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B.C. Expropriation Association

25th Anniversary Fall Conference
Case Law Update

James Goulden, Partner
Norton Rose Fulbright Canada LLP

Phong Phan, Barrister and Solicitor
Legal Services Branch, Ministry of Justice

Expropriation Case Updates

Windsor (City)(RE) 2017 CanLII 51867

Heard by: Ontario Information and Privacy Commissioner

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Windsor (City)(RE) 2017 CanLII 51867

Facts:

- Journalist makes request under the Ontario *Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, Ch. M 56 ("MFIPPA")* asking the City of Windsor to disclose the amount paid in the expropriation of two properties.

- The City refused to disclose the records containing this information. The records were a release agreement and an offer of settlement both executed in the expropriation of the properties.

- The City refused pursuant to section 12 of the *MFIPPA* stating that the records containing the information were protected under statutory litigation privilege as they were "prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation".

Windsor (City)(Re) 2017 CanLII 51867

Issue:

Are the documents, which contain the information regarding payment for the expropriated properties, protected by statutory litigation privilege under section 12 of the *MFIPPA?*

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Windsor (City)(Re) 2017 CanLII 51867

Result:

> *The City had a legitimate basis for its decision to withhold the records.*

- Statutory litigation privilege protects records prepared for use in the mediation or settlement of litigation.
- The records consisted of a full and final settlement and legal release, and an offer of settlement made under section 25 of the *Expropriation Act, RSC 1985, c E-21.*
- The records were prepared by or for counsel to settle the issue of the expropriation of two properties by the city. They fell within the scope of the solicitor-client privilege exemption in section 12 of the *MFIPPA.*
- The public policy interest in maintaining confidentiality in documents that encourage and bring about settlement of litigation outweighs the public

Victory Motors v. Assessor, 2017 BCCA 295 (CanLII)

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Victory Motors v. Assessor, 2017 BCCA 295 (CanLII)

- Property assessment case
- Contaminated gas station/auto dealership
- Listed for $1.2M but couldn’t sell, fell into disrepair
- Buyer purchased for $42K (via share purchase), assumed environmental liability
- Spent another $750K to renovate to commercial rental units

Victory Motors v. Assessor, 2017 BCA 295 (CanLII)

- Assessor valued property at ~$1M
- Property Assessment Review Panel reduced assessment to $500K on account of contamination
- Property Assessment Appeal Board reinstated assessor's valuation of $1M
- BCSC held that Board erred in law by focusing on value to current owner

Victory Motors v. Assessor, 2017 BCCA 295 (CanLII)

BCSC at para. 31:

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 v. Assessor, 2017 BCCA 295 (CanLII)

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

- Assessor appealed to BCCA…

Victory Motors v. Assessor, 2017 BCCA 295 (CanLII)

- BCCA judgment delivered by Justice Frankel

- Frankel cites *Nav Canada, 2016 BCCA 71 (CanLII)*; says that it supports the Board's approach to value

- In *Nav Canada*, BCCA revisited the issue of whether a property can have value when there is no actual market for it

Victory Motors v. Assessor, 2017 BCCA 295 (CanLII)

- Notes on Nav Canada…
- 5 justice panel of the BCCA
- Written reasons by Chief Justice Bauman
- Para. 49 → one must regard the owner as one of the possible owners, estimate what they would spend to replace the property
- Para. 54 → one must ignore the subjective value, the special value to the owner, and value the property in the hands of the objective owner
- Para. 56 → special value to the owner is that beyond what it would have in similar use by another

Victory Motors v. Assessor, 2017 BCCA 295 (CanLII)

In *my* words, *Nav Canada* stands for the proposition that an objective valuation is possible for a property with a restricted market by assessing the value of that property to its current owner, as the potential purchaser, being careful to ignore its special value to that particular owner.

Note: Justice Frankel was a part of the five judge panel. Returning to Victory, he says…

Victory Motors v. Assessor, 2017 BCCA 295 (CanLII)

[63] I do not agree with Victory Motors (Abbotsford) Ltd. and Wil Management Ltd. that Nav Canada applies only to restricted-use properties. As a matter of common sense it cannot be said a property that generates income under an existing permitted use is without value, as one must consider an owner to be a potential purchaser and estimate what the owner would be willing to expend to replace the property in that use. When, for whatever reason, there is no market for a property that has value to its owner, that owner can serve as "a proxy for a competitive market": Nav Canada at para. 51.

