British Columbia Expropriation Association

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Case Law Update

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***Gautam v. Canada Line Rapid Transit Inc*.** 2018 BCSC 1515

This is the latest chapter of the fight over the cut and cover construction of the Canada Line that was fought through the courts by Susan Heyes. This time it was brought by other impacted property owners as a class action for nuisance or, alternatively injurious affection. This ruling concerned the damages claimed by three of the impacted owners. The parties had agreed that any judgment would be against South Coast British Columbia Transit Authority alone at was the only named defendant that was an expropriating authority. The involvement of an expropriating authority is a statutory condition of a claim for injurious affection where no land is taken.

On the limitations issue, the defendants took the position that the owners could only recover damages that had occurred within one year of when the claim was first made. The claim was first raised in court proceedings on July 17, 2009, and consequently, only damages suffered after July 17, 2008 were recoverable. To resolve the limitations issue, the court worked through the specific nature of a claim for injurious affection where no land is taken. The applicable principles were to be found in *The Queen v. Loiselle*, [1962] SCR 624 at 727:

> The conditions required to give rise to a claim for compensation for injurious affection to a property, when no land is taken, are now well established [citations omitted]. These conditions are:
>
> (1) The damage must result from an act rendered lawful by statutory powers of the person performing such act;
> (2) The damage must be such as would have been actionable under the common law, but for the statutory powers;
> (3) The damage must be an injury to the land itself and not a personal injury or an injury to business or trade;
> (4) The damage must be occasioned by the construction of the public work, not by its user.

The focus of the limitations defense turned to the second condition, known as the "actionable rule". Did the construction of the Canada Line constitute nuisance, but for statutory authority, and if so, when? To amount to a nuisance, the interference had to be both "substantial" and "unreasonable". In a previous hearing, the court concluded that the interference was substantial and at this hearing, the defendants conceded that the substantial interference caused by the cut and cover construction was also unreasonable. However, the defendants argued that the project was finished at the location in question by November 30, 2007 and that any lingering interference after that point in time was no longer, "unreasonable". Accordingly, the plaintiffs suffered no damage within a year of filing their claims; and their claims were statute barred.

The plaintiffs argued that time did not begin to run until the damage was complete.

While moving through its reasoning, the court seems to replace the concepts of "substantial" and "unreasonable" with the single descriptor, "intolerable". The court then held that it was not the degree of interference at any given moment that was intolerable, it was, instead, the length of time of the interference.

The court points to several factors to consider in determining whether the nuisance is actionable, noting that the "nature, severity and duration of the interference, the character

of the neighborhood, the sensitivity of the plaintiff's use and the utility of the action" will guide the assessment.

Moreover, the intolerable interference did not end by November 30, 2007 as the defendants argued. Rather, the court found that the intolerable interference continued while utilities were restored and the surface of Cambie was refinished and repaved. This took the intolerable interference well into the summer of 2008 and past the crucial date of July 17, 2008. The claims were not out of time.

The next question was whether the plaintiffs were limited to claiming only those losses that occurred after July 17, 2008. The court said, no. Carrying through with the notion that there was a duration component to a nuisance, the court held that it would not make sense to require an injured party to make a series of claims. So, an owner can wait for the nuisance to end (and then a year) prior to making a claim for compensation.

The final matter of interest is the assessment of damages. Something to keep in mind here, this was not a viva voce trial. The evidence was all entered through reports and documents, and perhaps the Court was done a disservice in not having the expert in person to explain the technical aspects of the valuation. The plaintiffs, on the other hand, led no expert evidence and relied solely on the accounting records of the individual plaintiffs to demonstrate the loss.

Injurious affection where no land is taken affords owners only a limited form of potential compensation. Unlike the situation of a partial take, where business losses that are proven to be directly attributable to the works may be compensable, injurious affection no land taken is far more restrictive. Here the damages are limited to indemnifying only injury to land itself, and not personal or business injury.

The defendant's appraiser opined that injurious affection could be (para 49) "estimated by determining the difference in estimated market value of an interest under two scenarios: (A) as if the works did not occur and (B) taking into account the existence of the works".

The court spent some time teasing out an appropriate way to describe the type of damages theoretically available and concluded:

> Para 59 "The proper measure … is the difference in the market value of the leases with and without the works over the period during which the premises were injuriously affected. What were the plaintiffs obliged to pay, and what would someone else with similar interests have paid with full knowledge of the impact of the works? What, in short, was the effect of the works on the letting value of these properties in the open market while the works continued?"

