. 10(1) of the *EA* as follows:

> **10** (1) In this section, **"linear development"** includes a highway, a railway, a hydro or other electric transmission or distribution line, a pipeline or a sewer, water or drainage line or main.

[32] The purpose behind this exclusion from the inquiry process is to avoid the potential complications of having to conduct inquiries in respect of each individual owner traversed by a linear development: *Seaside Acres Ltd. v. Pacific Coast Energy Corp.* (1994), 87 B.C.L.R. (2d) 229 at para. 17.

[33] In this case, the Minister decided, after receiving written submissions from both parties, that the expropriations were for the construction, extension or alteration of a linear development. She declined to appoint an inquiry officer, thereby precluding Atco from having recourse to the public inquiry process.

Atco's Position

[34] In oral submissions, Atco conceded that the Water Line Right of Way falls within the linear development exception and, therefore, seeks no review of the Minister's decision in respect of it. However, Atco does seek a review of the Minister's decision in respect of the Access Road Right of Way.

[35] Atco submits this court ought to apply a standard of correctness in reviewing the Minister's decision, and find that the decision was incorrect. Alternatively, Atco submits that the decision was unreasonable in that it was not one of the possible, acceptable outcomes based on application of the law to the facts.

[36] Atco says that as an existing private road, the Access Road Right of Way is not a "highway" as defined by the *EA*, nor is it a "water or drainage line or main". Even if the Access Road Right of Way could be construed in either way and be classified as a "linear development", it submits that the expropriation is not for the "construction, extension or alteration" of such.

[37] Atco asks this court to find that the Minister's decision was either incorrect or unreasonable. In either case, Atco is entitled to have an inquiry officer appointed. If

so, Atco says the expropriation would not be in compliance with the provisions of the *EA* and should be declared a nullity.

The Minister's Position

[38] The Minister urges the court to apply the reasonableness standard of review. Counsel submits that the question for this court, on such a standard, is whether the Minister's decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law. The Minister asks the court to find the decision to be reasonable and leave it undisturbed.

The Regional District's Position

[39] The Regional District agrees with the Minister that the reasonableness standard ought to be applied. It submits that the Minister's decision was a possible, acceptable outcome viewed in light of the overall purpose of the expropriation - to allow the Regional District access to its water system. It submits that so long as the purpose of the Access Road Right of Way expropriation relates in some way to the linear development (the complete water line system, including the treatment plant), it should be considered part of the linear development.

Role of the Court on Judicial Review Generally

[40] The role of the court on judicial review was set out in *Kinexus Bioinformatics Corporation v. Asad*, 2010 BCSC 33 at paras. 12-14 where Wedge J. wrote:

> [12] In an application for judicial review, the court determines whether relief under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 ("*JRPA*") is warranted. The court assesses, on the applicable standard of review, whether a tribunal has made a reviewable error justifying the court's intervention. The court is not permitted to set aside a decision of a statutory tribunal merely because it would have reached a different conclusion: *Re McInnes and Simon Fraser University* (1982), 140 D.L.R. (3d) 694 (B.C.S.C.), aff'd (1983), 3 D.L.R. (4th) 708 (B.C.C.A.).
>
> [13] The court on judicial review does not sit as an appellate court. It does not re-try the matters decided by the tribunal. It is not the court's role to review the wisdom of the tribunal's decision. The court cannot re-weigh the evidence, make findings of credibility or substitute its view of the merits for that of the tribunal. The court's role is limited to determining whether the tribunal has acted, and made its decision, within its statutory authority or jurisdiction: *Ross v. British Columbia (Human Rights Tribunal)* (1 May 2009),

> Vancouver L042211 (B.C.S.C.); *Tse v. British Columbia (Council of Human Rights),* [1991] B.C.J. No. 275 (QL) (S.C.).
>
> [14] Further, relief under the *JRPA* is discretionary. The court must determine whether its intervention is warranted having regard to the applicable principles, including the principle of restraint concerning judicial intervention in administrative matters.

[41] This court's review of the Minister's decision must be based on the record of proceedings before the Minister: *Kinexus* at paras. 16 - 20.

[42] In this case, the materials before the Minister were:

1) January 16, 2013 letter from counsel for Atco requesting an inquiry;

2) Form 2 - notice of request for inquiry submitted by counsel for Atco;

3) the Notice;

4) February 19, 2013 email from counsel for the Minister to Atco and the Regional District requesting submissions;

5) February 27, 2013 submissions from the Regional District (2 pages); and

6) March 5, 2013 submissions from Atco (2 pages).

[43] Although there are additional materials before this court, they are in respect of other issues that have been argued. I am careful not to consider those additional materials in respect of my review of the Minister's decision.

