2011 Expropriation Association Fall Seminar

Section 33 – the "Scheme"

Outline

- Alan – introduction, historical context and principles
- James – BC cases and practical considerations

Introduction

- section 33
- focus will be on (a); (d) and (g)
- judicial and other descriptions of the issue
- simple to define; complex to apply

Historical context

- in BC until 1987 compensation was based on judicial interpretation of "compensation" under the *Land Clauses Act* or its successor
- common law or judicial rules developed – value to owner, not value to taker; special value or adaptability; exclusion of advantages due to the scheme for which the property was taken
- scope of scheme – narrow (*Indian case*) or (relatively) wide *(Pointe Gourde)*
- statutory intervention beginning in England in 1919; in BC in 1989
- recent English developments – Waters, 2003 Law Commission Report

General Principles

- absence of clear policy analysis to guide decisions
- determination of the extent of the scheme gives rise to "complex and intractable problems"
- the wider the scheme, the more artificial the valuation exercise and the more potential inequalities among owners
- the narrower the scheme, the more likely that increases or decreases in value which should be attributed to the scheme will be missed
- appraisers, valuation and the no-scheme world
- exclusion of increases and decreases in value due to the scheme
- public vs. private takings
- relevance of scheme to pre taking disturbance damages (Shun Fung; Dell Holdings)
- is s. 33 a complete code, or do common law rules survive?

Exclusions from market value

33 In determining the market value of land, account must not be taken of

(a) the anticipated or actual purpose for which the expropriating authority intends to use the land,

(b) an increase in the value of the land resulting from a use that, at the date of expropriation, was capable of being restrained by a court,

(c) an increase in the value of the land resulting from improvements made to the land after the expropriation notice under section 6 (1) (a) or order under section 5 (4) (a) has been served, but not including improvements that are necessary to preserve the value or state of the land,

(d) an increase or decrease in the value of the land resulting from the development or prospect of the development in respect of which the expropriation is made,

(e) an increase or decrease in the value of the land resulting from any expropriation or prospect of expropriation,

(f) an increase or decrease in the value of the land due to development of other land that forms part of the development for which the expropriated land is taken, or

(g) any increase or decrease in value of the land that results from the enactment or amendment of a zoning bylaw, official community plan or analogous enactment made with a view to the development in respect of which the expropriation is made.

The Issue

"It is well settled that compensation for a compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition"

Point Gourde Quarrying and Transport Co. v. Sub-Intendent of Crown Lands, [1947] AC 565 (PC)

"Where the market value of a property has fallen as a result of public knowledge of a project, before expropriation takes place, should the compensation exclude the decrease in value? We do not believe that the owner should have to bear this decrease. Otherwise he will not receive sufficient compensation to enable him to purchase equivalent property elsewhere.

On the other hand, where the value arises, we see no justification for giving the owner compensation which will include the increase. The owner should be entitled to be put in a position to buy equivalent property elsewhere, based on what the value of his property would have been if there had been no public knowledge of the project. Otherwise, the owner will receive a windfall. "

BC Law Reform Commission Report on Expropriation, 1971

" … no allowance is to be made because the resumption or acquisition was compulsory; and land is to be valued at the price it might be expected to realise if sold by a willing seller, not an unwilling seller. But subject to these qualifications, a claimant is entitled to be compensated fairly and fully for his loss. Conversely, and built into the concept of fair compensation, is the corollary that a person is entitled to compensation for losses fairly attributable to the taking of his land, but not to any greater amount. It is ultimately by this touchstone, with its two facets, that all claims for compensation succeed or fail."

"A landowner cannot claim compensation to the extent that the value of his land is increased by the very scheme of which (the compulsory acquisition) forms an integral part. A loss in value attributable to the scheme is not to enure to the detriment of a claimant… The underlying reasoning is that if the landowner is to be fairly compensated, scheme losses should attract compensation but scheme gains should not. Had there been no scheme those losses and gains would not have arisen."

Director of Buildings and Land v. Shun Fung Ironworks Ltd., [1995] 2 AC 111 (PC)

[Value must be assessed] "upon consideration of the state of affairs which would have existed, if there had been no scheme of acquisition"

Fletcher Estates v. Secretary of State, [2000] 2 AC 307 (HL)

"Unhappily the law in this country on this important subject is fraught with complexity and obscurity. To understand the present state of the law it is necessary to go back 150 years to the Lands Clauses Consolidation Act 1845. From there a path must be traced, not always easily, through piecemeal development of the law by judicial exposition and statutory provision. Some of the more recent statutory provisions defy ready comprehension. Difficulties and uncertainties abound. One of the most intractable problems concerns the 'Pointe Gourde principle' or, as it is sometimes known, the 'no scheme rule'."

Waters v. Welsh Development Agency, [2004] UKHL 19

A Selection of British Columbia Cases Involving Section 33

1. *Neill v. Her Majesty the Queen in Right of British Columbia* (ECB 1991)

Issue: Highway case. What would highest and best use of land be but for the taking? While parties agreed would be as holding property, claimant argued for commercial/industrial use while taker asserted light industrial use.

Outcome: ECB agreed with claimant.

Take away: Decision is notable for its discussion about who bears the burden of proof. ECB concluded that authority had onus to show that prospect of commercial development only arose because of the project, and that owner had onus of showing "through credible planning evidence" that any decrease in value of land was caused by the development.