Reti v. Sicamous (District) **1999, 66 L.C.R. 57**

This is not a new case but is included for comparison with *Gautam v. Canada Line Rapid Transit Inc.*

In 1995, Sicamous acquired land behind the Retis' property for a sewage treatment facility and public works yard. No land was taken from the Retis. The plant started to operate on June 14, 1996. The Retis filed their claim for compensation on October 14, 1997. Sicamous took the position that their claim was barred by the operation of the one year limitation set out in s. 42 of the *Expropriation Act*. The Vice Chair had made an earlier ruling that the evidence did not establish that the Retis had meaningful knowledge of the

loss in market value of their property as a result of the injurious affection from the sewage treatment facility prior to October 14, 1996. That finding was made despite the fact that there were smells and noises emanating from the plant and a probability that this impacted on the market value of their property. The Vice Chair suggested that there had to be "meaningful knowledge" of the particulars of the loss which perhaps did not occur until the Retis received an appraisal report or sold the property. Sicamous was given liberty to reargue the limitation defense at the full hearing.

***Reti v. Sicamous (District)* 1999, 68 L.C.R. 296**

At the full hearing, the Sicamous again raised the limitation period. The Board noted that the difficulty for Sicamous was that the claim was for a continuing nuisance and, therefore, a new cause of action arose every day the nuisance persisted. The issue for the board was "what damage the Retis would have know about before October 14, 1997. In other words, the limitation provision did cut off the Retis' claim; they could not reach back in time longer that the one-year limitation. Therefore the Retis' claim for cracking of their walls and leaks in their pool caused by vibration during construction were out of time.

469238 B.C. Ltd. (c.o.b. Lawrence Heights) v. Okanagan Aggregates Ltd. v.

***(c.o.b. Motoplex Speedway and Event Park),* [2016] B.C.J. 829**

This case concerns a nuisance claim against a racetrack. It is neither new nor about expropriation. It is included simply as a comparison to *Gautam v. Canada Line Rapid Transit Inc*.

One of the defenses raised was the *Limitation Act*. The proceedings were commenced in October 2009. There, after determining that the applicable limitation period was 6 years, the court assessed damages from October 2003 onward. In other words, the plaintiffs were not permitted to reach back in time further than the applicable limitation period. Note as well that this was the type of nuisance that the court in *Gautam* was dealing with, i.e., a nuisance that the longer it went on the more interference, it would cause.

***Nye-Islam v. West Vancouver (District)*, 2018 BCSC 868**

On September 2, 2015, the District of West Vancouver expropriated Ms. Nye-Islam's residential property at 1454 Argyle Avenue. The owner received an advance payment of $5,300,000. Her appraiser, Geoff Johnston valued the property at $8,000,000. This was based on the highest and best use of the property being as part of a land assembly and a rezoning to allow for a multi-residential development. Alternatively, according to Mr. Johnston, the property was worth $6,600,000 without redevelopment.

The parties agreed that in considering the value of the property, the District's acquisition policy had to be ignored. This agreement followed pursuant to s. 33 of the *Act*

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

> (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,

The District had instituted an acquisition policy for waterfront properties. Ms. Nye-Islam's property was one such property. The question for the appraisers and the court then isn't simply "what is the highest and best use at the date of taking" but the more nuanced question of "absent the Acquisition Policy, what was the highest and best use at the date of taking".

The disagreement was over what if any impact that policy had on the value of the subject property. After reviewing the evidence, the court concluded at paragraph 34:

> When examined in its entirety, the historical evidence about the District's plans and attitudes about rezoning the area in which Ms. Nye-Islam's property is located is at best mixed, even if one disregards the existence of the acquisition plan. Thus, despite Ms. Nye-Islam's able argument, there is insufficient evidence to conclude on a balance of probabilities that, but for the acquisition plan, rezoning of Ms. Nye-Islam's property for multi-residential use was ever anything more than a mere possibility.

Assessing highest and best use is often a complex challenge. Adding a further theoretical element in the form of the statutory disregard only serves to complicate the matter. The appraisers are required to case their mind to an alternate reality and attempt to infer how different zoning policies would have affected the subject property.

The focus then turned to the value of the property, as is. Essentially, it became a battle of appraisers. That did not go well for the owner. At paragraph 40, the court wrote:

> In my view, the District's evidence of the valuation of the property is more compelling than Ms. Nye-Islam's. Mr. Johnston's approach was revealed as unreliable by the reports of Mr. Hooker and Ms. Cawley. His evidence was also significantly undermined in cross-examination.

