

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Nguyen v. British Columbia*  
(*Transportation and Infrastructure*),  
2018 BCSC 192

Date: 20180209  
Docket: S136095  
Registry: New Westminster

Between:

**Thuy Bich Nguyen**

Plaintiff

And

**Her Majesty the Queen**  
**In Right of the Province of British Columbia as Represented by**  
**The Minister of Transportation and Infrastructure**

Defendants

Before: The Honourable Mr. Justice Armstrong

## Reasons for Judgment

Counsel for the Plaintiff:

P. Phan  
T.J. Quirk

Counsel for the Defendant:

J.B. Melville

Place and Date of Trial/Hearing:

New Westminster, B.C.  
December 14, 2015  
April 18-21, 2017

Place and Date of Judgment:

New Westminster, B.C.  
February 9, 2018

**Table of Contents**

**INTRODUCTION ..... 3**

**BACKGROUND..... 4**

    The Lands ..... 4

    The Project ..... 4

    Position of the Parties: ..... 5

        The Plaintiff’s Position ..... 5

        The Defendant’s Position..... 8

    The Witnesses..... 10

        Oleg Verbenkov ..... 10

        Calvin Coley-Donohue..... 11

        John Ho ..... 19

        Declan Rooney ..... 21

        Pitcairn..... 22

        Mark Bliss ..... 23

        Douglas Fourchalk..... 24

**LAW..... 25**

    Highest and Best Use..... 27

**ADVERSE INFERENCE ..... 32**

**CONCLUSION..... 33**

**Introduction**

[1] In June 2010, the defendant was preparing to execute a planned reconfiguration of highway improvements in Surrey known as the Port Mann Bridge Highway 1 Improvement Project (the “Project”). This work involved new road construction at the intersection of Highway 1 (HWY 1) and 176 Street.

[2] The plaintiff owned land at 10267–176 Street, in Surrey, BC (the “Lands”), and a part of the Lands was required by the defendant to complete the project. The defendant required a portion of the Lands (the lands taken) to facilitate the construction of the Project. The plaintiff was an owner for the purposes of the *Expropriation Act*, R.S.B.C. 1996, c. 125 [the “Act”] and on June 23, 2010, she agreed to transfer a portion of the Lands taken and grant temporary statutory rights of way for construction of the Project. Under the agreement and the *Act* she is entitled to compensation for the land taken and any negative impact to the remainder.

[3] The defendant made an advance payment to the plaintiff under s. 20 of the *Act* of \$90,080 based on the appraised value of the lands taken, including \$1,280 for a temporary statutory right-of-way. The plaintiff claims compensation in the sum of \$293,000 for the value of the Land taken and the reduction in the market value of the remainder. The advance payment of \$88,800 (the value of fee simple land taken) is deducted from the gross claim and she seeks an order for the net amount of \$204,200 plus interest and costs.

[4] The defendant contends that the plaintiff has been fully compensated by way of its advanced payment.

[5] The two issues for decision are the highest and best use of the Lands and the market value of the Lands at the time of taking and whether the defendant is obliged to pay any amount above initial payment.

## **Background**

### **The Lands**

[6] The plaintiff acquired the Lands in April 2002. There is a dwelling on the property but no indication it was occupied or used by the plaintiff or anyone else at the time of the taking. There was a suggestion from an appraiser that the dwelling had been renovated within the previous six years.

[7] Prior to implementation of the Project, the Lands fronted onto 176 Street which was a north-south arterial road with heavy traffic passing between the industrial lands to the north and HWY1 to the south. The Lands were also bounded on the immediate south and west by one acre residential properties and to the east by 176 Street. The area to the north of the Lands appears to be unimproved land that also borders on 176 Street. Before the taking, the lands were 2.09 acres in area and were zoned “RA-1 acre residential” (permitting subdivision into one acre lots).

[8] The portion of the lands taken by the defendant comprised 451.1 square metres (approximately 4,856 square feet), and the statutory right-of-way was 162.8 square metres (approximately 1,752 square feet).

[9] The area of land expropriated was a strip along the eastern boundary of the Lands located immediately adjacent to 176 Street on the east and north of Highway 1 (“HWY1”) and comprised approximately 5% of the total area of the Lands.

[10] Topographically, the Lands sloped down from East to West with a steeper slope at the west end of the lands. The improvements occupied a 3036 square-foot dwelling and 742 square-foot garage.

### **The Project**

[11] The goal of the Project was to facilitate traffic flow and eliminate congestion in the vicinity of HWY1 and 176 Street and throughout the Lower Mainland. The Project involved the creation of a new highway (Highway 17) connecting HWY1 with a perimeter road to the north. Highway 17 was built to run parallel with a newly configured 176 Street.

[12] The Project succeeded in reducing travel flows on 176 Street and improving overall traffic flows in the area of the intersection of HWY 1, 176<sup>th</sup> Street and Highway 17.

[13] After the Lands were taken, the defendants built a concrete noise attenuation shield separating the new Highway 17 from 176 Street. The purpose of this shield was to protect adjacent properties from traffic noise. Before the taking, 176 Street was a two lane bidirectional arterial road connecting the industrial and residential properties to the north to HWY1 and extending south to the US border. After the project was complete, 176 Street became a dead end street to the north but with access to the other transportation routes to business and commercial areas in Surrey.

**Position of the Parties:**

***The Plaintiff's Position***

[14] The plaintiff seeks an order awarding compensation for the market value of the land taken and reduction in market value to the remainder (\$293,000) less the amount of the advance payment made by the defendant under s. 20 of the *Act* for a net reward of \$204,200.

[15] The plaintiff is also seeking regular and additional interest as provided for by the *Act*. The plaintiff argues that he should be paid interest under s. 21(1) or (12) on any amount awarded that exceeds \$88,800. In this case, he contends the interest should run from June 30, 2010, which is the date provided for in paragraph seven of their agreement.

[16] The plaintiff points out that if the amount paid under s. 20 is less than 90% of the award, the court must order the authority to pay additional interest at the prescribed rate of 5% on the amount of the difference. He argues that additional interest will therefore become payable if the compensation awarded exceeds \$98,666.66. She also points out that additional interest runs from the date the

payment is made to the date of determination of compensation which in this case, is from July 21, 2010.

[17] The plaintiff framed this claim broadly as a “combined award for the market value of land taken and reduction in market value to the remainder”. He relies on the reports and opinion of Calvin Coley-Donohue (“Mr. Coley-Donohue”), a qualified real estate appraiser, which incorporates a “before and after method” to arrive at the value being claimed.

[18] The plaintiff also relied on the opinion of Oleg Verbenkov (“Mr. Verbenkov”), a property planner.

[19] The plaintiff submits that the highest and best use of the property was in anticipation of future development into RF zoned lots. She argues that this approach adopts the Canadian Uniform Standards of Professional Appraisal Practice as “the reasonably probable and legal use of property that is physically possible, appropriately supported, financially feasible, and results in the highest value”.