The Applicable Standard of Review

[44] There are only two standards of review - reasonableness and correctness. Reasonableness is a deferential standard pursuant to which a court determines whether the decision under review falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Correctness, on the other hand, requires the reviewing court to undertake its own analysis of the question: *Dunsmuir v. New Brunswick,* 2008 SCC 9 at paras. 34, 47 and 50.

[45] Where a decision-maker is interpreting a statute closely connected with its function with which it will have particular familiarity, as I find to be the case here, the Supreme Court of Canada has held that such a decision "should be presumed to be a question of statutory interpretation subject to deference on judicial review": *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61 at para. 34 and *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para. 21.

[46] This presumption may be rebutted by establishing either that the decision falls into one of those categories traditionally regarded as requiring review on the standard of correctness, or by showing that, on a contextual analysis, a deferential review would be inappropriate: *McLean* at para. 22.

[47] Atco relies on the first route to rebut the presumption, contending that the Minister "wrongfully declined jurisdiction". Questions of jurisdiction traditionally require a decision to have been correct in order to withstand judicial review: *Dunsmuir* at para. 59.

[48] Atco amplified its original submissions on this issue in its further written submissions requested by the court. In short, Atco takes the position that the Minister had no power to make the decision she did.

[49] Atco says that once a request under s. 10 of the *EA* is received, the Minister must appoint an inquiry officer. The Minister, it says, has no power to determine whether the linear development exception applies.

[50] The Minister and the Regional District both submit that the Minister does have authority to determine whether the linear development exception applies and did exercise that authority. They say that Minister applied the appropriate law to the facts before her.

[51] "Jurisdiction" is intended in the narrow sense of whether or not the decision-maker had the authority to make the inquiry. In other words, true jurisdiction questions arise when the decision-maker must explicitly determine whether its

statutory grant of power gives it the authority to decide a particular matter: *Dunsmuir* at para. 59.

[52] True questions of jurisdiction should be interpreted narrowly and will be exceptional. As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness: *Alberta (Information and Privacy Commissioner)* at para. 39.

[53] I disagree with Atco's submission that the Minister has no jurisdiction to determine whether the linear development exception applies.

[54] In order for an inquiry officer to be appointed to commence the inquiry process, a request pursuant to s. 10 of the *EA* must be made to the Minister. The legislation is clear that unless the request pertains to the construction, extension or alteration of a linear development, the Minister must appoint an inquiry officer. This logically and necessarily implies that the Minister must determine whether the exception applies.

[55] Support for this finding can be found in *Seaside Acres*. In discussing the purpose served by the approving authority in the case of a linear development, Goldie J.A. wrote at para. 22: "[the] most obvious answer is that the Minister must ensure that the taking is in fact a linear development".

[56] I find this is not a true question of jurisdiction. I agree with the respondents that the Minister did have statutory jurisdiction to make this decision and, in fact, did exercise that jurisdiction. The Minister was interpreting a statute closely connected with her function and, the petitioner having failed to rebut the presumption established in *Alberta (Information and Privacy Commissioner)*, her decision is to be reviewed on the deferential standard of reasonableness.

Analysis

[57] I turn now to consider whether the Minister's decision satisfies the standard of reasonableness.

[58] In applying the reasonableness standard, the majority in *Dunsmuir* explained, at paras. 47-48:

> [47] …In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> [48] …We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279 at p. 286 …

[59] In this case, the Minister provided the following reasons:

> I have carefully reviewed the submissions and authorities provided by your counsel and by counsel for the Regional District of Kootenay Boundary. I have concluded that the proposed expropriation is for the construction, extension or alteration of a linear development within the meaning of Section 10 of the *Expropriation Act* - namely an access road and a water pipeline.
>
> It follows therefore that as no statutory grounds for an inquiry exist, no inquiry into this matter will be granted.

[60] As the Minister's letter only expressed an acknowledgment of consideration of the parties' submissions and her conclusion, the court requested further written submissions on what effect, if any, the Minister's lack of reasons has on the court's application of the reasonableness standard.

[61] From the thorough submissions received and my review of the authorities, a number of principles emerge, which include:

1. Reasons are important, as they constitute the primary form of accountability of the decision-maker to the applicant, to the public and to a reviewing court: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 63;

2. Deference, as the guiding principle, requires a court to pay respectful attention to the reasons offered or which could be offered in support of a decision: *Dunsmuir* at para. 48;

3. Reasons which "could be offered in support of a decision" should not be taken as diluting the importance of giving proper reasons: *Khosa* at para 63;

4. Reasons need not be perfect or comprehensive. The result is to be looked at in the context of the evidence, the parties' submissions and the process: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 18;

5. "Adequacy" of reasons is not a stand-alone basis for quashing a decision. The reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes: *Newfoundland and Labrador Nurses' Union* at para. 14;