Victory Motors v. Assessor, 2017 BCCA 295 (CanLII)

[64] That the Victory Motors property has value to Victory Motors (Abbotsford) Ltd. is beyond question. Were it otherwise, Victory Motors (Abbotsford) Ltd. would not have invested hundreds of thousands of dollars to convert the existing building from a state of disrepair into income-generating rental units. To accept that the property has no value would be to accept that Victory Motors (Abbotsford) Ltd. can carry on a commercially-viable income-generating business while contributing nothing to the property tax revenues the City of Abbotsford requires to provide municipal services.

Victory Motors v. Assessor, 2017 BCCA 295 (CanLII)

- *Victory Motors* has expanded the analysis in *Nav Canada* to apply beyond restricted-use properties? Is this correct?

- Assume there are two identical and adjacent properties, which share the same HBU and produce the same income. If one is contaminated and the other is not (and following this case) can they have market value?

- Should this case be restricted to the assessment context given s. 19(3) of the *Assessment Act*? Consider Justice's Frankel's "fairness" comment

Victory Motors v. Assessor, 2017 BCCA 295 (CanLII)

19(3) In determining actual value, the assessor may, except where this Act has a different requirement, give consideration to the following:

(a) present use;

(b) location;

(c) original cost;

(d) replacement cost;

(e) revenue or rental value;

(f) selling price of the land and improvements and comparable land and improvements;

(g) economic and functional obsolescence;

(h) any other circumstances affecting the value of the land and improvements.

Bowolin v. British Columbia Transportation and Financing Authority

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Bowolin v. British Columbia Transportation and Financing Authority

Facts:

- The owners of a piece of property in the Craigellachie area of British Columbia had their property expropriated under the Expropriation Act so that Highway 1 could be expanded from two lanes to four.

- The owners were in possession of a permit issued under the Mines Act, S.B.C. 1996, c. 293 which allowed them to remove sand and gravel from the property. They had indeed removed gravel from the land over the years.

Bowolin v. British Columbia Transportation and Financing Authority

Facts:

- An advance payment was issued pursuant to section 20 of the Expropriation Act. In calculating the advance payment, only the land value was taken into account. The value of the gravel on the property was not considered.

- The owners brought this action to have the advance payment and notice of expropriation set aside based on the fact that the value of the gravel was not included in the calculations for the advance payment.

Bowolin v. British Columbia Transportation and Financing Authority

Issue:

Was the determination of the amount of the advance payment reasonable despite the failure to take into account the value of the gravel?

Bowolin v. British Columbia Transportation and Financing Authority

Result:

– The expropriating government agency is required to make a determination of the land value as well as any other value associated with the land taken. The agency is then obligated to pay those funds either in advance of or contemporaneously with the taking of the lands.

> *I am satisfied that the decision under s. 20 of the Expropriation Act must include not only the lands, but the value of the gravel. Not to do so…is an error that requires intervention because failing to consider this is not reasonable.*

