BCEA 2015 Fall Conference

Caselaw Review

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MCA Land Development Corp. v. The Queen (Ministry of Transportation), 2014 BCCA 435

Facts:

- Partial taking of lands used by a lumber distribution business, which was the tenant.
- The registered owner (i.e. the landlord) and the tenant had common ownership, but were separate corporate entities.
- The plaintiffs (tenant and owner) claimed over $5 million in disturbance damages, much of it related to the relocation of the tenant.

MCA Land Development Corp. v. The Queen (Ministry of Transportation), 2014 BCCA 435

Decision: Trial Judge

- The landlord engaged in an active business on the expropriated land.

- The landlord and the tenant were intertwined, and awarded $3.5 million in the aggregate relating to the relocation of the tenant.

MCA Land Development Corp. v. The Queen (Ministry of Transportation), 2014 BCCA 435

[143] Expropriation statutes must be given a broad and liberal interpretation consistent with their purpose of fully compensating land owners whose property has been taken: *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32 at paras. 20-23, 142 D.L.R. (4th) 206. The plaintiffs are both "owners" under the *Act* and had done business together on the MCA lands for decades. To accede to the defendant's position that MCA's compensation is restricted to the market value of the land taken, and Keystone's to the costs of moving its business to another leasehold property, would not place the plaintiffs in the position they were in before the acquisition. Rather, it would allow the expropriation to effectively force an end to their long-standing business relationship by obliging the Court to determine compensation as though the expropriation had done so. Such an approach seems fundamentally contrary to the *Act*'s restorative purpose.

[144] Fundamentally, MCA's business -- providing land and facilities to Keystone in exchange for compensation -- and Keystone's business -- using the space provide by MCA to earn income -- were intertwined. The defendant's position that MCA should only be compensated for the value of the land and that Keystone only for the cost of relocation ignores the reality that unless MCA obtained new lands suitable for Keystone, neither MCA nor Keystone could have continued to carry out their respective businesses.

MCA Land Development Corp. v. The Queen (Ministry of Transportation), 2014 BCCA 435

Decision: Court of Appeal

- Issues on Appeal included:
  - Whether the trial judge erred by failing to differentiate between the separate interests of the landlord and the tenant.
  - Whether the trial judge erred by failing to assess the reasonableness of the disturbance damages for the tenant's relocation.

MCA Land Development Corp. v. The Queen (Ministry of Transportation), 2014 BCCA 435

[54] With respect, I am of the view that the trial judge erred in her application of the compensatory scheme mandated by the *Act.* The error flowed from her mischaracterization of the MCA business as one that was operated on the taken land, thereby entitling MCA to relocation costs that effectively provided an equivalent arrangement for Keystone as the one it had with MCA before the taking. This approach is contrary to the scheme of the *Act,* which expressly restricts disturbance damages to "owners" who use or carry on business on the taken land.

…

[59] In this case, MCA was the lessor of the land upon which Keystone independently operated its business. It did not itself operate a business on that land. MCA was therefore only entitled to claim disturbance damages for the market value of the taken land. While Keystone was entitled to claim disturbance damages for the cost of its attempted relocation to the Bridgeport Property and actual relocation to the combined MCA-Rubber Bumper Land as a lessee of the taken land, those damages had to be determined in accordance with the statutory factors listed in s. 39.

Justice Smith

MCA Land Development Corp. v. The Queen (Ministry of Transportation), 2014 BCCA 435

[68] I also agree that the approach taken by the trial judge was inconsistent with the reasoning of this Court in *Actton* that affirms the relevance of the existence of separate corporate entities for the purposes of assessing compensation under the *Act*. The judge concluded, without the necessary analysis of the structure of the entitlement to compensation provided by the *Act*, that the *Act* should not be interpreted to deprive MCA and Keystone of compensation that would, in comparable circumstances, have been available to a single entity. It seems to me that that proposition is contrary to the statutory scheme that contemplates compensating separate interests and does not mandate treating separate legal entities as if they were one. Whether the same total compensation turns out to be available to separate entities as would have been available to one would be the result, not the premise, of the analysis.

…

[70] I appreciate that the trial judge indicated that she was not lifting the corporate veil to treat MCA and Keystone as a group enterprise. Nonetheless, in my view, proceeding on the basis that the two companies are entitled to compensation that would have been available to a single entity is, in its effect, tantamount to adopting a form of "group enterprise" approach inconsistent with the reasoning in *Actton*. Treating companies as part of a "group enterprise" and effectively, therefore, as a single entity for a particular purpose does not necessarily require that the corporate veil be lifted. Even though the trial judge did not lift the corporate veil, she did treat the two entitles as one for the purposes of compensation and, in doing so, did not give effect to the separate existence of the corporate entities to their entitlement to compensation within the statutory scheme. It may be that the corporate veil was not lifted, but it was dissolved for the purpose of compensation.