It did not end there. Other comments from the bench included:

Para. 42	First, Mr. Johnston's use of comparables in Kitslano was not helpful….. In this sense, Mr. Johnston was giving equal weight to the significantly different Vancouver comparables, which cast doubt on the objectivity of his approach.
Para. 43	Mr. Johnston's approach was not based on available empirical evidence, but rather his subjective opinion about the superiority of Ambleside.
Para. 44	Third, Mr. Johnston admitted that use of district-wide HPIs (home price indices), as Mr. Hooker had done, is standard to make time adjustments and generally produces accurate results.
Para. 45	Finally, cross-examination revealed that many of Mr. Johnston's adjustments to property values based on the property's physical attributes were exaggerated. Mr. Johnston also based his adjustments on sparse or inadequate information.
Para. 47	Overall, much of Mr. Johnston's appraisal is simply too subjective and speculative.

In the end, the court held that the property was worth precisely what the District had paid to the owner by way of an advance payment.

***Bowolin v. B.C. Transportation Financing Authority*, unreported,**

(Kelowna Supreme Court file S114900 dated June 19, 2017)

In this case, the court struck down an expropriation on the grounds that the authority had made an inadequate advance payment. The case raises two issues. First, are there any requirements on the authority concerning the making of an advance payment? Second, is a proper advance payment a condition of a valid expropriation. There is, as cited by the court, legal authority for the proposition that an advance payment must be based on the expert opinions delivered to the owner with that advance payment. However, the court does not appear to have considered that *Van Kam Freightways Ltd. v. Kelowna (City)*, [2007] B.C.J. No. 1026 was determinative to the question before it on judicial review. In *Van Kam*, the appellant, the holder of an unregistered lease argued that the expropriation was a nullity as it had not received an advance payment or the other related expropriation documents. In dismissing the appeal, our Court of Appeal wrote:

> Kelowna satisfied the requirements of s. 4, which contains the only conditions precedent required under the Act for a valid taking.

According to our Court of Appeal, the making of an advance payment is not a prerequisite of a valid taking. *Van Kam* was recently followed in *Prince Rupert (City) v. Sun Wave Forest Products Ltd*., [2018] B.C.J. No. 307 (see, below).

The judicial review was argued on a rather different footing than what comes out through the decision. Very little of either party's argument features in the decision.

Despite the fairly clear legal authority for the BCTFA to rely on a single appraisal report in fashioning an advance payment, the court appears to have been guided by a view that the BCTFA took an unreasonably hard line in negotiations. The decision, as it stands, also appears to indicate that authority's have a duty to identify and value interests above and beyond the market value of the interest to be acquired.

***Prince Rupert (City) v. Sun Wave Forest Products Ltd*.,**

[2018] B.C.J. No. 307

This case stands in sharp contrast to Mr. Justice Groves decision in *Bowolin*. The case concerns the efforts by Sun Wave to essentially confound the City's efforts to expropriate. In fact, it had commenced independent proceedings seeking a declaration that the notice of expropriation was invalid. In these proceedings, the City had petitioned the court for an order that it could comply with s. 20 of the *Expropriation Act* by making a series of payments to various, identified parties and paying the balance to Sun Wave. Sun Wave argued that the court lacked the jurisdiction to make the orders sought because there was an unfulfilled condition precedent (per s. 20(4)) to the City's ability to proceed with an expropriation. The court disagreed and cited *Van Kam Freightways Ltd. v. Kelowna (City)*, 2007 BCCA 287 for the proposition that the only conditions precedent to an expropriation are those set down in s. 4 of the *Expropriation Act*.

***Bowolin v. B.C. Transportation Financing Authority,* 2017 BCSC 2080**

This is the decision on costs following the judicial review. The parties provided written submissions to the court on this issue. The authority relied on the traditional immunity from costs enjoyed by statutory decisionmakers on *judicial review*. The petitioners relied on the costs provisions generally applicable to *compensation actions*. Thus the parties approached the question from completely different perspectives.

The court accepted that the principles applicable to judicial review set the general framework. After noting the general immunity from costs, the court nonetheless proceeded to award costs against the BCTFA. The basis for doing so appears to be the judge's view that the way the BCTFA handled the negotiations with the Bowolins was "so egregious that, even in spite of the rarity of such awards, costs should be awarded."

Nguyen v. B.C. (Minister of Transportation and Infrastructure),

[2018] B.C.J. No. 219

This case concerned a claim for compensation for a partial acquisition of a property for a highway project. The area acquired was 451.1 sqm in fee simple and a further 162.8 sqm for a SRW. The owner received an advance payment of $88,800 and sought an additional $204,200 plus interest. The Province took the position that the owner had been fully compensated.

