

DUELING OPINIONS

EXPERTS AT ODDS



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Topic – Dueling Opinions

Why? More can be explained than might appear

Constituency has a role to play

Options to help resolve

Include some case references



Why?

- **Terms of Reference**
- **Appraiser interpretation of TOR**
- **Assumed Facts**
- **Lack of Good Data**



Four cases

1. **Geoffrey W Hodgson et al v Musqueam Indian Band and HMQ, & third parties 2017 FC 509**
2. **Rainbow Country Estates Ltd v Whistler, 2010 BCSC 300**
3. **Royal Bank of Canada v Westech Appraisals Ltd, 2018 BCSC 473**
4. **Cari-Van Hotels v Globe Estates, 1974 CanLii 1686 BCSC**



Redemption First

Cari-Van Hotels, although an old decision (1974) often canvassed:

“Variations, even wide variation, between the opinions of two or more appraisers are not uncommon. The profession of appraisal is not an exact one. It comes down essentially to the opinion of one person arrived at in large part by assessing the opinions of other persons.”



Redemption First

Justice Butler, in *RBC v Westech* also considered the uniqueness of appraisers as experts, and cites:

“Courts have recognized that an appraiser must be treated differently from professionals in more exacting fields such as architects, engineers or building inspectors: *Haven Invt. Ltd. v. Harper*, [1985] B.C.J. No. 190 (Co. Ct.), *aff’d* (1986), 10 B.C.L.R. (2d) 56 (C.A.).



Terms of Reference

- If no differences, no case
- Often favors one side of the story
- Can influence approach, or
- HBU
- Encourages using specific methods



Terms of Reference - Example

- Musqueam Ruling calls the initial terms of reference “somewhat of a black hole”
- The letter of instructions provided to Mr. Neufeld asked that he prepare a report that addressed “what if any reductions should be made to the fee simple value of off-reserve, unimproved, single family residential lots in the vicinity of Musqueam IR No. 2”



Assumed Facts

- Just as influential as TOR
- Sometimes in combination with TOR
- Supplied to support position – do they go too far
- May include opinions of other parties
- Often to one side and not the other



Assumed Facts – Examples

- Ontario case to be discussed
- Another ongoing litigation – Assumed Facts ignore previous ruling on key issue



Appraiser Interpretation

- Buy into the “story”
- Feel reluctant to challenge Terms of Reference or AF
- Assume other support for position
- Rely on unconfirmed or incomplete information



Appraiser Interpretation – Examples

From RBC v Westech:

[196]...Instead of considering whether Mr. Bartlett's data was adequate and relevant and whether his application of the appraisal methods and techniques was appropriate and reasonable, Mr. Doolan approached the case by considering what the correct value of the Property was as of the date of the Appraisal...



Poor Data

- Can affect the spread
- Feel reluctant to challenge Terms of Reference or AF
- Assume other support for position
- Rely on unconfirmed or incomplete information



Poor Data - Example

From *Rainbow Country Estates Ltd v Whistler*:

“As a result, the usefulness of many of Mr. Dybvig’s comparables is diminished...I have concluded that the sales used by Mr. Dybvig in his comparables 2, 4, 5, 6, 7, 8, 9, 12 and 13, qualify as either distressed, involuntary or non-arm’s length sales, and the circumstances and conditions of those sales have not been adequately explained by Mr. Dybvig.”



The Other 20%

Back to Musqueam:

“Mr. Neufeld acknowledged that the question of the appropriateness of an "on-reserve discount" was a central issue that was of extremely high importance in this case, and he admitted in cross-examination that he had been "careless" in his analysis on this point.”



Role of Constituency

- Blatant examples should be reported
- Important to the profession
- AIC process now streamlined



Options to Resolve

- Third party reviewer
- Important to the profession
- AIC process now streamlined



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