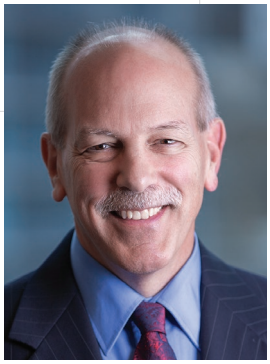

Contamination remediation costs and expropriation compensation

Tanex Industries Ltd. v. Greater Vancouver Water District

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In my last article, I raised the question whether an expropriating authority should be able to deduct costs to remediate contamination on expropriated property.[1] One might respond rather quickly by saying, if such costs affect market value, why not?

Assume an owner is only partly responsible for contamination of its property. Outside an expropriation proceeding, the owner can remediate the property, seek cost recovery from other responsible parties under environmental legislation, and then sell the property without discount for remediation costs. The owner avoids loss of property value for contamination it did not cause or create and insulates itself from cost recovery actions related to the property that could have been initiated by others.

On the other hand, when property is expropriated, a deduction from compensation for contamination remediation imposes the full cost on the expropriated party whether responsible for the contamination or not. Further, the expropriated party is left open to possible future liability in any subsequent cost recovery proceedings related to the property. This situation is what some American courts refer to as 'double liability,' and, in their rulings, they have found a basis in their constitutions to award 'just compensation' rather than compensation based on market value.[2]

In Canada, there is no constitutional basis that would allow the result that some American courts have fashioned, but I ended my last article pondering whether expropriation legislation could be interpreted so as to protect against double-liability. The January 23, 2019 British Columbia Supreme Court decision in *Tanex Industries Ltd. v. Greater Vancouver Water District*, 2019 BCSC 74 [*Tanex*] suggests not.

Factual background and positions of the parties

In 2016, the Greater Vancouver Water District (GVWD) expropriated the fee simple interest Tanex Industries Ltd. (Tanex) held in real property it used primarily for its mill-working business. The advance payment GVWD made to Tanex pursuant to the *Expropriation Act*, RSBC 1996, c. 125, reflected a deduction of $500,000 based upon GVWD's opinion that there was contamination on the property and its view of how much it would cost to address the alleged contamination. At the date of writing, there is no determination by any regulatory authority that the property is contaminated.

In a pre-trial application to the British Columbia Supreme Court, Tanex maintained that there should not be a deduction for contamination costs when property is expropriated. Tanex relied upon the American courts (discussed in my previous article) that exclude evidence of contamination in fixing compensation for expropriation and upon a 'bundle of rights' interpretation of 'market value.' (Market value is the basis for expropriation compensation under the British Columbia legislation.)

Tanex argued that the bundle of rights GVWD acquired on expropriation included a right to pursue a cost recovery action under the *Environmental Management Act*, SBC 2003, c. 53 (*EMA*) in respect of any contamination costs GVWD incurred for the property. However, by deducting $500,000, the value of the cost recovery right was not reflected in the compensation. Tanex submitted that GVWD had not paid for the *EMA* right and, therefore, had not paid market value for the property as required under the *Expropriation Act*. Consistent with the American case law, Tanex submitted that if, in fact, the property was contaminated, it was appropriate that the expropriator bear the cost and effort of remediation. The expropriator could then initiate a cost recovery lawsuit under the *EMA* that would determine if there was contamination and who was responsible for it.

GVWD countered that consideration of costs to remediate contamination are incidental to a determination of market value and therefore its deduction was appropriate.

The argument against deduction of contamination costs

American courts divide between jurisdictions that do not allow evidence of contamination remediation costs (exclusion approach) and jurisdictions that allow such evidence (inclusion approach). In *Moorhead Economic Development Authority v. Roger W. Anda, et al.*, 789 N.W. 2d 860, 2010 Minn. LEXIS 534 (Supreme Court of Minnesota) [*Moorhead*], the court described the competing approaches.

Under the inclusion approach, evidence of environmental contamination is admitted on the basis that environmental contamination affects the market value of property and, therefore, is relevant in determining compensation. However, in the exclusion approach, courts hold that valuing expropriated property as contaminated is unfair to the property owner. As the court in *Moorhead* noted:

> ... Admitting evidence of contamination and remediation costs during the condemnation proceeding encourages a jury to value the property as contaminated, often times reducing the condemnation award dollar-for-dollar by the actual or estimated cost of remediation... At the same time, the property owner may be held liable for contamination under environmental law...
>
> ... The exclusion approach, in contrast, acknowledges that environmental contamination of a condemned property necessarily involves environmental liability laws and avoids subjecting an owner of condemned property to double liability. If remediation costs are not admissible in condemnation proceedings, the property owner will not be forced to surrender his property to a condemnor at a reduced price, thus avoiding any risk of double liability.

The court wrote that it is open to the expropriating party to seek redress from responsible property owners, including the expropriated party, through a separate court proceeding. A logical extension of this observation is that such a proceeding would adjudicate all responsibility for the contamination, rather than effectively resting all liability on the expropriated party through a deduction in compensation.