[20] The plaintiff argues the court should accept rezoning potential of developable land as representing its highest and best use because there is a probability that zoning will take place and that the probability be greater than 50 percent: see *Farlinger Developments Ltd. v. East York (Borough)* (1975), 61 D.L.R. (3d) 193 (Ont. C.A.); *Runnymede Development Corp. v. Ontario (Minister of Housing)* (1979), 104 D.L.R. (3d) 703 (Ont. C.A.) These authorities have been adopted in British Columbia in *Holdom v. British Columbia Transit* (2005), 85 L.C.R. 198 (B.C.E.C.B.), aff’d. 54 B.C.L.R. (4<sup>th</sup>) 236, 2006 BCCA 282 [*Holdom*].

[21] In this case, the plaintiff asserts that at the time of the taking, there was a likelihood in the future she would succeed in obtaining City of Surrey permission to rezone the Lands (to RF) and, together with neighbouring property owners subdivide. She contends that before the taking, the Lands could have been subdivided into a ten or ten-and-a-half lot subdivision but the potential for subdivision after the taking is for only nine to nine-and-a-half lots. She contends the

prospects of success in rezoning and subdivision to RF status rises to a level of probability in the order of 70% to 75%. This level of probability was derived by the plaintiff's land use planning expert, Mr. Verbenkov.

[22] The plaintiff did not argue that her compensation should be calculated or measured as a loss stemming from the reduced capacity of the Lands to accommodate a subdivision of only nine to nine-and-a-half lots after the taking (as opposed to ten or ten-and-a-half lots before the taking). She said the measure of her injurious affection should be measured by the difference between the before taking and after taking market value of the Lands remaining, in addition to the fee simple loss of the part taken by the defendant. The plaintiff relies on the estimate of lost value given by Mr. Coley-Donohue at \$293,000, arrived at by a comparison of the pre-taking value of the Lands and post taking value of the remainder.

[23] Mr. Coley-Donohue opined that the highest and best use of the Lands was a holding property with development prospects. He not give any opinion about the value of the loss of a single lot resulting from the diminished area of the Lands available in a prospective subdivision but said that he took into account in his valuation the chance that a prospective development of the Lands would yield one less lot because of the taking.

[24] The only evidence on this point was delivered by the defendant's expert, John Ho ("Mr. Ho").

[25] Nonetheless, in argument, the plaintiff said that Mr. Ho's opinion regarding the value of one lot was not reliable because he assumed that the development costs would not be shared with surrounding property owners if subdivision was a joint effort with neighbouring property owners. He said the defendant's expert Declan Rooney ("Mr. Rooney") estimated development costs higher than necessary and Mr. Ho's prediction of the measure of lost profit was too low. In part, the plaintiff contends that Mr. Rooney failed to take into account the likelihood that subdivision of the Lands would occur in conjunction with subdivision of neighbouring properties thereby reducing the average development costs of each lot.

[26] Lastly, the plaintiff argues that she should be entitled to costs if she is awarded \$102,120 or more. She asks the court to exercise its discretion to award costs even if the ultimate award is less than \$102,120.

***The Defendant's Position***

[27] The defendant contends the payment already made to the plaintiff is more than adequate to meet its obligation under the *Act* to compensate her for the taking. They argue the plaintiff has not proved entitlement to further after taking into account, the positive and negative impacts of the taking and the effects of the Project on the value of her land.

[28] The defendant argues that the two opinions relied upon by the plaintiff are disconnected. They note that the planner, Mr. Verbenkov, concluded injurious affection has been caused by the loss of a single residential family lot (from ten lots to nine lots) in the post taking scenario whereas, the plaintiff's appraiser, Mr. Coley-Donohue did not specifically attribute the plaintiff's loss due the lost profit from a single lot reduction in the plaintiff's potential subdivision. He opined that features of the remainder including increased exposure to traffic, noise, dirt, light, pollution, and changes in routing made the property less attractive to buyers resulting in a loss in value as compared to other comparable properties he considered. The defendant contends the plaintiff did not prove the factual assumptions made by Mr. Coley-Donohue and thus, has not proven any further loss resulting from the diminution in the size of the remaining part of the lot.

[29] Considering the question of highest and best use, the defendant argues that permissibility and feasibility of RF zoning and development of the remainder is seriously in doubt and does not meet the probability test to establish a highest and best use with potential for high density lot development. The defendant said the potential difficulties in relocating the City's sewer line that bisects the property was a significant impediment to subdivision. If RF development was feasible, the location of Lot 5 identified in Mr. Verbenkov's concept plan was not viable given its proximity

to the existing sewer line. Last, if Lot 5 was feasible Mr. Verbenkov's concept plan might allow for a ten lot subdivision after the taking occurred.

[30] The defendant argued that the likelihood of the rezoning occurring as claimed by the plaintiff is less than the 70 to 75% probability suggested by Mr. Verbenkov. It is their position the testimony of Ms. Pitcairn of the City of Surrey was persuasive and against the evidence that development of Lands as at the date of expropriation was probable. In part, any development would have required an amendment to the OCP and council approval and city staff would not likely have recommended acceptance of the plaintiff's proposal. Ms. Pitcairn conceded that city council is not bound by staff recommendations and might have approved rezoning. They contend there was sufficient doubt and uncertainty that undermines the plaintiff's contention that an RF development of the lands into ten lots.

[31] In any event, the defendant submits the plaintiff's evidence concerning the lost lot theory was not sufficient to establish the measure of the value lost. It contends there were simply too many uncertainties.

[32] Notwithstanding the differences in the parties' views about development, the defendant acknowledges the appraisers established strikingly similar conclusions concerning the highest and best use of the land and their assessed values of the taken land. The parties' appraisers used some of the same comparables in their analyses.

[33] The defendants contend that Mr. Ho's opinion as to value of the land taken was not seriously challenged or undermined in cross-examination. He used some of the comparables included in Mr. Coley-Donohue's report and determined the highest and best use to be a holding property for future low-density subdivision.

[34] The defendant seeks an order depriving the plaintiff of some or all of its costs and to set-off any costs payable by the plaintiff to defendant against the court order of December 14, 2016.

[35] If the plaintiff is awarded damages the defendant argues that the only impact on the value of the Lands occurring because of the taking could be the sum of \$74,702 after taking into account the estimated minimum compensation of \$72,214 for the land taken as set out in Mr. Ho's second opinion. The defendant seeks an order depriving her of statutory interest under s. 47 for the period of time from the adjournment he obtained to the present.

### **The Witnesses**

[36] The plaintiff did not testify in this trial but relied on the opinion evidence of two experts, Mr. Coley-Donohue and Mr. Verbenkov. The defendant seeks an adverse inference based on the plaintiff's failure to testify.