6. A decision-maker does not have to consider and comment upon every issue raised by the parties in its reasons. The issue for review is whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v. Driver Iron Inc.,* 2012 SCC 65 at para.3;

7. Even in a situation where no reasons are provided and the decision implied, if there exists a reasonable basis upon which the decision-maker could have decided as it did, the court must not interfere: *Alberta (Information and Privacy Commissioner)* at para. 53;

8. Other decisions of the decision-maker on the same issue can be used to assist a reviewing court to determine whether a reasonable basis for the decision exists: *Alberta (Information and Privacy Commissioner)* at para. 56;

9. A reviewing court has an obligation to support the reasons, not subvert them: *Canada Post Corporation v. Canadian Union of Postal Workers*, 2013 BCCA 108 at para. 73.

[62] In its further written submissions, counsel for the Minister described the decision at issue as a relatively simple, interpretive task. I disagree with this characterization. The appointment of an inquiry officer is the first step toward a public inquiry, a right that most owners have and, given their vulnerable positions, should have. The only exception to the appointment of an inquiry officer is if the proposed expropriation is in respect of lands for the construction, extension or alteration of a linear development. While the Minister's ultimate determination on this issue is a simple yes or no, it does not necessarily follow that the analysis she must undertake is also simple. At this stage, the Minister performs a very important gate-keeping function. Her determination significantly impacts an owner's rights.

[63] In my view, it would have been preferable for the Minister to have provided reasons for her decision. Some explanation of her reasoning process would go a long way toward ensuring transparency.

[64] Despite my preference that reasons should have been given, I am mindful of the British Columbia Court of Appeal's direction in *McLean v. British Columbia (Securities Commission)*, 2011 BCCA 455 at para. 26:

> …If this Court can discern the "why" of the decision from the record and whatever reasons have been given, it must not intervene on the basis of the reasons' adequacy or sufficiency …

[65] Based on the submissions and authorities provided by the Regional District to the Minister, I am able to discern the "why" of the Minister's decision. It could be said that the Beaver Water Treatment Plant, as part of the Regional District's water utility system, forms part of the linear development - the water system. Further, it could also be said that the expropriation at issue, the Access Road Right of Way, allows the Regional District access to that portion of the linear development. As such, it could be considered an extension of the linear development.

[66] Although the Minister's decision is not necessarily one I would have reached had I been the decision-maker, I conclude that the Minister's decision is a possible and acceptable outcome, defensible in respect of the facts and law. Accordingly, the

petitioner's application to have the Minister ordered to appoint an inquiry officer and the expropriation declared a nullity for non-compliance with the *EA* is dismissed.

2. THE VALIDITY OF THE EXPROPRIATION

[67] Atco also challenges the validity of the expropriation on three additional grounds:

1. the impermissible combining of two distinct expropriations;
2. the right of way agreement contains impermissible positive and personal covenants; and
3. the right of way agreement is vague and overly-broad.

Are Atco's Challenges Statute Barred?

[68] As a complete answer to all challenges, the Regional District submits that the petitioner's claims are statute barred, pursuant to s. 51(1) of the *EA*.

[69] Atco submits that the limitation provision contained in s. 51 of the *EA* is inapplicable in this case because its challenges, if successful, would render the expropriation void, as opposed to voidable. Alternatively, it says that if the limitation provision does apply, the petition was brought in time.

[70] Section 51 of the *EA* provides:

> **51** (1) Legal proceedings to challenge the validity of an expropriation must not be brought after land vests under section 23.
>
> (2) Subject to subsection (1), an application under the *Judicial Review Procedure Act* must be brought within 30 days after the order or determination subject to review is made.

[71] First, in order to determine whether s. 51(1) of the *EA* applies, the acts complained of by Atco must render the expropriation voidable, as opposed to void.

[72] The distinction between a voidable act and one which is void is critical in a case where a limitation provision applies. Where an act by a public authority is void, the fact that the applicant failed to challenge it within the requisite timeframe will not

serve to validate it. A limitation cannot apply to a void act: *Camp Development Corporation v. Greater Vancovuer Transportation Authority*, 2010 BCCA 284 at para. 17.

[73] A voidable act is one taken in a defective manner, but which is nonetheless valid unless it is set aside by court order. On the other hand, a void act is one which is so fundamentally flawed that it has no effect from the outset - it is a nullity. In such a case, there is no need for an order setting that act aside; rather, the most that a court can do is recognize the nullity by declaring the act to have been void from the beginning: *Camp Development Corporation* at para. 16.

[74] It is rare for the act of a public authority to be void as opposed to voidable. A void act is one which is defective in its essentials. It may be an act performed by a body that is utterly without power to perform it, or it may be an act that is undertaken without adhering to essential procedures: *Camp Development Corporation* at para. 18.