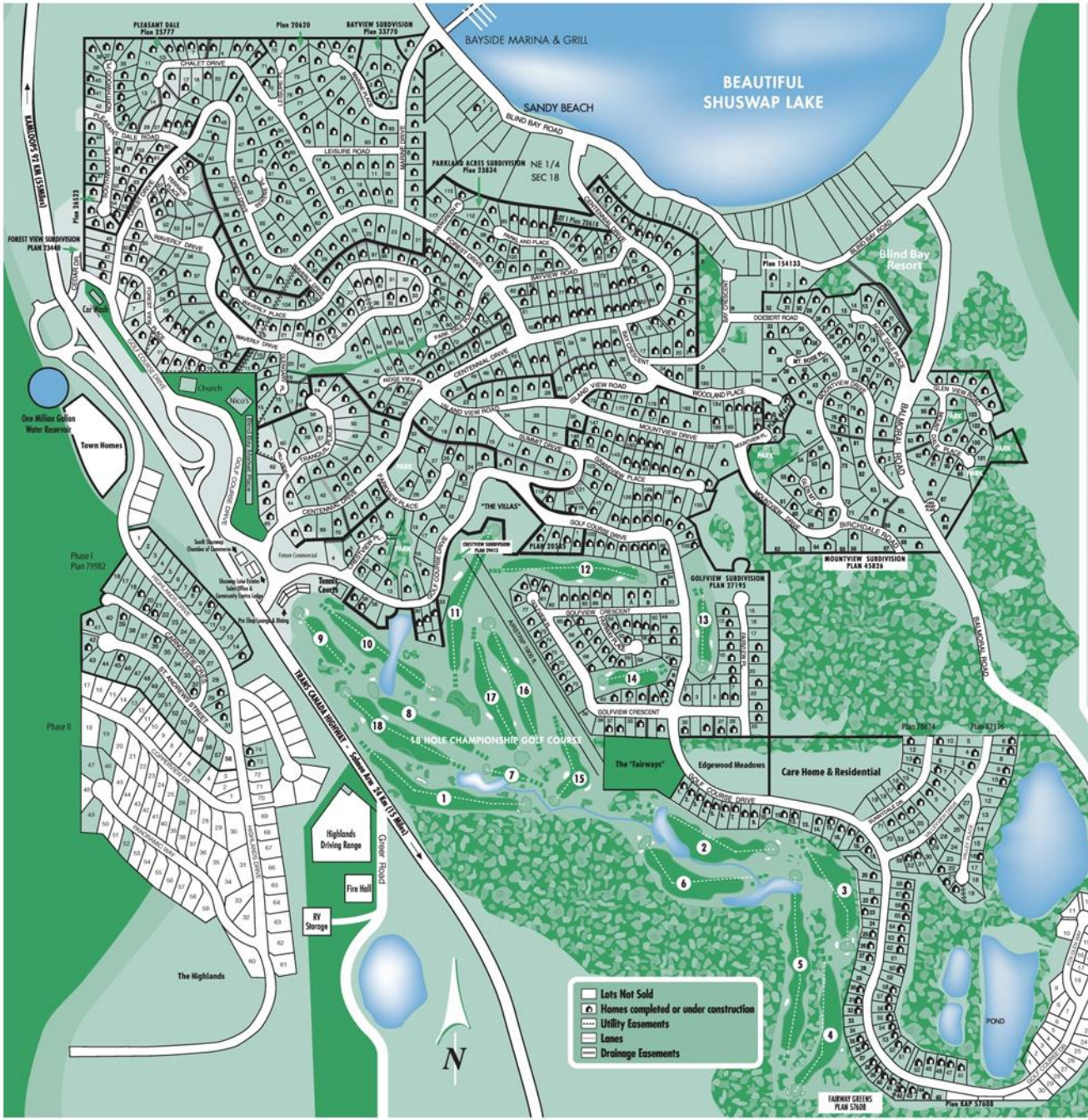
Bowolin v. British Columbia Transportation and Financing Authority

Result:

- There is an obligation to base the decision as to value on expert evidence such as appraisals or other reports.

- The advance payment and expropriation notice were set aside. If the British Columbia Transportation and Financing Authority wished to reactivate the matter, the advance payment would have to include the value of the gravel on the land.

Shushwap Lakes Estates v. HMQ, 2016 BCSC 2374 (CanLII) – Costs Decision



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Email:
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Shuswap Lakes Estates v. HMQ, 2016 BCSC 2374 (CanLII)

- No formal expropriation, no section 3 agreement
- MoTI and plaintiffs entered into an APS, which expressly stated that business loss could be claimed as if the land acquired was expropriated
- In 2013, Justice Hyslop (BCSC) ordered the plaintiffs to amend their claim to reflect that it was rooted in contract and not under the *Expropriation Act*

Shuswap Lakes Estates v. HMQ, 2016 BCSC 2374 (CanLII)

- Prior to trial, the Plaintiffs made an offer to settle of $3.4M plus costs pursuant to Rule 9-1