The owner argued that the highest and best use of the property was in anticipation of future development. This would require a rezoning of the property which the owner claimed was more likely than not.

The owner did not testify and the Province asked the court to draw an adverse inference from the owner's failure to testify. The court ultimately agreed on the basis that the plaintiff would have knowledge of matters relevant to the proceedings and the failure to testify was likely because the evidence would be at best unhelpful and likely harmful to the plaintiff's case.

Like a number of decisions this year, much turned on the court's assessment of the respective expert evidence. The owner presented their case on the strength of two experts, a planner and an appraiser. The owner's planning expert testified that the taking resulted in the loss of a single buildable lot. Among other issues with his report, some of the evidence in the planner's opinion focused on events and matters that post-dated the acquisitions in question.

The owner's appraiser testified. In the normal course, the appraiser would then adopt the planner's highest and best use and proceed to value the loss on that basis. However, what occurred here is that the appraiser partially adopted the planner's conclusion of highest and best use (loss of a lot) but nonetheless proceeded to perform a "before and after" analysis based on injury to the parcel caused by "increased noise, pollution, and loss of access". The appraiser listed three main items that reduced the value of the property in the after condition. These were: 1) access; 2) increased exposure to noise and pollution; and 3) the reduced yield of any subdivision of the property in the after condition. The plaintiff's appraiser did not conduct a residual analysis as part of their report, and so

the court was left with two expert reports speaking at cross purposes. Other problems with the appraisal were noted by the court.

Regarding access, what came out in cross-examination was, as the judge put it, the appraiser, "simply did not know the geography of the area at that time."

Regarding noise and pollution, the appraiser admitted never having seen the defense report that demonstrated that the noise level had gone down in the after condition. The appraiser remained firm on his position that the owner felt that noise was a large issue, but as the court pointed out, the owner did not testify.

Regarding the reduced yield aspect of the claim, the court noted that the appraiser had not in fact valued the specific impact of the reduction in yield. In addition, the appraiser conceded that his comparable sales data was simply reproduced from an earlier report (not in evidence) done by someone else.

After reviewing the appraiser's comparable sales analysis, the court had this to say at paragraphs 77 and 80:

> Mr. Coley Donohue's report and testimony were punctuated with repeated indications that after the taking, the lands were subject to more noise, pollution, dirt, and longer travel to access municipal services. He resiled from these observations when cross-examined and, as such his opinions are entirely unreliable evidence because his assumptions were not proved, he based his report largely on conjecture or speculation.
>
> Overall, I can place very little weight on Mr. Coley-Donohue's opinion concerning the differences in market value of the plaintiff's property pre and post taking. His evidence concerning the impact of dirt, light, noise, pollution, and access routes open to the plaintiff was undermined to such an extent that his opinion concerning values can be given so little weight that it is unhelpful. Further, his analysis of comparator properties was fundamentally flawed, in part because of his unreliable assumptions, that his opinion cannot be relied on. His overall reliability was seriously undermined on cross-examined (sic) and his opinion falls short of meeting the plaintiff's burden of proof concerning loss in value caused by injurious affection he claims resulting from the taking.

A large portion of the decision focuses on the infirmities of the evidence led by the plaintiffs and the defendant's experts by contrast escaped relatively unharmed. The court accepted the evidence of the authority's engineer concerning costs of development and in the end accepted the "before and after" valuation performed by John Ho.

Nguyen v. B.C. **(Minister of Transportation and Infrastructure),**

[2018] B.C.J. No. 1338 (on costs)

This matter went back before the trial judge to sort out costs. The owner sought recovery of her costs despite not recovering more that 115% of the advance payments. The Province sought recovery of its costs thrown away on account of the owner being granted an adjournment of the trial after the trial had commenced. The court awarded the owner 60% of her costs on the basis that the plaintiff could not be faulted for pressing forward with her claim to a certain point. There is nothing particularly new or exceptional about that analysis or result. The more unique and interesting aspect of this ruling is the award of costs in favour of the Province. Prior to this decision, one might have thought that there were only two circumstances where an owner could be liable for any part of the authority's costs. Those were: 1) an expropriation under the *Water Sustainability Act*; and 2) a claim for compensation for injurious affection where no land is taken. This decision creates or at

least acknowledges one more circumstance in which the owner may be liable for a portion of the authority's costs: that being in the context of interlocutory matters.