[75] When considering whether Atco's challenges would render the expropriation void or voidable, it is important to look first at the Regional District's powers. The *EA* does not confer a power of expropriation. It regulates those powers: *Seaside Acres* at para 14.

[76] The Regional District's authority to expropriate arises by virtue of the *Local Government Act*, R.S.B.C. 1996, c. 323 [*LGA*].

[77] Section 309(1) of the *LGA* allows the Regional District to expropriate "real property or works, or an interest in them." This broad definition includes, in my view, the ability to expropriate a statutory right of way.

[78] The conditions precedent for a valid taking are few. They are set out at s. 4 of the *EA*:

> **4** (1) Subject to section 5, an expropriating authority must not expropriate land unless
>
> > (a) an expropriation notice is served under section 6 (1) (a), and

> (b) the expropriation is approved by the approving authority under section 18.
>
> (2) A person may not, in any proceedings under this Act, dispute the right of an expropriating authority to have recourse to expropriation.

[79] These are the only requirements for a valid expropriation. In *Camp Development Corporation*, Groberman J.A. explained the rationale for such an interpretation at para. 26:

> [26] …"the requirements of s. 4, [are] the only conditions precedent required under the Act for a valid taking." The rationale for this interpretation is apparent. Few deficiencies in the expropriation process will be so fundamental as to call into question the very existence of an expropriation. There is nothing in the statute to suggest that expropriations should be readily set aside as nullities. Indeed, the scheme of the Act suggests the Legislature was anxious to ensure that expropriations occur expeditiously, and that rights of review once a taking has occurred be limited.

[80] In this case, it is clear that the Regional District complied with the fundamental requirements of s. 4 of the *EA*. The Notice was served upon Atco in accordance with s. 6 and the Regional District, as the approving authority, approved the expropriation under s. 18. Consistent with the decisions of the British Columbia Court of Appeal in *Camp Development Corporation* and *Van-Kam Freightways Ltd. v. Kelowna (City)*, 2007 BCCA 287, it would seem Atco's challenges, if successful, would not call into question the very existence of the expropriation. They would not render it void.

[81] As Atco's challenges are in respect of potentially voidable acts, s. 51 of the *EA* does come into play. This section operates to prevent challenges to the validity of an expropriation after the interest in land vests with the expropriating authority.

[82] The parties disagree on a pivotal issue - when the interest vested in this case.

[83] Section 23 of the *EA* determines when the land vests. The relevant portions of s. 23 provide:

> **23** (1) The expropriating authority must, within 30 days after it has complied with section 20 (1) or an order under section 20 (6), file in the land title office, in accordance with the requirements of the *Land Title Act*, a vesting notice in

> the prescribed form, and, on filing the notice, the authority must serve a copy of it on the owner.
>
> …
>
> (3) If an estate, right, title or interest less than the fee simple is expropriated,
>
> > (a) the estate, right, title or interest in the land covered by the order or notice filed under section 7 (1) vests in the expropriating authority with priority over all charges, as defined in the *Land Title Act*, that are registered or endorsed against the land, and
> >
> > (b) the registrar must register the estate, right, title or interest of the expropriating authority against the land that is affected by it.

[84] The Regional District delivered the advance payment to Atco on February 27, 2013. By operation of the above provision, it then had to file the vesting notice by no later than March 29, 2013.

[85] In compliance with s. 23, the Regional District filed the vesting notice on March 22, 2013.

[86] As indicated, the parties disagree as to when the interest vested. Atco says that although the vesting notice was filed on March 22, 2013, it was defective and, therefore, not "filed" by the registrar until the defect was remedied on April 11, 2013.

[87] The Regional District says that, by operation of provisions of the *LTA*, read together with ss. 23 and 51 of the *EA*, its interest vested at the time of filing - March 22, 2013.

[88] It submits that the petitioner's argument with respect to the "defect" in filing is a non-issue in the circumstances of this case. During filing of the vesting notice, the wrong drop-down menu option was used and the Regional District was charged incorrect fees. Once discovered and brought to its attention, the Regional District submitted a corrective declaration to identify the proper label and paid the correct fee. In support of its position that this irregularity should not affect the filing, it points to two facts: First, the filing of the vesting notice was not rejected by the registry. Second, as evidenced on several Land Title Office documents following the

correction, the interest was registered against the Land as of the filing date - March 22, 2013.