- Defendant responded by rejecting that Rule 9-1 applied, but countered at $1M plus costs in case the rule applied

Shuswap Lakes Estates v. HMQ, 2016 BCSC 2374 (CanLII)

Cost options

9-1(5) In a proceeding in which an offer to settle has been made, the court may do one or more of the following:

> (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
>
> (b) award double costs of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle;
>
> (c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
>
> (d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle

Shuswap Lakes Estates v. HMQ, 2016 BCSC 2374 (CanLII)

Considerations of court

9-1(6) In making an order under subrule (5), the court may consider the following:

> (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
>
> (b) the relationship between the terms of settlement offered and the final judgment of the court;
>
> (c) the relative financial circumstances of the parties;
>
> (d) any other factor the court considers appropriate.

Shuswap Lakes Estates v. HMQ, 2016 BCSC 2374 (CanLII)

- *Compensation Action Procedure Rule*, B.C. Reg. 100/2005
- **Certain rules do not apply**
- 4 Rules 3-8 and 9-1 of the Supreme Court Civil Rules do not apply to a compensation action.

Shuswap Lakes Estates v. HMQ, 2016 BCSC 2374 (CanLII)

- BCSC dismissed entire business loss claim relating to lost sales (awarded $77K for bypass relocation costs)

- A day after the judgment was released, the Plaintiffs wrote to the Defendant to accept the $1M counter-offer

Shuswap Lakes Estates v. HMQ, 2016 BCSC 2374 (CanLII)

- Plaintiffs sought to recover costs, and argued that matter was a "compensation action"

- In other words, they argued that the settlement offers under Rule 9-1 did not apply per section of the Compensation Action Procedure Rule, even though they had made the initial Rule 9-1 offer

- Defendant argued that the matter was not a compensation action, that Rule 9-1 therefore applied, and that costs after the $1M offer should be deprived

Shuswap Lakes Estates v. HMQ, 2016 BCSC 2374 (CanLII)

- Court found that, for all intents and purposes, the matter was a compensation action

- The claim was one for compensation under the Expropriation Act, and the parties treated it as such

- Plaintiffs entitled to their costs in accordance with the *Compensation Action Procedure Rule* and the Act.

Russell Inns Ltd. v. Manitoba 2016 MBCA 43

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Russell Inns Ltd. v. Manitoba 2016 MBCA 43

Facts:

- The respondent owns two adjacent lots of land, Lot 1 and Lot 2. A portion of Lot 2 was expropriated by the Province of Manitoba in accordance with the *Expropriation Act, CCSM c E190.*

- The Land Value Appraisal Commission dealt with the respondent's claim for injurious affection to its remaining land pursuant to section 30(1)(a) of the *Expropriation Act.*

Russell Inns Ltd. v. Manitoba 2016 MBCA 43

Facts:

- At the Commission, the Province brought an appraiser as a witness. The appraiser gave the opinion that the Commission should value the remaining land according to the "larger parcel theory" under which the remainder of Lot 2 and all of Lot 1 would be viewed as one parcel. Under this theory there was no reduction in market value of the remaining land as a result of the expropriation.

- The Commission did not apply the larger parcel theory. It was concluded that the remaining land was solely the remainder of Lot 2 and that the expropriation had caused that land to have no residual value. Compensation was awarded accordingly.

Russell Inns Ltd. v. Manitoba 2016 MBCA 43

Issue:

Was the Commission's decision to not apply the larger parcel theory and to assess the remaining land as solely the remainder of Lot 2 reasonable?

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Russell Inns Ltd. v. Manitoba 2016 MBCA 43