Justice Harris

MCA Land Development Corp. v. The Queen (Ministry of Transportation), 2014 BCCA 435

[74] On one view, the judge treated the businesses of the two corporations as separate entities, with MCA the landlord and Keystone the tenant. Taking that view of the reasons for judgment, I respectfully consider that the judge's characterization of MCA's activity as carrying on business on the taken land and her consequent award of compensation for Keystone's failed relocation to another property and its eventual relocation do not accord with the statutory scheme for compensation, for the reasons of Madam Justice Smith.

[75] On the other view, the judge found that the businesses of the two corporations were so intertwined that the corporations should not be deprived of "compensation available in comparable circumstances to a single entity". On that view, I respectfully consider the judge erred, for the reasons of Mr. Justice Harris.

[76] The sum of the reasons of my colleagues is respect for the business choices made in allocating real property and an operating business to separate corporations. I respectfully conclude, as my colleagues have done, that compensation awarded on the basis of corporate 'intertwining' fails to give full effect to both the choices made in establishing a corporate structure, and the legislation as developed in the jurisprudence discussed by them.

Justice Saunders

Moore v. Getahun, 2014 ONSC 237

Facts:

- Medical malpractice action.
- Plaintiff alleged the defendant, a surgeon, caused the plaintiff permanent muscle damage by negligently fitting the plaintiff for a cast
- The main issue at trial was whether the cast was a breach of the defendant's standard of care and had caused the plaintiff's muscle damage.

Moore v. Getahun, 2014 ONSC 237

Relevant Issue:

Whether it was improper for counsel to review a draft expert report and have discussions about it with the expert author?

Ratio:

- Rule 53.03 of the *Rules of Civil Procedure* was created to ensure the independence and impartiality of expert witnesses.
- In deference to the new rule counsel should no longer review drafts of expert reports.
- There should be full disclosure of any changes to the final report based on counsel's corrections, suggestions, or clarifications.

Moore v. Getahun, 2015 ONCA 55

Relevant Issue:

Did the trial judge commit an error in law by finding that lawyer's should not review or discuss draft reports with experts witnesses?

Moore v. Getahun, 2015 ONCA 55

Finding:

[62] I agree with the submissions of the appellant and the interveners that it would be bad policy to disturb the well-established practice of counsel meeting with expert witnesses to review draft reports. Just as lawyers and judges need the input of experts, so too do expert witnesses need the assistance of lawyers in framing their reports in a way that is comprehensible and responsive to the pertinent legal issues in a case.

White Burgess Langille v. Abbott and Haliburton Co., 2015 SCC 23

Facts:

- Appeal arising from a professional negligence action by the respondents (shareholders) against the appellants, the former auditors of their company (the auditors).

- Shareholders claimed auditors failed to follow generally accepted auditing and accounting standards while carrying out their duties and this caused the shareholders a financial loss.

- Auditors sought a motion for summary judgment to have the shareholder's action dismissed.

White Burgess Langille v. Abbott and Haliburton Co., 2015 SCC 23

Facts cont'd:

- The shareholders retained a forensic accountant from the same firm that discovered the auditor's irregular practices.
- The forensic accountant's affidavit laid out her findings and stated that the auditors had not followed general accounting practices and standards.
- The auditors moved to have the affidavit struck on the grounds that the forensic accountant was not an impartial witness.

White Burgess Langille v. Abbott and Haliburton Co., 2015 SCC 23

Previous Judgments:

Nova Scotia Supreme Court: 2012 NSSC 210

- The motions judge struck out the affidavit in its entirety and stated that its findings were not independent and impartial.

Nova Scotia Court of Appeal: 2013 NSCA 66

- Majority of the Court of Appeal reversed the motion judge's decision and found that the admissibility test adopted by the motions judge was wrong in law.

White Burgess Langille v. Abbott and Haliburton Co., 2015 SCC 23

Supreme Court of Canada:

Ratio:

Expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence if admitted.

- Expert witnesses have a duty to be fair, objective and non-partisan
- If the expert's evidence is unchallenged then the expert's attestation or testimony recognizing and accepting this duty meets the threshold for admissibility

White Burgess Langille v. Abbott and Haliburton Co., 2015 SCC 23

Supreme Court of Canada cont'd:

The SCC developed a two step approach for admissibility of expert evidence:

1. Proponent of evidence must establish the threshold requirements for admissibility:
   - Relevance
   - Necessity
   - Absence of exclusionary rule
   - Properly qualified expert

   (*R v. Mohan* [1994] 2 S.C.R. 9)

White Burgess Langille v. Abbott and Haliburton Co., 2015 SCC 23

Supreme Court of Canada cont'd:

2. Discretionary gatekeeping step:
   - Judge must do cost/benefit analysis to determine if the benefits of admitting the evidence outweigh the risks by considering:
     - Relevance
     - Necessity
     - Reliability
     - Absence of bias

Pinch v. Hofstee, 2015 BCSC 1887 (released this Monday)

- [3] In order to meet the requirement of Rule 11-6(1)(c), all actual instructions received by the expert should be appended to the expert report that is to be tendered into evidence. It is not sufficient to satisfy Rule 11-6(1)(c) to have the expert either to paraphrase the instructions received or to include some but not all of the instructions received.