[89] To determine when the Regional District's interest vested, ss. 51 and 23 of the *EA* must be considered together with provisions of the *LTA*. The following sections of the *LTA* are relevant:

> **Operation of instrument as from time of registration**
>
> **22** An instrument purporting to transfer, charge, deal with or affect land or an estate or interest in land passes the estate or interest, either at law or in equity, created or covered by the instrument at the time of its registration, irrespective of the date of its execution.
>
> …
>
> **Registration effective from time of application**
>
> **37** (1) An instrument or application so registered is deemed to have been registered and to have become operative for all purposes in respect of the title, charge or cancellation claimed by the application for registration, and according to the intent of the instrument or application, as of the date and time when the application was received by the registrar.
>
> (2) An indefeasible title stored by electronic means, when entered in the register, other than as a pending application, is deemed to be registered and take effect as of the date and time when the application for the title was received by the registrar.
>
> (3) An indefeasible title not stored by electronic means, when signed by the registrar, is deemed to be registered and take effect as of the date and time when the application for the title was received by the registrar.
>
> (4) A certificate of charge, when signed by the registrar, is deemed to be issued and take effect as of the date and time when the application for the certificate was received by the registrar.
>
> …
>
> **Time of application**
>
> 153 (1) The registrar must record on each application received by the registrar
>
> (a) the date and time of its receipt, and
>
> (b) the serial number assigned to the instrument or other document.
>
> (2) For the purposes of priority among purchasers, transferees, mortgagees and others, and for all purposes of this Act, the date and time recorded under subsection (1) (a) is the date and time when the application was received by the registrar and a true copy of that record must be received in all courts as conclusive proof of the date and time the application was received by the registrar.

[90] To the extent that s. 51 of the *EA* is ambiguous, the ambiguity is properly resolved in favour of the petitioner: *Camp Development Corporation* at para. 50.

[91] Section 51 of the *EA* imposes a very short limitation period on the right to challenge the validity of an expropriation. It does so for obvious reasons. Public authorities must be able to commence improvements on expropriated property with assurance that their title to the land will not later be challenged. Where land has been expropriated for a particular project, the expropriating authority must be able to proceed with the project in a timely manner. The use of expropriated land should not be unnecessarily delayed by litigation over the propriety of the expropriation: *Camp Development Corporation* at para. 51.

[92] In most cases, no ambiguity would exist. Once the vesting notice is filed, by operation of provisions of the *LTA* in conjunction with the provisions of the *EA*, the interest is registered and thereby vests. In an ordinary case, this all occurs at the same time - the time of filing. However, this is not an ordinary case. As a result of some errors in the filing, a degree of ambiguity arises. In accordance with *Camp Development*, that ambiguity is properly resolved in favour of the petitioner. I find that in the unusual facts of this case, the petitioner's challenges to the validity of the expropriation are not barred by operation of s. 51 of the *EA.*

Challenges to the Expropriation

i) Combining Two Expropriations

[93] Atco submits that the *EA* does not allow the combination of separate expropriations into one single expropriation. In support of this position, it relies upon s. 31(3) of the *EA*, which provides:

> (3) If there is more than one separate interest in the land expropriated, the value of each interest must, if practical, be established separately.

[94] Atco says that by expropriating the separate interests together, the Regional District avoided its obligation to separately appraise and pay Atco for each taking. This, it submits, also convolutes Atco's entitlement to costs (s. 45 of the *EA*) and to penalty interest (s. 46(4) of the *EA*).

[95] In response, the Regional District first submits that s. 31(3) of the *EA* applies only to compensation issues, issues not raised in this petition. In any event, it says that s. 31(3) refers to more than one strip of land. In this case, only one "interest" was taken - a statutory right of way.

[96] The Regional District further submits that the compensation and valuation issues raised by Atco are not complex and convoluted given that the two takings pertain to the same area of land, occurred at the same time and are of the same type.

[97] I agree with the Regional District on this issue. There is no authority in the *EA* or in the caselaw supporting Atco's position that an expropriation combining two takings of the same type of interest on the same area of land is invalid.

ii) Impermissible Positive and Personal Covenants

[98] Relying on the common law, Atco argues that the proposed right of way agreement contains impermissible positive and personal covenants, such that they are incapable of forming an interest in land.

[99] While denying that the right of way agreement contains any positive and personal obligations, the Regional District also submits that s. 218 of the *LTA* has abrogated the common law requirements of an easement as they relate to statutory rights of way, such that a statutory right of way can create positive obligations and still run with the land.

[100] I agree with Atco on this issue. In reaching my conclusion that a statutory right of way cannot impose positive and personal covenants and still create an interest in land, I start with the legislation.