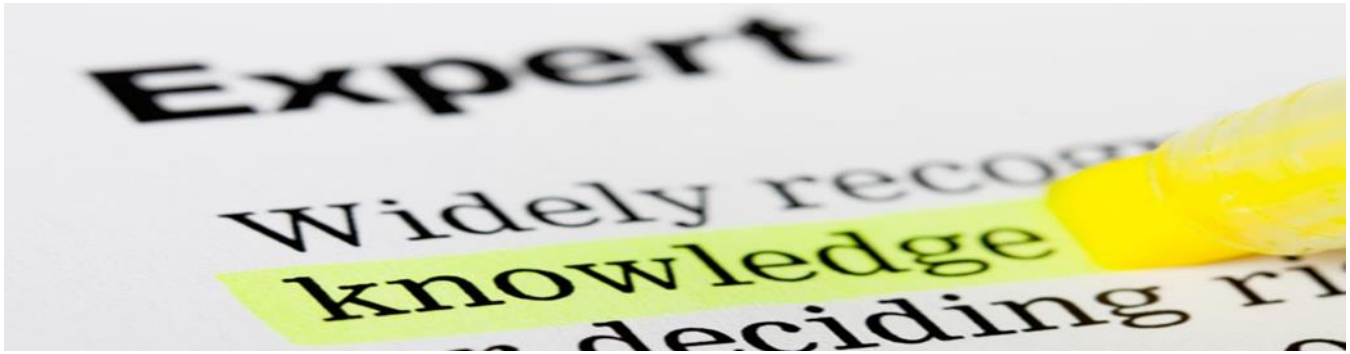
Result:

- Methodology is a question of fact, and decisions as to methodology are directly within the expertise of the Commission. This Court will not intervene in decisions of methodology unless there has been a clear error in principle.

- The Commission adequately explained why it did not adopt the larger parcel theory. After careful consideration of the facts and the law, it concluded that the Province had not provided sufficient evidence justifying the application of the larger parcel theory.

- Deference should be accorded to the Commission's decision.

Kushnir v. Macari 2017 ONSC 307, 2017 ONSC 1660, 2017 ONSC 3382



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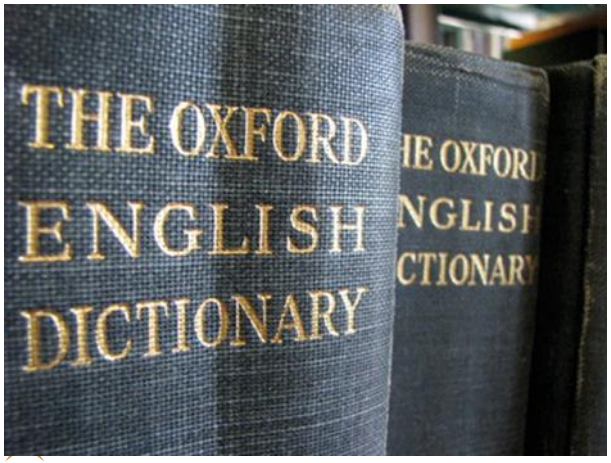
Kushnir v. Macari 2017 ONSC 307, 2017 ONSC 1660, 2017 ONSC 3382

Facts:

- The plaintiff was a pedestrian in a shopping mall parking lot when she was struck by the defendants car. The plaintiff claimed she sustained permanent and serious injuries to her back, neck, pelvis, and brain.

- The defendant requested, and was entitled to, two independent medical examinations. The plaintiff agreed to the examinations but asked that they be on the condition that the reports were not to be "ghost written".

- The Court set out the Oxford Dictionary definition of ghost writer as: A person whose job it is to write material for someone else who is the named author.



Kushnir v. Macari 2017 ONSC 307, 2017 ONSC 1660, 2017 ONSC 3382

Issue:

Should the court impose a term requiring counsel and the health practitioners to confirm that they will not engage in ghost writing and have such a term set out in an order of the court as a condition of the examinations?

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Kushnir v. Macari 2017 ONSC 307, 2017 ONSC 1660, 2017 ONSC 3382

Result:

- The parties, counsel and the court rely on the expertise of the stated author and the opinion stated in an expert's report. Many cases resolve after the delivery and exchange of expert reports, without the test of the opinion in court through examination-in-chief and cross-examination. If the parties cannot rely on the fact that the report is the sole work of its author, then the benefit and cost of expert reports is dubious.

Kushnir v. Macari 2017 ONSC 307, 2017 ONSC 1660, 2017 ONSC 3382

Result:

- To be clear, the expert report must be that of the expert and not a report written partly by administrative staff or other individuals employed by the agency through which the doctor provides expert services.