Victory Motors (Abbotsford) Ltd. v. B.C. (Assessor of Area No. 15 – Fraser Valley), 2015 BCSC 1230

Facts :

- Contaminated property (old gas station and dealership).

- Neighbour owner bought the shares of the property owner – acquired so he could assume responsibility for contaminated sites litigation (which owner may have been neglecting).

Victory Motors (Abbotsford) Ltd. v. B.C. (Assessor of Area No. 15 – Fraser Valley), 2015 BCSC 1230

- Buyer paid $42,000 for the shares, which included the seller's outstanding taxes and professional costs.
- Buyer did $750,000 in renovations, which enabled leasing of certain units on the property, being careful not to trigger obligations to remediate.
- Assessor valued the property at almost $1.1 million.
- Review panel reduced the value to $500,000.
- The Appeal Board reinstated the valuation of almost $1.1 million, and the buyer appealed to Court.

Victory Motors (Abbotsford) Ltd. v. B.C. (Assessor of Area No. 15 – Fraser Valley), 2015 BCSC 1230

Decision:

- Proceeded by way of a stated case with several questions, including "Did the Board err in law in holding that the land's probable market value is its appraised value at its highest and best use without remediation…".

- "The Board assessed the value in a manner that gave no meaningful recognition to the property's brownfield status, particularly in light of the provisions of the (*Environmental Management Act*), which any potential buyer would have in mind as a potential economic risk."

Victory Motors (Abbotsford) Ltd. v. B.C. (Assessor of Area No. 15 – Fraser Valley), 2015 BCSC 1230

- The Board "ignored the fact that the current owner acquired the property under circumstances which made the potential economic risk uniquely acceptable to that owner…(and erred by) accepting a highest and best use which was of value only to the current owner, and for which there was no evidence in the market."

Victory Motors (Abbotsford) Ltd. v. B.C. (Assessor of Area No. 15 – Fraser Valley), 2015 BCSC 1230

- The Court remitted the matter back to the Board for reconsideration, to decide in light of the Court's reasons, whether the assessed value reflects the market value given the presence of contamination.

- The Court did not make the ultimate decision on value, but gave the Board strict parameters within which it was forced to reconsider its prior valuation.

Chen v. Chilliwack, 2015 BCSC 382

Facts:

- City expropriated entire property for downtown assembly for redevelopment and revitalization.

- Plaintiff sought increased market value and disturbance damages.

Chen v. Chilliwack, 2015 BCSC 382

Decision:

- Court ordered $220,000 in additional compensation for market value, but no disturbance damages.

- Court criticized appraisers, including criticizing a failure of one appraiser to provide adjusted value for comparables.

Kleysen v Manitoba, 2015 MBCA 54

Facts:

- Appeal from a decision of the Manitoba Land Commission (LVAC).
- Province's appraiser said the land was a speculative holding and worth $15,000/acre, $585,000 in total.
  [estimated 30 – 50 year development horizon]
- Landowner's appraiser said the land was worth $100,000/acre, $3.9 million in total.
  [estimated 10 year development horizon}

Kleysen v Manitoba, 2015 MBCA 54

Facts cont'd:

- LVAC found that that owner was note a willing seller, and would not have considered selling the subject property for $15,000 an acre.
- LVAC found that land was worth $50,000/acre, $1.9 million in total.
- Province argued on appeal that the LVAC failed to apply the proper definition of "market value" as found in the *Expropriation Act*, R.S.M. 1987, c. E190.
- Province also argued the award of $1.9 million was unreasonable.

Kleysen v Manitoba, 2015 MBCA 54

Issue:

Was the LVAC's award of $1.9 million unreasonable?

Ratio:

- The award was within a reasonable range and the court cannot overturn the LVAC's decision unless it is found to be outside the acceptable range of outcomes based on the facts and the law.

Kleysen v Manitoba, 2015 MBCA 54

Findings:

- The standard of review is reasonableness (*New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9).
- Reasonableness is, “a single standard that takes its colour from context” (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para 59).
- Context then shapes the, “range of possible acceptable outcomes which are defensible in respect of the facts” (*Dunsmuir* at para 47.).

Kleysen v Manitoba, 2015 MBCA 54

Findings cont'd:

- The LVAC's reasons demonstrate how and why it made the decision it did, and the decision is reasonable.

- It is "…not the function of this court to conduct an extensive review of the evidence that was before the LVAC and substitute its own reward unless the reward being appealed is not 'within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law'". (para 33)

- Thank-you!