[101] The relevant provisions of the *LTA* provide as follows:

> **Definitions**
> **1** In this Act:
>
> …

> **"statutory right of way"** means an easement without a designated dominant tenement registrable under section 218;
>
> …
>
> **Statutory right of way**
>
> **218** (1) A person may and is deemed always to have been able to create, by grant or otherwise in favour of
>
> (a) the Crown or a Crown corporation or agency,
>
> (b) a municipality, a regional district, the South Coast British Columbia Transportation Authority, a local trust committee under the *Islands Trust Act* or a local improvement district,
>
> (c) a water users' community, a public utility, a pulp or timber, mining, railway or smelting corporation, or a pipeline permit holder as defined in section 1 (2) of the *Oil and Gas Activities Act*, or
>
> (d) any other person designated by the minister on terms and conditions that minister thinks proper,
>
> an easement, without a dominant tenement, to be known as a "statutory right of way" for any purpose necessary for the operation and maintenance of the grantee's undertaking, including a right to flood.
>
> (2) To the extent necessary to give effect to subsection (1), the rule requiring an easement to have a dominant and servient tenement is abrogated.
>
> (2.1) The minister may delegate to the Surveyor General the minister's powers under subsection (1) (d).
>
> (3) Registration of an instrument granting or otherwise creating a statutory right of way
>
> (a) constitutes a charge on the land in favour of the grantee, and
>
> (b) confers on the grantee the right to use the land charged in accordance with the terms of the instrument, and the terms, conditions and covenants expressed in the instrument are binding on and take effect to the benefit of the grantor and grantee and their successors in title, unless a contrary intention appears.

[102] The Regional District relies in particular on ss. 218(1) and (2) for the proposition that the common law relating to easements has been entirely abrogated as it relates to statutory rights of way. In my view, this overstates the effect of these subsections. Based on the definition in s. 1 and the clear and unambiguous wording of ss. 218(1) and (2), these provisions provide for only a limited alteration to the

common law to allow the Crown to receive an interest in land without providing a dominant tenement benefited by the easement.

[103] The Regional District also appears to rely upon s. 218(3) for the position that the common law relating to easements has been abrogated. Section 218(3) provides that a statutory right of way runs with the land. There is nothing, in my view, in this provision that expressly or implicitly overrides the common law. Rather, in order for a statutory right of way to be created, it must comply with the common law rules relating to easements, aside from the rule requiring a dominant and servient tenement.

[104] While Atco has relied solely on factually distinguishable cases, there is appellate authority supporting its argument that an easement cannot impose a position obligation on the servient tenement.

[105] In *Nordin v. Faridi* (1996), 17 B.C.L.R. (3d) 366, Madam Justice Rowles summarized the law regarding easements at paras. 31-40:

> [31] An easement is a right which one person may exercise with respect to the land of another. The four requirements for an easement were set out in Re Ellenborough Park, [1956] Ch. 131, and have been accepted in Canada in Dukart v. District of Surrey, [1978] 2 S.C.R. 1039 at 1050.
>
> 1. There must be a dominant and a servient tenement.
> 2. The easement must accommodate the dominant tenement.
> 3. The dominant and servient tenement owners must be different persons.
> 4. The right granted must be capable of forming the subject-matter of the grant.
>
> [32] As noted in S.G. Maurice, ed., Gale on Easements, 15th ed. (London: Sweet & Maxwell, 1986) at p. 3, the law recognizes three situations in which an easement may arise:
>
> 1. where natural right of the servient tenement owner to exclude others from his land is curtailed in favour of giving the corresponding right to the dominant tenement owner to encroach or invade the servient tenement.
> 2. where the dominant tenement owner receives a special right in respect of use of the dominant tenement which

curtails the natural right of the servient tenement in some way.

3. where the natural limited right of the servient owner to use his land as he pleases may be curtailed by an increase in the ordinary rights of the dominant tenement holder.

[33] The first two classes of easements are known as positive easements and the third as a negative easement. A positive or affirmative easement confers a right to commit some act upon the servient tenement whereas a negative easement involves merely a right to prohibit the commission of certain acts upon the servient tenement which the servient owner would have been otherwise entitled to commit. See Halsbury's Laws of England, 4th ed., vol. 14, at para. 26; C. Sara, Boundaries and Easements, (London: Sweet & Maxwell, 1991) at pp. 159-160.

[34] Neither class of easement, however, involves the imposition of a positive obligation upon the servient tenement holder. As Sara states in Boundaries and Easements, supra, at pp. 160-161:

> It is an essential characteristic of an easement that it does not place on the owner of the servient tenement any obligation to act. Such an obligation can only be imposed by a positive covenant, the burden of which will not pass with the land. As a result the owner of the servient tenement has no obligation to maintain a right of way or, as the law is generally understood, to keep in repair a building in respect of which there is an easement of support.
>
> Apart from the anomalous position of fencing easement, if a person wishes to place a positive burden on the owner or occupier of neighbouring land, he must do so by covenant which (as it is not a restrictive covenant) will not run with the land. Since the abolition of manorial incidents, therefore, it is impossible to burden land (as opposed to the landowner) with any positive obligations owed towards the neighbouring land.