The court in *Moorhead* noted that an expropriation proceeding does not have the same procedural safeguards as an environmental contamination action, including the opportunity for the property owner to contest liability for the contamination, bring third party actions against former owners, assert certain defences, or recover from any insurance coverage. Allowing a deduction for remediation costs – estimated or actual – allows the expropriator to avoid the procedures established under the environmental legislation for recovering remediation costs. In *Moorhead*, the court recognized this would mean that, even though the owner was not held liable for the contamination through an environmental action, he was forced to pay for the contamination through a reduced compensation award.

The *Tanex* decision

At paragraphs 26 to 32, the court described its understanding of Tanex's arguments:

> [26] Tanex's overarching position on the application is that, as a matter of law, and quite apart from the fact that there has been no formal determination of contamination, the *Expropriation Act* requires GVWD to pay market value for the Property as if any contamination on it had been remediated without regard to the cost to remediate. To do otherwise, it submits, will result in an unfair compensation

award and expose it to additional non compensable losses if it becomes a party to a recovery action for remediation costs brought under the *EMA*.

[27] Its position is broken down into the following points.

[28] First, deducting anticipated costs of potential contamination from market value unfairly strips it of its right to remediate and be compensated for any increased value of the Property that might result.

[29] Second, as a result of the expropriation, it has lost its right to seek recovery of any such remediation costs under an *EMA* recovery action from those responsible.

[30] Third, those rights, both of which it argues have value, were included in the basket of interests it held as an owner of the Property in fee simple prior to the expropriation.

[31] Fourth, it will suffer additional unfairness if it is subsequently sued in a recovery action by the GVWD brought against it (as a potentially responsible person) along with others should GVWD pay to remediate the Property. Not only will it have lost the value of the $500,000 deducted by GVWD in the expropriation, Tanex argues that, even if its liability is limited on an allocation analysis amongst defendants in a recovery action, it is nonetheless jointly and separately liable (per s. 47 of the *EMA*) and potentially responsible to pay for the entire judgment if other defendants lack the financial means to pay: *Dolinksy v. Wingfield*, 2015 BCSC 238 at paras. 39-44.

[32] Tanex relies quite heavily on the remarks of Mr. Justice Cory in *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32 in support of its position that, in every case, full and fair compensation must be paid for loss and damages which are the natural and reasonable consequence of the expropriation.

Putting it shortly, the court was not persuaded. First, it distinguished *Dell* on the basis that it addressed disturbance damages in an expropriation and not market value. The court held that, in British Columbia, the approach to compensation is dictated by the *Expropriation Act*, and this means market value. As for the 'exclusionary approach,' the court said it represented a minority view of courts in the United States, based upon constitutional considerations for property rights and 'just compensation,' neither of which has application in Canada. The court placed reliance upon *Nyugen v. British Columbia (Transportation and Infrastructure)*, 2018 BCSC 192, an expropriation case where the court allowed deduction of development costs that would be required to achieve the highest and best use of the property. At paragraph 52, the court wrote in part, "Applying the holding in *Nguyen* to this case, I conclude that it is always open for the trial judge to deduct remediation costs where appropriate. If remediation costs affect or promote a property's market value, deduction may be made. Where remediation costs will not do so, or where there is no properly quantifiable basis on the evidence to determine an appropriate deduction, it is open for the trial judge to conclude that no deduction ought to be made..."

The British Columbia Supreme Court noted Tanex's concern that the expropriation of its property interest subsumed rights it held under the *EMA* related to cost recovery actions, while leaving open the possibility Tanex could be drawn into a future cost recovery action as a former owner. At paragraph 56, the court wrote that it is not clear that Tanex has lost that right, but that the matter would have to be decided on another day – not a comfortable position in which to leave an expropriated party. Assuming for the moment that there is contamination on the Tanex site and remediation will cost what GVWD estimates, there is presently no guidance on the question of whether Tanex will be able to recover the whole or seek contribution of the amount deducted from other responsible parties (e.g. former owners). Even if Tanex has standing to initiate a cost recovery action, it is not clear that a deduction for estimated contamination costs in an expropriation hearing will equate to a payment of remediation costs forming the basis of a cost recovery action under the *EMA*.

Concluding remarks

At the timing of writing, the *Tanex* decision is just a few days old and it is not known how the parties will respond to the court decision. At the very least, it will create some difficult decisions for the expropriated party who, until the expropriating authority 'knocked on the door,' were minding their own business running their mill-working operation.

End notes

1 *Canadian Property Valuation*, Vol 62, Book 4, 2018 at page 32

2 *Canadian Property Valuation*, Vol 62, Book 4, 2018 at page 32-34

This article is provided for the purposes of generating discussion and to make practitioners aware of certain challenges presented in the law. It is not to be taken as legal advice. Any questions relating to the matters discussed herein should be put to qualified legal and appraisal practitioners.