[37] The defendant tendered reports from its appraiser, Hr. Ho, Mr. Bliss (noise expert), and Mr. Fourchalk.

### ***Oleg Verbenkov***

[38] The underlying basis of Mr. Verbenkov's report appears to have been a meeting he attended with staff of the City of Surrey (the "City") in early January 2013. At that time the City had concerns about dual entrances to any subdivision from 176 Street. This discussion seems to have focused on details contained in his plans for the development of the property. He said that, given previous approvals in the area, city staff would consider and support the proposal of rezoning the property to RF – single-family residential. He then went on to opine that "based on our research, local knowledge and discussion with the city staff, there is a high probability the subject property can be rezoned..."

[39] In Mr. Verbenkov's report he relies on data concerning subdivision approvals and processes occurring in 2011 and 2012. He also relied on conversations and information obtained from staff at the City of Surrey at a meeting in or about January 2013. A reading of those notes seems to indicate city staff were speaking about circumstances as they existed at the time of their meeting and expressions the City's views and interests in 2013.

[40] Mr. Verbenkov confirmed that an analysis of highest and best use components involved the legal permissibility of the project, the physical possibility, economic feasibility and maximum profitability. Mr. Verbenkov had considered only the land-use portion of the analysis and did not take into account the economic feasibility of the plan. He confirmed that relocation of the sanitary sewer trunk line was required by the layout plans and that the costs had not been factored into his report. Lastly, his report did not contain any analysis of maximum profitability.

[41] The defendant criticized the report because it relied on data relating to events that transpired after the taking. The defence relied on *Dempsey Estate v. Toronto (Metropolitan)* (1977), 12 L.C.R. 269 [*Dempsey Estate*] at 282-283 where the Ontario Land Compensation Board concluded that:

...However, counsel for the claimants has not suggested how any of the evidence tendered is relevant to proof of the highest and best use or market value as at the date of expropriation.

[42] This comment was followed by the following:

...If it were relevant on these facts to an issue, in any event, most if not all of the proposed evidence would appear to have little probative value; certainly the fifth item dealing with evidence of an application made with reference to the land in May, 1975, five years later, would have been so remote in time as in our opinion to have no value.

[43] Mr. Verbenkov referred to one rezoning application he believed received city approval for amendment of the Official Community Plan (OCP) and rezoning after the taking in 2010. He did not specify which property was involved in this process. It appears from his report, the third reading for some applications was heard in 2011 and/or 2012.

***Calvin Coley-Donohue***

[44] Mr. Coley-Donohue is an appraiser qualified in the areas of residential appraisals, review appraisals, expropriation appraisals, and industrial commercial and investment property appraisals.

[45] Mr. Coley-Donohue confined his opinion to the difference in market value measured by comparing the Lands to similarly situated properties (subject to adjustments) with the after taking value of same.

[46] Mr. Coley-Donohue did not conduct his own highest and best use analysis, but relied on the opinion of Mr. Verbenkov's highest and best use based on the analysis he undertook. He did so despite its flaws. In reaching his conclusions Mr. Coley-Donohue did not conduct a financial analysis or a profitability analysis.

[47] Mr. Coley-Donohue estimated the fair market value of the lands before taking at \$1,460,000. He opined that after taking, the remainder had a value of \$1,167,000. Thus, he concluded the difference between the pre-and post-taking values was \$293,000 (including the value of the land taken).

[48] While Mr. Coley-Donohue adopted Mr. Verbenkov's opinion that before taking subdivision of the Lands might have yielded ten to ten-and-a-half lots as opposed to the current potential of nine or nine-and-a-half lots, he did not appraise the value of one lot; he simply moved on to discuss the differences in fair market value of the Lands compared to other properties he believed accurately informed his opinion.

[49] On the question of injurious affection, Mr. Coley-Donohue said there was a threefold cause of the plaintiff's loss. First he noted the restricted access from the Lands to 176 Street in longer routes to arterial roads. Mr. Coley-Donohue said after the taking 176 Street the access to the Lands and the changes to 176 Street created a "severe restriction in comparison to the subject access in the before scenario". He said access to other arterial roads was required an estimated 3.2 to 4.0 km trip through neighbouring streets. However, when he was cross-examined on this point, and his attention drawn to a road to the intersection of 176th Avenue and HWY1 he admitted it was 1.8 km not 4 km.

[50] Under cross-examination, Mr. Coley-Donohue's attention was also drawn to the location of Barnston Drive, a collector route that was 535 metres from the land. He was directed to the location of Daly Road. He did not know that Daly Road

becomes 104 Avenue approximately 100 metres north of the subject property. Daly road is connected to 104 Ave. which is a Provincial highway and is 1.3 km or three minutes' drive away. Mr. Coley-Donohue said he did not believe these connections were available in 2010. He simply did not know the geography of the area at that time.

[51] The second factor affecting the value of the land was increased exposure to noise and related pollution affects coming from the new traffic volumes using Highway 17.

[52] In cross-examination, Mr. Coley-Donohue reiterated that the value of the land was influenced by the increased exposure to noise, dirt, truck exhaust and pollution. He conceded that his report did not address the question of dirt and admitted he has no expertise in the assessment or impact of automobile dirt deposits. He stated he was referring more to pollution from higher traffic volume.

[53] He was cross-examined on his assertion that traffic noise had increased since the taking and negatively influenced the market value of the property. He did not inspect or examine the property before the taking and said he "assumed traffic noise had increased". He recognized that the defendant had constructed a barrier between 176 Street and Highway 17 to ameliorate noise. He had no idea about the noise levels before the taking and does not know if there has been any increase in the noise since the taking. Nevertheless, he reiterated that, in his mind, the level of noise was a large issue for the plaintiff. The plaintiff did not give any testimony to that affect.

[54] Mr. Coley-Donohue had not been given a copy of the defendant's study containing measurements of noise levels at the property before and after the works were completed. He had not been informed that noise levels had in fact decreased since the taking. He conceded that in the absence of evidence about an increase in the post taking noise, his opinion might be incorrect.

[55] Next, Mr. Coley-Donohue was asked about his assertion that pollution impacting the property had increased since the taking. He concedes that there was no empirical data showing any increase in pollution or noise affecting the property from the roadway. He said he relied only on photographs of the area but could not point to any fact that might prove his assumptions.

[56] Mr. Coley-Donohue indicated he had no practical or personal knowledge of the traffic on 176 Street before the taking. He was aware that the goal of the project was to reduce the impact of trucks that lined up on 176 Street idling in front of the subject property waiting to enter onto HWY1. He was aware that when trucks were lined up in front of the property and idling, more exhaust was coming over onto the property. However, he said he knew generally of the truck problem in the region but no specifics concerning the property.

[57] He acknowledged that 176 Street was, before the taking, the only access point to HWY1 from the north which included an industrial area. In his report he mentioned the presence of night time headlights as interfering with the use of the property. In cross-examination he said he had no evidence that the land was affected by headlights before or after the taking.