[35] Similarly, an easement is described in Halsbury's Laws of England, supra, at para. 23, as follows:

> A true easement is either a right to do something or a right to prevent something; a right to have something done is not an easement, nor is it an incident to an easement. An easement merely imposes an obligation to submit to the commission of some act upon the servient tenement by the dominant owner, or an obligation upon the servient owner to refrain from the commission of some act upon his own land. Accordingly an easement does not cast any burden upon the owner of the servient tenement to commit any act upon that or any other tenement. The owner of a servient tenement is not bound to execute any repairs necessary to ensure the enjoyment or convenient enjoyment of the easement, but he must not deal with his tenement so as to render the easement over it incapable of being enjoyed or more difficult of enjoyment by the dominant owner.

[36] In Jones v. Price, [1965] 2 Q.B. 619 (C.A.), the dominant tenement owner sought to enforce an easement which contained a positive obligation against the servient tenement. In that case, the plaintiff and defendant were farmers occupying adjoining farms. The farms were separated by a hedge which the defendant alleged the plaintiff was under an obligation to maintain. The Court of Appeal held that an easement concerns a right to do something or a right to prevent something from occurring, but it is not a right to have something done. An easement requires no more than sufferance on the part of the occupier of the servient tenement, whereas an obligation to do something requires a positive act (Jones at p. 631). If the parties agreed to it, however, there would be nothing preventing them from making an agreement between themselves that one or other shall keep the boundary fence in repair. But such an agreement would only bind those who are a party to it, for covenants to perform positive acts, such as would be involved in the maintenance of a fence, are not one of the burdens which run with the land or bind the successors in title of the covenantor (Jones at p. 633).

[37] The Supreme Court of Canada considered the effect of a positive obligation in an easement in Parkinson v. Reid, [1966] S.C.R. 162. The defendants were the owners of the lot which adjoined a lot owned by the plaintiff. When the defendants' predecessors were constructing a stairway on their property to lead to the second floor of their building, it was agreed between the parties that the stairway should also lead to the second floor of the building on the adjacent lot owned by the predecessors of the plaintiff. Those parties entered into an easement which provided for the "free and uninterrupted use and right of way to use the said stairway ... in common with the [defendants' predecessors]". Within the easement agreement was a specific covenant to repair and reconstruct the stairway in case of its destruction.

[38] A fire occurred and, while the stairway may still have been usable, the defendants had to tear it down in order to reconstruct the building. The defendants refused to reconstruct the stairway so that it would connect to the second storey of the plaintiff's building.

[39] The Supreme Court of Canada held that there was no privity of contract or privity of estate between the parties and that the covenant to repair and reconstruct the stairway did not run with the land. At p. 167, Cartwright J. referred to the following passage from D.H. McMullen, Gale on Easements, 12th ed. (London: Sweet & Maxwell, 1950) at p. 77:

> The rule in Tulk v. Moxhay does not extend to affirmative covenants requiring the expenditure of money or the doing of some act. Such covenants do not run with the land either at law or in equity. The doctrine only applies to covenants which are negative in substance though they may be positive in form.

[40] The plaintiff in Parkinson v. Reid, supra, had argued that the easement was not a mere right of way, but was a right to pass over a structure and that the easement would be incapable of enjoyment unless the structure was maintained. The Court rejected that submission, Cartwright J. stating at p. 167:

> An obligation on the owner of the servient tenement to perform work on it would be inconsistent with the nature of an easement which as regards the servient owner is always negative, the obligation on him being either to suffer or not to do something.

[106] I note that the third requirement for the creation of an easement listed at para. 31 (that the dominant and servient tenements have different owners), has been abrogated by operation of s. 18(7) of the *Property Law Act*, R.S.B.C. 1996, c. 377.

[107] That a statutory right of way must be negative in nature is also supported by s. 219 of the *LTA*. This section allows for the creation of an interest in land based on a positive covenant made without the need for a dominant tenement. Such a covenant must, however, be registered pursuant to this section. This demonstrates that where the legislature intended to abrogate the common law regarding covenants to allow for the imposition of positive obligations running with the land, they did so expressly. No such provision exists in s. 218 of the *LTA* regarding statutory rights of way.

[108] I also agree with Atco that several of the clauses in the proposed right of way agreement do purport to subject Atco to positive and personal obligations, either on their own or in combination with other clauses.