Teal Cedar Products Ltd. v. B.C. (Ministry of Forests, Lands and Natural Resource Operations), **[2018] B.C.J. No. 389**

This was an appeal of an arbitrator's refusal to grant Teal Cedar a gross up to cover the tax implication of the award. At paragraph 36, the Court of Appeal quotes from the SCC decision in *Athey v Leonati* to the effect that possible future events do not need to be proven on a balance of probabilities. Instead, they are given weight according to their relative likelihood. A future possibility even if unlikely (below 50%) will be taken into account as long as it is a real and substantial possibility and not mere speculation. This seems at odds with what our courts are doing in expropriation cases. For example, in *Nguyen*, the court refers to the B.C. Court of Appeal reasons in *Holdom v. B.C. Transport*, 2006 BCCA 282 for the proposition that to be taken into account the chances of a future rezoning must be over 50%. Given that expropriation laws are to be interpreted and applied somewhat generously in favour of the owner, this divergent treatment of future possibilities is curious.

Shuswap Lake Estates Ltd. v. B.C. (Minister of Transportation and Infrastructure), **[2018] B.C.J. No. 9**

This case concerned an agreement arising out of an acquisition for highways purposes near Shuswap Lake that preserved the owners' rights to seek compensation for business losses. The construction began in April 2010 and ended in August 2011.

The general theme of the business loss claim was a loss of lots sales due to the project. In support of their business loss claims, the plaintiffs called two experts, an appraiser and a business valuator.

The appeal focused on the admission and use of expert evidence at trial. The Court of Appeal upheld the trial judge's finding that the plaintiffs had failed on the evidence to prove on a balance of probabilities that the project caused the decline in the lot sales. With that finding of fact, none of the expert evidence tendered by either side really mattered.

British Columbia (Minister of Transportation and Infrastructure) v. Registrar, Victoria Land Title Office**, 2018 BCCA 288**

This case concerns strata property law in B.C. The Province had entered into an agreement with a strata corporation for the purchase of a portion of the strata's common property for use in the slope stabilization along a section of the Trans-Canada Highway on Vancouver Island. The Province submitted to the Land Title Office, a reference plan to dedicate the area purchased as highway pursuant to s. 107 of the *Land Title Act.* The Province also submitted a certificate confirming a ¾ vote by the owners approving the sale to the Province. The Registrar declined to register the plan on the basis that a plan dedicating common property must be signed by all of the registered owners in fee simple.

Under B.C. law, every owner of a strata lot owns, as a tenant in common, a proportionate, indivisible share of the common property.

The problem facing the Province was the interplay between the *Strata Property Act* (*SPA*) and the *Land Title Act* (*LTA*). Under s. 80(2)(a) of the *SPA*, all that is required to dispose of common property (in some circumstances) is a resolution passed by a ¾ vote at a general meeting of the strata. But, then s. 253(1)(a) of the *SPA* provides that a disposition of a freehold interest in common property is deemed to be a subdivision under Part 7 of the *LTA*. Part 7 of the *LTA* includes s. 97 which provides that a subdivision plan must be signed by each owner of the land subdivided. So, the Registrar applied s. 97 of the *LTA* to conclude that the Province needed everyone's signature in order to register the dedication plan. In front of the Court of Appeal, the Province argued that a dedication under s. 107 of the *LTA* was distinguishable from a more typical transfer of a freehold estate and that s. 107 dedications should not be subject to s. 253 of the *SPA*. Much of the case concerns the standard of review applicable to the Registrar's determination. The Court of Appeal concluded that the presumption of deference applies to this case. The Court of Appeal went on to find that the Registrar's decision that the dedication was a subdivision was reasonable. The Province lost.

Conclusion

A couple themes run through a few of the cases this year. Chief among them, the old adage about assumptions. In many expropriations the parties have historically assumed that the taking was the cause of the damages, whether injurious affection or disturbance. What we see from *Nguyen* and *Shuswap Lake Estates* in particular is that owners play a dangerous game when they invite the court to make the connection between the taking and the damages without compelling evidence to tie the two together. Both cases involved claims that could have been framed differently and where the evidence could have been presented on a different footing. If that had occurred the results may well have been very different. The same goes for experts and the assumptions they make (or are instructed to make). This year we see that in at least 3 cases. In *Gautam, Nguyen* and *Shuswap Lake Estates* the owners were unsuccessful because the assumptions that the experts relied on were not proven. Now, there may be all sorts of reasons why the assumptions were framed by counsel as they were, but it behooves all players, counsel, experts, parties, to be on the same page about how the assumptions are going to interact with the facts that can be proven.