[58] Mr. Coley-Donohue conceded that the project had reduced travel times from the property to Vancouver and to New Westminster. He did not take any such savings into account in forming his opinion. It appears he did not take into account that since the taking, 176 Street experiences less traffic overall and the Lands are subject to less noise from that road.

[59] The third factor relied on by Mr. Coley-Donohue was the reduced yield from any subdivision of the remainder of the Lands after the taking. As noted above, he did not evaluate the specific impact of on the remainder of the Lands caused by the reduced subdivision potential.

[60] Mr. Coley-Donohue conceded that the comparable sales data in his report was simply reproduced from an earlier report, not in evidence, prepared by

Mr. Richard Miskiewicz of his office well before this trial began. He did not personally gather the information concerning the comparables used in his report.

[61] Mr. Coley-Donohue was cross-examined on his use of several comparable property sales mentioned in his report. He identified a property at 17261 – 100 Avenue (number 2) which, before taking he described as overall similar to the plaintiff's lands. He said of this property, it "is near or slightly below what is achievable by the subject". He said the per square foot value of this property when it was sold in May 2010 was \$20.75. In comparing that property to the Lands he applied a downward adjustment to \$15.22.

[62] He was also referred to a property at 17447-90 2<sup>nd</sup> Avenue (number 5), which he described as "overall inferior" which sold in April 2010. The \$13.15 per square foot sale price was "below what is achievable by the subject, in the pre-taking scenario."

[63] This evidence must be contrasted with Mr. Coley-Donohue's views on the post taking analysis. He said comparable number 2 was "overall superior" to the Lands and the price \$15.22 per square foot was "above what is achievable by the subject, in the post taking scenario".

[64] Mr. Coley-Donohue said that the value per square foot of large properties is generally less than the value per square foot of smaller properties. Thus, when comparing different size properties adjustments must be made to reflect size differences and market condition responses to smaller properties.

[65] Comparable number 5 had sold February in 12, 2010 for an equivalent price of \$13.15 per square foot. He said this property was a superior improved site but "overall slightly inferior" and the \$13 per square foot value is "near or slightly below" what is achievable by the subject, in the post taking scenario.

[66] In his final conclusion he said the post taking value of the plaintiff's property fell between the adjusted rates of number 2 and number 5 but, given the exposure of the plaintiff's property to noise, pollution, traffic, and dirt after the taking, he

considered the appropriate value to fall near or above number 5. He then estimated a value of \$13.50 for the adjusted value of the plaintiff's property after taking.

[67] There are several distinctions relevant to Mr. Coley-Donohue's analysis. First, number 2 is a one acre property whereas the plaintiff's property comprises two acres. Second, the improvements on number 2 were valued at \$212,000 and no value ascribed to the improvement on the Lands. Third, number 2 adjoins the property at 10045-1 73<sup>rd</sup> St. (number 7).

[68] Comparable number 7 sold October 24, 2009 for a price of \$19.15 per square foot.

[69] Both comparable number 2 and number 7 are separated from HWY1 by 100th Avenue. Comparable number 2 is ranking inferior to the plaintiff's property and number 7 is ranked superior. Comparable number 2 sold for \$20.75 (adjusted by Mr. Coley-Donohue in the comparison to the plaintiff's land to \$15.22 per square foot) whereas comparable number 7 sold for \$19.15 per square foot and was adjusted to \$18.73 per square foot in comparison to the plaintiff's property. The adjustment for the value on number 2 as compared to the plaintiff's property was 36%. This adjustment was significantly greater than the adjustments for properties Lot 5 and Lot 7. These differences were not adequately explained by Mr. Coley-Donohue.

[70] Mr. Coley-Donohue conceded in cross-examination that his comparables number 2 and number 7 were not adjusted to not account for the lack of sound attenuation wall when those properties were sold. Each of number 2 and number 7 faced onto HWY 1 without any sound protection from highway noise but he did not take into account impact of the noise attenuation wall constructed east of the lands as part of the project.

[71] I accept that the flaws in Mr. Coley-Donohue's report include his failure to take into account the noise attenuation efforts on 176 Street absent in the cases of comparables number 2 and number 7 in addition to the exposure of those properties

to HWY 1 contrasting with the Lands facing the dead end road that is now 176 Street.

[72] The only distinction between comparable number 2 in the pre-taking context and post taking context is exposure. Before taking the plaintiff's Lands had inferior exposure resulting in an upward adjustment and the after taking state was described as similar exposure with no adjustment. Mr. Coley-Donohue defined his use of the term exposure:

Exposure to the traffic is considered a detriment when valuation of residential properties is concerned, mainly due to the nuisance created by the traffic noise, exhaust pollution, headlights at night, etc.

[73] He said that an upward adjustment was necessary when dealing with number 2 and number 3 because of busier traffic, whereas number 5 and number 7 were located on quieter streets resulting in downward adjustments.

[74] Mr. Coley-Donohue opined that number 7 was overall superior in part because of "superior exposure". I am not satisfied that Mr. Coley-Donohue's assessment of the exposure adjustment after taking can be supported or that there was any diminution in the per square foot value of the Lands after the taking.

[75] Under the heading financial feasibility, Mr. Coley-Donohue said the subdivision of the Lands into nine lots was "possible" if the site was redeveloped with the additional southern lots. He concluded that due to Highway 17 traffic levels, noise and pollution, the property, after taking, is negatively impacted. And impacts the potential redeveloped residential subdivision. It is significant that Mr. Coley-Donohue provided no opinion concerning the financial feasibility of the rezoning and development of the land.

[76] Under the next head, maximum profitability (as vacant), Mr. Coley-Donohue commented that the access from the land to 176 Street was different because 176 Street is now a dead end road in one direction and requires a longer trip in the other direction to travel to the intersection of 104 Avenue and Highway 17. He observed that the partial taking had reduced the size of property by 451 square metres which

translated in the loss of one potential RF lot. Again he noted that the Highway 17 now carries heavier traffic loads with intensified noise and pollution affecting the land. He then said “this will have a negative impact on the market value of the raw a lot, and in my opinion, future subdivided lots.” He opined that the current use of the property as a holding property is interim only and will change when higher density zoning and new developments take place in the neighbourhood. Lastly, he observed that the maximum financial outcome due to the loss of one potential lot, the access changes and exposure to Highway 17 traffic will impact the marketability of the entire site.

[77] Mr. Coley Donohue’s report and testimony were punctuated with repeated indications that after taking, the lands, were subject to more noise, exhaust, 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.

[78] I have found, Mr. Coley-Donohue based his conclusions as to value on assumptions concerning the pre-and post exposure of the Lands to noise, vehicle exhaust, pollution, or dirt without any reliable evidence in support. Further, he was ill-informed about the geography of the area and his conclusion that the new road configuration extended the plaintiff’s travel time by up to 4 km. was against the evidence.