[109] The following clauses are relevant:

> 4. GRANTOR'S COVENANTS
>
> The Grantor hereby covenants and agrees with the Grantee that the Grantor:
>
> (a) shall not erect, place or maintain any building, structure, improvement, driveway, fence, gate, barrier or other improvement on the Right of Way Areas and in particular, the Grantor shall not obstruct, or permit the existence of any obstruction on the Right of Way Areas;
>
> …
>
> (c) shall indemnify and hold harmless the Grantee, its officers, employees, servants, agents, contractors, subcontractors and licensees from and against any and all causes of action, claims, demands, liabilities, fees, costs, damages and expenses due to or arising out of, result from or attributable to:
>
> (i) any act, omission, negligence or wilful misconduct by the Grantor, or its agents, servants, licensees, workmen or other persons for whom it is in law

responsible in, over and upon the Right of Way Areas; and

(ii) any breach by the Grantor of any provisions of this Agreement,

including any liabilities, claims, actions, fees, costs, damages and expenses for injury or damage to the person or property of the Grantor or its agents, employees, contractors, subcontractors, invitees, licensees or to the person or the property of any other person, excepting always any liabilities, claims, actions, fees, costs, damages and expenses whatsoever arising out of the independent acts of the Grantee or other persons for whom the Grantee is in law responsible;..

(d) shall execute all further documents and agreements whatsoever required for the better assuring to the Grantee of the statutory rights of way hereby granted.

…

6. MUTUAL COVENANTS

It is mutually understood and agreed by and between the parties that:

(a) nothing in this Agreement shall obligate the Grantee to inspect, maintain, upgrade or repair the Right of Way Areas or the Works or any portion thereof;

(b) if the Grantor is at any time or from time to time in default of its obligations under this Agreement, the Grantee, following fourteen (14) days written notice to the Grantor and at any time in the case of an emergency, may (but will not be obligated to) perform any of the Grantor's obligations and the Grantor will reimburse the Grantee for all costs in connection therewith forthwith on demand and the Grantor, with the intent to bind its successors and assigns, hereby authorizes the Grantee, in addition to any other remedies available to the Grantee, to add such costs to taxes payable in respect of the Lands and collect such costs in the same manner as unpaid taxes.

…

(f) this Agreement shall be construed as a covenant running with the Lands and none of the covenants herein shall be personal or binding upon the parties hereto save and except during the Grantor's seisen or ownership of any interest in the Lands, but the Lands shall be and remain at all times charged therewith.

[110] Atco currently maintains a gate across the entrance of its road. This gate keeps the road from use by members of the public. Clause 4(a) would prohibit Atco from maintaining this gate. As a result, it would be forced to either remove the gate or leave it open at all times. Either option is, to my mind, imposing a positive and personal obligation on Atco.

[111] Clause 4(c) requires Atco to indemnify and hold harmless the Regional District, its officers, employees and the like, from and against any and all causes of action arising out of any conduct by Atco upon the right of way areas and of any breach by Atco of any provisions of the right of way agreement. In my view, this provision effectively extracts a promise by Atco with respect to its future conduct. This imposes a positive and personal obligation on Atco.

[112] Similarly, clause 4(d), which requires Atco to execute future documents and agreements to the Regional District's benefit, operates to extract a promise from Atco with respect to its future conduct. This too can only be seen as a positive and personal obligation.

[113] Next, while other provisions of the right of way agreement give the Regional District the right to maintain and improve the road, clause 6(a) relieves the Regional District from any obligation to do so. No such clause exists for Atco.

[114] Clause 6(b) allows the Regional District to perform any of Atco's obligations pursuant to the right of way agreement and then demand repayment of its costs. If not paid, the Regional District may then add the amount of those costs to Atco's taxes. This leaves determination of Atco's obligations pursuant to the right of way agreement solely in the hands of the Regional District.

[115] Clause 6(f) does, as argued by the Regional District, restate s. 218(3) of the *LTA* insofar as it confirms that the statutory right of way runs with the land, but it goes further than that in my view. This clause purports to bind Atco to personal covenants contained within the agreement.

[116] As I have outlined, some of these covenants are positive and personal in nature standing on their own. In combination, they also impose positive and personal obligations on Atco. The combined effect of the Regional District's use of Atco's private road, without any obligation to maintain or repair it, places a positive obligation upon Atco to do so. It must, in order to safely use its own road, maintain and repair not only its own wear and tear, but also that done by the Regional District.

[117] The Regional District is, through this statutory right of way expropriation, attempting to impose a number of positive and personal covenants upon Atco. Such covenants are impermissible. They are incapable of forming an interest in land and, therefore, the Regional District has exceeded its power in expropriating them.

[118] Atco has not sought severance of these unenforceable provisions. As they are numerous and go to the heart of the statutory right of way agreement, I find the only appropriate remedy is the one sought by Atco. The Expropriation Notice filed in the Land Title Office under CA2919583 is set aside. As this decides the matter, I need not go on to consider Atco's third and final challenge to the validity of this expropriation.

[119] Atco is entitled to its costs as against the Regional District at Scale B.

"S.A. Donegan J."

DONEGAN J.