2. *Vision Homes v. City of Nanaimo* (ECB 1994, BCCA 1996)

Issue: Highway establishment case; to what extent are earlier OCP designations showing highway for which taking occurred to be excluded when determining value?

Outcome: "In each case, the question whether the pre-existing bylaw was excluded depended on the nature and extent of the nexus, or causal connection, between the bylaw and the expropriation or development in question. In each case, the determination of whether there was a sufficient nexus or causal connection to exclude the bylaw was one of fact."

Take away: Outlines basic test; the focus is on the facts of the case. Court holds that "critical issue" in determining whether previously enacted bylaws should be excluded is whether they were passed with a view to the development in respect of which the expropriation occurred, rather than if they were passed to freeze the land to facilitate development. It is not just the bylaw that is to be ignored, but the requirements made pursuant to the bylaw.

3. *Devick v. British Columbia* (ECB 1994, BCCA 1998)

Issue: Highest and best use in context of highway widening. ECB concluded claimant failed to meet onus of reasonable expectation of rezoning to commercial.

Outcome: Court of Appeal held ECB failed to take into account evidence before it that rezoning likely but for long-standing actions of Respondent. Court also held that planning evidence not required about likelihood of rezoning occurring and that ECB impose "excessively onerous" evidentiary onus on Claimant

Take away: Reinforces importance of considering all the evidence.

4. *McPhail's Equipment Co. v. City of Surrey* (ECB 1995, BCCA 1997)

Issue: Consideration of value of unmarketed in situ fill held by claimant under profit a prendre where taker was only potential customer but had not taken any steps to use fill.

Outcome: Applying former s. 32(a) (now 33(a)), ECB concluded that but for expropriation, taker "would likely have been forced to reach some financial accommodation [with Claimant]" to obtain access or purchase fill.

Take away: Case seems to be based more on common law (the *"Indian Case"* and *Fraser v Canada* (SCC)) concept than the *Expropriation Act*.

5. *286684 BC Ltd. v. City of Colwood* (ECB 1999)

Issue: Section 33 treatment of SRW taking for sewer when area also designated in OCP for future road.

Outcome: ECB concluded that was "overly subtle" to treat sewer as a different development from proposed road. ECB noted that OCP also contemplated inclusion of utilities in roadways and expressed concerns about inadequate compensation from acquisition creep.

Take away: Consider the true nature of the development.

6. *Horsley v. British Columbia* (ECB 2000)

Issue: Subject properties designated rural in OCP that also referred to parkway for which takings occurred

Outcome: Insufficient connection between rural designation in OCP and references to parkway. Only aspects of OCP excluded from consideration were references to parkway.

Take away: Board appears to appreciate Respondent's "comprehensive over-view of the land use regulations" in establishing likelihood of OCP change and rezoning argued by Claimant.

7. *Gonev and Douglas v. City of Richmond* (ECB 2000)

Issue: Land acquired for park. What would density under official community plan have been but for the expropriation? To what extent would density have exceeded "base density" for area?

Outcome: Board considered OCP sub-plans including for subject property, excluding designation for taking. Board rejected urban model put forth by claimants and concluded that would be density for townhouses, and not high rises.

Take away: Look to overall patterns of development and what is actually achievable. Board's conclusion supported by information available to market at time of taking concerning availability of density bonuses, market conditions, likelihood that design for properties propounded by claimants actually achievable.

8. *Clements v. Penticton* (ECB 2003, BCCA 2005)

Issue: Road widening case. Application of (1) s. 33(g) with respect to whether bylaws going back many years should be excluded in determining market value and (2) s. 33(d) with respect to changes in value resulting from the development.

Outcome: ECB looked to whether there was nexus between taking and other earlier bylaws/matters. Concluded widening of road resulted from "de facto arterial" status of road increases in population, and not earlier OCP designations. Even if connection, was no resulting decrease in value of subject properties. Distinguished from *Vision* and *Colwood* cases where no pre-existing works. ECB concluded earlier changes to road were not part of same development for which taking occurred. Highway designation did not decrease property values.

Take away: You can't make a sow's ear into a silk purse. Look to reality of situation.

9. *Langdale Landing/Greatbanks v. British Columbia* (ECB 2003)

Issue: Definition of "the development" for purpose of section 33(d)). Compensation sought for profits a prendre for gravel extraction following expropriation where profit a profits a prendre were obtained by owner at least partly for the development, and for claims related to subdivision potential.

Outcome: ECB provided different definitions of the development depending on the claim considered.

Take away: Highly fact specific decision. Strong reliance on and reference to evidence. ECB treated common law cases (e.g., *Indian Case, Fraser*)) with caution and suggests narrow treatment be given to s. 33.

10. *Lulu Island Holdings Ltd. v. GVSDD* (BCSC 2007)

Issue: Consideration by BC Supreme Court of expansion of sewage treatment plant.

Outcome: Court treats expansion as trigger for compensation.

Take away: "Traditional" application of s. 33

11. *Thunderbird Entertainment Ltd. v. GVTA* (BCSC 2011)

Issue: Should covenant granted by owner for setback area be taken into account in calculating compensation for land taken for roadway?

Outcome: Court found that covenant was granted by plaintiff as part of "prudent step" to mitigate loss in the face of expropriation and was causally connected to expropriation. Decision under appeal.

Take away: Court prefers evidence about specific events over evidence about the "typical "to and fro"" in the development process