[79] Thus, when Mr. Coley-Donohue changed his assessment of number 2 from “overall similar” to “overall superior” to the Lands, he did so without the necessary evidence to support the assumptions that have made informed his opinion about the post taking value of the remainder lands. I am satisfied that if Mr. Coley-Donohue had not discounted the post taking value of the Lands he would have arrived at a value equal to or greater than \$15.22 per square foot as the comparator to plaintiff’s property. At \$15.22 per square foot, the plaintiff’s after taking property value would

be \$1,315,000 against which he valued the lands at \$13.50 per square foot or \$1,167,000.

[80] 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-examination and his opinion falls short of meeting the plaintiff's burden of proof concerning the loss in value caused by the injurious affection he claims resulting from the taking.

[81] Although Mr. Coley Donohue opined that the highest and best use of the property was as for future residential development site accommodating urban size lots with single-family detached houses, he did not address the reduction in the market value of the remaining land assessed on the basis of the single lot difference.

***John Ho***

[82] Mr. Ho has been a property consultant and appraiser at Carmichael Wilson Property Consultants since 2003. He has a Bachelor of Commerce (Urban Land Economics) from UBC. He was also awarded membership and use of the professional designation of Accredited Appraiser Canadian Institute (AACI) by the Appraisal Institute of Canada in 2004.

[83] In Mr. Ho's first report dated July 26, 2010, he opined that value of the land lost because of the taking was \$88,800. This valuation is based on the amount of land lost as a result of the taking being approximately 5.29% of the total lot and his assessment that the pre-taking value of the Lands was \$1,680,000. He estimated the loss of value resulting from the temporary statutory right of way was \$1,280.

[84] He described the highest and best use of the Lands before and after the taking was as residential property with low-density development/subdivision potential in the nature of half-acre type lots based on the current OCP.

[85] Mr. Ho he said that highest and best use takes into account factors that include government regulation, market forces, and a presumption that use must be in keeping with zoning and legal requirements. He said, prospective uses within the realm of possibility that are not reasonably probable should be excluded from consideration. He did not address directly the four criteria mentioned in Mr. Coley-Donohue's report for assessing "highest and best use".

[86] Next, he estimated the after taking value at \$1,622,000 and on this basis concluded the loss in value to the plaintiff from the taking was \$58,000.

[87] After completing that analysis, he assessed the minimum statutory calculation using the same comparables from his pre-taking analysis and three additional properties. However, because the plaintiff was entitled to the minimum compensation of \$88,800, no additional loss occurred because of any injurious affection.

[88] He noted that portions of the lands were more readily developable than other parts. After taking into account the differences between the developable [non-sloping] portion and the portion with more development challenges, he concluded \$88,000 to be the value of the land taken.

[89] Mr. Ho provided a second opinion, dated September 20, 2015. He based this opinion on a hypothetical retrospective appraisal that assumed the conceptual subdivision plan provided by Mr. Verbenkov had been approved by the City. For the purposes of this report he also assumed that the highest and best use of the subdivision was set out in Mr. Verbenkov's conceptual plans.

[90] In this analysis, Mr. Ho compared the plaintiff's lands to comparable sales against other properties in the before taking scenario. He then did an analysis of the economic impact of the taking based on a nine lot subdivision post taking. After

subtracting commissions and closing costs the net proceeds estimated by Mr. Ho were estimated to be \$3,071,125. After taking into account total development costs estimated at \$1,473,232 there was an indicated residual land value after deducting expenses, of \$1,219,29 or \$135,477 per lot. The difference between the before taking and after taking value was \$146,916. In this calculation, Mr. Ho said the statutory calculation estimate of the land taken was \$72,214 (subject to the extraordinary assumptions and limiting conditions in his report) and the impact on the remainder of the land could be was \$74,702.

[91] Mr. Ho was questioned about his reliance on Mr. Rooney's cost estimates. He recognized that the per unit value of a lot was sensitive to the assumptions regarding charges that varied with different configurations. However, there is no evidence to indicate the neighbouring property owners would have participated in a subdivision with the plaintiff. She had never made attempts to interest those neighbours in a potential joint subdivision project.

[92] The plaintiff argued that Mr. Ho's opinion focused on potential subdivision as the highest and best use of the Lands to accommodate half acre lots with single-family houses was not supported by the evidence. She argued that Mr. Verbenkov's report represents the more accurate assessment of the Land's development potential. They argued this was so despite Mr. Ho's second report where he took into account Mr. Verbenkov's opinion that the plaintiff had lost the possibility of one additional lot being created from the lands remaining.

[93] Mr. Ho testified he was aware there had been development approvals designating property with RF zoning in the area but did not take this into account in his opinion. He relied on the assumptions set out in his report that discounted that evidence. The plaintiff contends that flaws in Mr. Ho's conclusions noted above render his opinions of little value.

***Declan Rooney***

[94] Mr. Rooney provided an analysis of the subdivision costs based on the plan that the plaintiff would develop his own property without involving neighbours. Total

construction costs were estimated at \$978,000. Costs for development fees and other charges with \$475,504 and real estate and closing costs were \$89,600. Based on these estimates and Mr. Ho's analysis of the value of a nine lot subdivision, the residual value of the land was estimated at \$1,366,209 after subtracting a developer's profit. Thus, the raw lot value was \$136,621. After subtracting the after taking value from the taking value [\$1,366,209 - \$1,219,293] the loss in value attributable to one lot is \$146,916. The value of the land taken [the minimum compensation] was \$72,214 and the injurious affection became \$74,702.

[95] The plaintiff challenged Mr. Rooney's opinion because it did not take into account the shared costs that would offset the plaintiff's costs of development if that were to occur. In my view, it is at this stage, too speculative to ascertain what costs would be payable if others were involved in this development.

***Pitcairn***

[96] Ms. Pitcairn, a planner from the City of Surrey, was, since 2015 part of the staff dealing with the Project. She said that in 2010 city staff were not considering increased densities in the area surrounding the land. Based on the then existing OCP, the development would not have met with staff approval. It does not appear that there were any discussions about the midterm prospects and ongoing changes that were happening in the area.

[97] She commented on the existence of a sewer trunkline on the property and the potential expense and difficulty of moving that service septic trunkline that would connect to the property.

[98] She said it was not until May 2015, that Surrey's counsel started the planning process relating to densification of the residential population in the area. Staff had produced a land concept plan in this regard that was taken to council in December 2015.

[99] Ms. Pitcairn confirmed that staff recommendations were not always accepted by counsel and had been directed by counsel to consider higher density in the area.

She acknowledged that there may be creative solutions to minimize the impact of the sewer trunk line relocation.