Bruff-Murphy v. Gunawardena

2017 ONCA 502

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Bruff-Murphy v. Gunawardena 2017 ONCA 502

Facts:

- The appellant was hit from behind by the respondent while stopped in her motor vehicle. The respondent admitted fault and the issue for the court was the amount of damages payable.

- One of the respondent's expert witnesses was a psychiatrist named Dr. Bail. The appellant states that Dr. Bail's report was an attack on her credibility and that he was biased.

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Bruff-Murphy v. Gunawardena 2017 ONCA 502

Facts:

- Dr. Bail's methodology included engaging in a hunt for discrepancies between what the appellant said in a short interview and what the medical records revealed. His report was a recitation of these discrepancies. At no point was the appellant given a chance to explain.

- At trial, the trial judge qualified Dr. Bail as an expert despite reservation about his methodology and independence. It became apparent to the trial judge during Dr. Bail's testimony that he had crossed the line from an objective witness to an advocate for the defence. Despite this, the trial judge did not exclude the opinion evidence or alert the jury to the concerns.

Bruff-Murphy v. Gunawardena 2017 ONCA 502

Issue:

The relevant issue in this case for our purposes was whether the trial judge erred in qualifying Dr. Bail as an expert and/or not intervening or taking steps to exclude Dr. Bail's testimony.

Bruff-Murphy v. Gunawardena 2017 ONCA 502

Result:

> *The court's residual discretion to exclude prejudicial evidence is ongoing and continues throughout the trial.*

- The test for qualifying an expert witness has two parts: 1) the threshold of admissibility: relevance, necessity, absence of exclusionary rule, and need for a properly qualified expert; and 2) the discretionary gate-keeping stage where the judge must balance probative value against prejudicial effect.
- Although the expert's report provides a roadmap of the anticipated testimony, the trial judge cannot predict with certainty the nature and content of the expert's testimony.

Bruff-Murphy v. Gunawardena 2017 ONCA 502

Result:

- Where the expert's eventual testimony raises doubt as to independence, the trial judge must exercise their gate-keeper function.

- In this case, a new trial was ordered. If the trial judge had properly applied the two-part qualification test he would have concluded that the risk of the expert's evidence outweighed the potential benefit: the expert lacked independence, was essentially an advocate for the defence, and was dangerously close to usurping the role of the jury.

John Howard Society v. Calgary,
2017 ABLCB 10

John Howard Society v. Calgary, 2017 ABLCB 10

- JHS purchased an apartment building, made “modest structural changes”, and ran it as a halfway house known as “Bedford House”

- In 2005, City expropriated Bedford House from JHS for the expansion of the Stampede grounds

- City asserted market value of expropriated property of $820K

John Howard Society v. Calgary, 2017 ABLCB 10

- JHS asserted that the property was a “special purpose structure”
- As such, JHS sought compensation based on “reasonable equivalency” under s. 46 of the AB Act – i.e. equivalent reinstatement in BC
- JHS claimed $1.25M for cost of reasonable alternative interest in land, and another $4M for the cost of re-establishment on alternate premises
- City argued that the property was not special or purpose built, and that JHS simply wanted full compensation for building a larger facility

John Howard Society v. Calgary, 2017 ABLCB 10

- City argued that in order to qualify for compensation as a "special purpose structure" you must first look at whether a market value can be established

- City argued that the property was not so unique that there was no market for it (recall that it was an apartment building with "modest" renos)

- Board found that the "modest" improvements to and location of the property made it special to JHS

John Howard Society v. Calgary, 2017 ABLCB 10

- At the time of the expropriation, was there a general demand or market for the subject property for its use?

- Panel found that the HBU of the property was not as an apartment building, but as a halfway house, although it had no market

- *"The legislature clearly contemplated that there may be situations where markets do not exist for a particular property as its highest and best use, hence s. 46 of the Act."* see page 15

John Howard Society v. Calgary, 2017 ABLCB 10

- Board awarded compensation based on equivalent reinstatement

- Board ultimately awarded $1.45M for construction of a replica house after a reduction of 15% for betterment, plus $120K for site development costs

- Key fact: JHS led evidence that it was difficult to purchase a replacement property given public backlash to various potential locations

Thoughts??? Questions???

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