***Mark Bliss***

[100] Mr. Bliss is an acoustical engineer who prepared a report dated October 2013 addressing post-construction noise monitoring assessment, Fraser Heights connector. Mr. Bliss relied on information obtained from an earlier study by Wheatfield acoustics obtained in the summer of 2004 and completed at or near the plaintiff's property at 10245 176 Street.

[101] Mr. Bliss returned to the property in August 2013 and took measurements of the noise levels which he said had reduced from 2004 to 2013 by approximately 5%.

[102] The plaintiff challenged the reliability of Mr. Bliss' report because he had no personal knowledge of the data collection or analysis from 2004. In the absence of proof of Mr. Bliss' assumptions, no proper conclusion could be drawn from the differences in the data presented. She also contends the report was not admissible because it was not produced in a timely way and was not prepared for the purposes of this compensation hearing. She said because the report was not intended for this trial and was obtained for different objectives it should not be accepted. If admissible, the plaintiff contends it should not be given any weight because it was not referred to in any of the opinions as to value.

[103] First, the report from Mr. Bliss did not include the requisite certification of an expert required under the R 11-2.

[104] The report relied on an earlier report that reflected noise data from the area adjacent to the lands in 2004. He said "the acoustical environment in this area remained essentially unchanged until construction commenced in 2009/2010". He said that the noise from 176 Street/Highway 17 was 5% less after works were completed than before.

[105] I accept the plaintiff's criticism of this report in that the defendant did not prove the assumptions on which Mr. Bliss relied. That is, he relied on the data collected by Wheatfield Acoustics Ltd. and, although he was employed by Wheatfield at the time, had no personal knowledge of the data-gathering process that happened at that time. In the end, Mr. Bliss's opinion did not meet the requirements of the rules nor were the assumptions proven and I place no weight on the opinions that were tendered.

***Douglas Furchalk***

[106] Mr. Furchalk was the property acquisition coordinator for the HWY1 improvement project. His role was to supervise agents in obtaining the land to build the project. He said the project involved widening HWY1, construction of the Pitt River Bridge, and connecting the North Fraser Perimeter Road to HWY1.

[107] He reported that before the taking, 176 Street was a two lane road serving as a main truck access in and out of the industrial area to the north of HWY1. CN rail and other businesses used 176 Street as a truck route for moving product to HWY1, East, west and south. He also testified that before taking, truck traffic frequently stopped on the incline of 176 Street while approaching HWY1. These backups caused noise and interfered with adjacent property owners accessing and entering properties along 176 Street.

[108] Traffic congestion was caused by a traffic light near the intersection of 176 Street and HWY1.

[109] Before construction of the project, the defendants had a noise mitigation program that depended on noise monitoring in the area. He described the defendants noise policy and in particular the elimination of the barn to drive off-ramp from HWY1. He also commented on the importance to the North Perimeter Road and South Perimeter roads now part of Highway 17. There are no driveway accesses to Highway 17 in the vicinity of the lands.

[110] Mr. Fourchalk said that congestion in the area is now much reduced as is the travel time between 176 Street and Brunette overpass in Coquitlam. As part of the project, a new Barnston Drive overpass was built and Barnston Drive and Daly Road were connected. He testified that the drive from the Lands to Barnston Drive is less than one minute. Daly Road, a Provincial highway, is approximately two minutes away.

[111] He said that the connector from 17580 Street to Barnston Drive was completed in 2012 and the Barnston Drive overpass of Highway 17 was completed in November 2011.

[112] Mr. Fourchalk said that the defendants performed noise monitoring to assess whether noise negation efforts after construction had been successful. He discussed the placement of noise barrier mitigation wall adjacent to HWY 17 which he believed had reduced the noise in the vicinity of the Lands; he believed the noise was lower than existed before construction. However, he was not qualified to give acoustical measurement information. He testified that the noise abatement measures taken by the defendant in the area had met the overall policy goals to reduce noise in the area.

### **Law**

[113] Pursuant to s. 30(1), every owner of land that is expropriated is entitled to compensation to be determined in accordance with the *Act*. The basic formula for calculation is provided for in s. 31(1):

31 (1) The court must award as compensation to an owner the market value of the owner's estate or interest in the expropriated land plus reasonable damages for disturbance but, if the market value is based on a use of the land other than its use at the date of expropriation, the compensation payable is the greater of

- (a) the market value of the land based on its use at the date of expropriation plus reasonable damages under section 34, and
- (b) the market value of the land based on its highest and best use at the date of expropriation.

[114] The definition of “market value” is set out in s. 32:

32 The market value of an estate or interest in land is the amount that would have been paid for it if it had been sold at the date of expropriation in the open market by a willing seller to a willing buyer.

[115] Section 33(e) specifically provides that in determining the market value of land, account must not be taken of “an increase or decrease” in the value of the land resulting from any expropriation or prospect of expropriation.

[116] Section 40 deals with partial takings:

40 (1) Subject to section 44, if part of the land of an owner is expropriated, he or she is entitled to compensation for

(a) the market value of the owner's estate or interest in the expropriated land, and

(b) the following if and to the extent they are directly attributable to the taking or result from the construction or use of the works for which the land is acquired:

(i) the reduction in the market value of the remaining land;

(ii) reasonable personal and business losses.

(2) If a person claims business losses under subsection (1), the losses must not, unless the person and the expropriating authority otherwise agree, be determined until at least 6 months after the loss was sustained.

(3) If part of the land is expropriated, the amount of compensation payable in respect of the matters referred to in subsection (1) (a) and (b) (i) may be established by determining the market value of the area of all of the land before the date of expropriation and subtracting from it the market value of the land remaining after the expropriation occurs, but in no case, subject to section 44, must compensation be less than the amount determined by multiplying the ratio of the area of the land taken to the area of all of the land before it was taken, times the value of the land before it was taken with the appropriate reduction if the interest expropriated is an easement, right of way or similar interest less than the fee simple interest.

(4) For the purposes of the second calculation referred to in subsection (3), the value of the land before it was taken is the value of the land only, having no regard to improvements on the land.

(5) If, in the case of a partial taking, the character and use, or potential use, of the land before it was taken varies such that the land that was taken was, before the taking, more valuable or less valuable than the average value of the land that was not taken, the court may, after making a determination under subsection (3), make an adjustment to reflect that value accordingly.

(6) For the purposes of this section, expropriation of part of the land of an owner occurs only if

- (a) he or she retains land contiguous to the expropriated land, or
- (b) he or she owns land close to the land that was expropriated, the value of which was enhanced by unified ownership with the land expropriated.

### **Highest and Best Use**

[117] The first question to be answered is what the highest and best use of the property.

[118] When considering the highest and best use of property, the court should take into account a number of factors that may influence considerations of probable versus possible uses of the property at the time of the taking. In *Expropriation in Canada: a practitioner's guide*, by Kenneth Boyd, the author discusses the tensions between probable and possible uses. Factors such as the time frame within which a development may be achieved are important. He suggests that if future development is some distance into the future, highest and best use should be expressed as a speculative or holding property for future urban development.

[119] If significant costs are associated with the redevelopment of property, they must be subtracted from the allowable compensation because market value would ordinarily be a function of those costs: see *Vision Homes Ltd. v. Nanaimo (City of)*, [1996] B.C.J. No. 1327, 59 L.C.R. 106.

[120] When evidence indicates a plaintiff will likely hold property in a “hybrid between residential use” and “holding property for development when the market was ripe” the highest and best use may have characteristics of both purposes: see *Husband v. Langley* (1996), 509 L.C.R. 221 (B.C.E.C.B.) at para. 30.

[121] In *Holdom*, at para. 38-39 approved a test for assessing highest and best uses of potentially developable property as whether there is a:

” probability or a reasonable expectation that such rezoning will take place. It is not enough that the lands have the capability of rezoning. In my opinion, probability connotes something higher than 50%.

[122] In *Holdom*, the Court of Appeal accepted that a marginal probability sufficed to prove that development was more probable than not.

[123] Mr. Coley-Donohue concluded that the highest and best use for this property is future residential development, accommodating urban sized lots with single-family detached houses (RF Zoning). The current use of the Lands is considered a holding or interim purpose property until redevelopment is possible. The development scenario would likely require a joint effort and cooperation by two adjacent lots along the southern boundary of the lands. The plaintiff believes the financial impact to the remainder land is the potential loss of one lot.

[124] The experts opining as to the highest and best use disagree only with respect to the overall density of such a subdivision. Mr. Ho opined that only low-density residential development (four half acre lots) was possible and Mr. Verbenkov believes there was a probability of subdivision into ten lots.

[125] In this case, the highest and best use has characteristics allowing for residential use with potential of being amalgamated with other parcels to establish low or medium density residential development.

[126] Mr. Coley-Donohue relied on Mr. Verbenkov's opinion that redevelopment rose to the level of 70% to 75% likely.

[127] The challenge to Mr. Verbenkov's opinion includes the fact that he took into account evidence of events concerning developments in the area happening after the taking including subdivision approvals and processes that happened in 2011 and 2012.

[128] It also appears that his conversations with staff at the City of Surrey at a meeting in or about January 2013 reflected their recommendations and views as development and planning matters existed in 2013. A reading of those notes seem to indicate city staff were speaking about circumstances as they existed at the time and their comments on the City's views and interests in 2013. On both issues, the defendant contends that the information cannot be used to support his opinion

because it related to events occurring well after the taking of the plaintiff's land. In *Dempsey Estate and Re-Valley Improvement Co. Ltd. and Metropolitan Toronto* (1965), 50 1 D.L.R. (2d) 481, in the absence of an ongoing process involving development of the lands in question at the date of expropriation, evidence of subsequent facts and events ought not to be admitted.

[129] The point was discussed in *Premanco Industries Ltd. v. British Columbia (Ministry of Environment, Lands and Parks)*, 2001 BCCA 116. In refusing leave to appeal from a decision of the Expropriation Compensation Board, Hall J.A. said at para. 2:

It seems to me, however, that what I shall deem "the hindsight issue" adverted to by Mr. Shorthouse in his Reasons ought to be determinative of the application for leave to appeal on this particular issue. The task the Board is called upon to perform in a case like this is to determine a fair market value for property as at the time of expropriation. In this process, the Board has to assess what price would represent a fair price likely to be struck between a willing buyer and a willing seller at the relevant time based on the state of the information then available to the parties. I am also of the view that the jurisdiction of the Board to grant any such order must be doubtful for the reasons expressed by the Chair in his Reasons. It does not appear to me that there would be any prospect of this argument succeeding on its merits, nor are there any substantial questions to be argued concerning this issue. It seems to me that clearly the Chair was correct in his assessment of the merits of the matter, namely that hindsight evidence would not have been useful or appropriate in arriving at the determination which the Board was required to make under the terms of the statute. Accordingly, I would not grant leave to appeal from this decision made in the course of proceedings.

[130] Evidence concerning comparable sales after the date of expropriation is admissible on the question of fair market value because appraisers are qualified to make time adjustments in determining those questions. However, events dealing with the probable highest and best use of property based on zoning and development changes after the expropriation date are not admissible.

[131] In considering value assessments based on the development prospects of property, this Court has adopted a critical approach. In *Yin Wan Enterprises Ltd. v. City of Richmond*, 2008 BCSC 146, Goepel J.(as he then was) said:

36 The Development Approach has been the subject of criticism. In ***Double Alpha Holdings Corp. v. Pacific Coast Energy Corporation***

(1998), 65 L.C.R. 99, (B.C. Exp. Corp. B.), the Expropriation Compensation Board said at paras. 29-31:

[29] Professor Todd, in *The Law of Expropriation and Compensation in Canada*, 2nd ed. (Toronto: Carswell, 1992), discusses the subdivision development approach. He says at p. 219:

Courts and tribunals are usually reluctant to rely on the land development (subdivision) approach for two reasons. First, unless a proposed subdivision has actually been officially approved there is always some degree of uncertainty as to whether, and under what conditions, the subdivision would ever have materialized ...

Second, it is recognized that the approach is "volatile" in the sense that a comparatively minor change, for example in the costing of service, can produce a figure in the end result which will significantly affect the residual value.

He goes on to indicate that courts and tribunals frequently reject the approach on the basis of the availability of reliable comparable sales data, the conclusion that the subject property was not ripe for development at the date of expropriation, or a determination that the various factors such as servicing, engineering and other development costs were not based on solid, factual evidence.

[30] The Appraisal Institute's *The Appraisal of Real Estate, Canadian Edition*, (1992) states at p. 297 that:

... bona fide sales data provide a better indication of value than a subdivision development prospectus. The reliability of the approach is determined by the accuracy of the lot yield, absorption rate, sale prices, servicing costs and soft cost estimates.

Most of the case law on the appropriateness of the subdivision development approach deals with the issue of the remoteness in time of the development, as well as the availability of reliable data with which to perform a direct comparison valuation. In *Lincoln Village Ltd. v. City of Waterloo* (1977), 12 L.C.R. 232 at p. 243, the Ontario Land Compensation Board stated that "... where the state of development of the lands is such that all the necessary computations can be accurately forecast, the development cost approach may be appropriate, provided that suitable comparable sales are not available." In *Oakfield Estate Ltd. v. Halifax (County)* (1992), 47 L.C.R. 100 at 105, the Nova Scotia Expropriations Compensation Board declined to accept valuation conclusions based on the

subdivision development approach because there was "uncertainty as to the date of commencement, the number of lots, the costs of development, price and marketability."

[31] This board, in *McKinnon v. School District No. 36 (Surrey)* (1994), 54 L.C.R. 23, referred to Professor Todd's text, and quoted him as stating that "it is appropriate to use the method where there is a paucity of comparable sales ... or where the appraisers for both sides find insufficient comparable sales on which to base an opinion on the market approach and both accept that development was imminent as of the date of expropriation." The board was not persuaded in that case that the "required degree of imminence was prevalent", and thus declined to apply the subdivision development approach.

[132] Nothing in either of the plaintiff's expert opinions provided guidance as to when redevelopment of the Lands might occur before the taking. Thus, I conclude it may yet take many years to achieve subdivision.

[133] I accept that, if Mr. Rooney's evidence is reliable and coupled with Mr. Verbenkov's subdivision plan, there is a possibility that the remainder of the lands might have lost value up to \$74,200.

[134] Although Mr. Coley-Donohue opined on the highest and best use of this property, he did not engage in a fulsome profitability analysis or economic feasibility analysis based on a ten lot versus nine lot subdivision and the differences in value. He merely accepted Mr. Verbenkov's report and its conclusions concerning the trends for development in the area, approved and ongoing development applications in the area and potential development for the Lands. He formed his conclusions that RF zoning into smaller lots was common in the area and said "based on the redevelopment trend observed in the local area, it is likely that the subject could be rezoned from an RA to RF. He also acknowledged that rezoning and subdivision of the property could occur "assuming the neighbouring properties to the south would be assembled and redeveloped at the same time".

**Adverse Inference**

[135] In this case, there is no evidence concerning the plaintiff's purpose or intention with regard to the Lands at the time of the taking or since. Similarly, there was no evidence from the plaintiff concerning his experience with exposure to, noise, exhaust pollution, light, dirt and access to arterial roads or any other aspect of the property that negatively affected his plans, use or enjoyment of the Lands.

[136] The defendant contends that in view of the many adverse post taking features of the Lands, the plaintiff's failure to testify should attract inference that any evidence the plaintiff may have given on these points or on his use or intended use of the Lands would have been unhelpful to his case. The defence relies on a number of authorities, including *Hodgins v. Street*, 2009 BCSC 673; *Barker v. McQuahe*, 49 W.W.R 685, and citing J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada*, 3<sup>rd</sup> ed. (Toronto: LexisNexis Canada, 2009) at para. 6.449.

[137] In *R. v. Jolivet*, 2000 SCC 29, the Court discussed some limits to making an adverse finding:

28 One must also be precise about the exact nature of the "adverse inference" sought to be drawn. In J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 297, § 6.321, it is pointed out that the failure to call evidence may, depending on the circumstances, amount "to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it" (emphasis added), as stated in the civil case of *Murray v. Saskatoon*, [1952] 2 D.L.R. 499 (Sask. C.A.), at p. 506. The circumstances in which trial counsel decide not to call a particular witness may restrict the nature of the appropriate "adverse inference". Experienced trial lawyers will often decide against calling an available witness because the point has been adequately covered by another witness, or an honest witness has a poor demeanour, or other factors unrelated to the truth of the testimony. Other jurisdictions also recognize that in many cases the most that can be inferred is that the testimony would not have been helpful to a party, not necessarily that it would have been adverse: *United States v. Hines*, 470 F.2d 225 (3rd Cir. 1972), at p. 230, *certiorari* denied, 410 U.S. 968 (1973); and the Australian cases of *Duke Group Ltd. (in Liquidation) v. Pilmer & Ors*, [1998] A.S.O.U. 6529 (QL), and *O'Donnell v. Reichard*, [1975] V.R. 916 (S.C.), at p. 929.

[138] In *Tower Waterproofing v. Mondiale Development Ltd.*, 2013 BCSC 1772, Savage J. (as he then was) described the principles concerning any inference that may be drawn from the failure of a party to call a witness who may have pertinent evidence. These comments are apposite to this case:

[22] It is a longstanding principle of law that an adverse inference may be drawn if, without sufficient explanation, a litigant fails to call a witness who might be expected to give supporting evidence: *Buksh v Miles*, 2008 BCCA 318 at para. 31, 296 D.L.R. (4th) 608. However, as the failure to call a witness may reasonably be open to different interpretations, an adverse inference should only be drawn when it is warranted in light of all the circumstances: *Davison v Nova Scotia Government Employees Union*, 2005 NSCA 51 at para. 73, 231 N.S.R. (2d) 245.

[23] Generally, an adverse inference should only be drawn in regard to the non-production of witnesses whose testimony would be superior in respect of the facts to be proved: *Bronson v Hewitt*, 2010 BCSC 169 at para 329, 58 E.T.R. (3d) 14. However, an adverse inference should generally not be drawn where the witness is equally available to both parties: *Zawadzki v Calimoso*, 2011 BCSC 45 at para 149.

[139] I am satisfied in this case that the plaintiff falls into that category of potential witness whose evidence would be significant, particularly on the issues concerning increased noise, pollution, dirt and light mentioned in Mr. Coley-Donohue's report. I conclude he did not testify at trial because his evidence would have been either contrary to his case or at least would not have supported the claims he has made.

### **Conclusion**

[140] On balance, I accept the defendant's contention that the plaintiff failed to establish evidence that the highest and best use of the plaintiff's land at the time of the taking would have included the potential ten lot subdivision. Mr. Verbenkov limited his opinion to the land-use portion of that analysis and did not comment on economic feasibility or profitability of the plan while acknowledging that the sanitary trunk line relocation may be necessary.

[141] I have some concern on the point of Mr. Verbenkov relying data post dating the taking and on council decisions made one or two years after the plaintiff's land was taken.

[142] Nevertheless, I agree with plaintiff's counsel that the analysis of market value of land in the area (the comparables used by the experts) are informed by the markets expectation concerning redevelopment of lands typical of the plaintiff's. Here, the plaintiff offered no valuation of his loss on the basis of Mr. Coley-Donohue's highest and best use opinion in the loss of the potential of an additional lot pre-taking. He did not value the Lands before and after taking on the basis of the prospective value of a single lot and that because of the lands taken, there would be one less lot that might be sold.

[143] Mr. Coley-Donohue specifically testified, that his opinion he did not take into account the value of one RF lot. Although he relied on Mr. Verbenkov's opinion that the future redevelopment potential would yield one less lot, nothing directly turns on the value of that lot.

[144] I assume that Mr. Coley-Donohue accepted that the market value of similar lands would reflect the potential they could be rezoned and subdivided. Otherwise, I do not understand Mr. Coley-Donohue's reluctance to engage in the type of analysis performed by Mr. Ho.

[145] In his conclusion, Mr. Coley-Donohue confined his opinion to the difference in market value measured by comparing the Lands to similarly situated properties (subject to adjustments) before taking the after taking value of same.

[146] I accept that if the highest and best use of the land involved the probable subdivision into ten or ten-and-a-half lots as opposed to the potential of nine or nine-and-a-half lots in 2010, the plaintiff's entitlement may have been affected by the economics of subdividing the Lands.

[147] Instead, Mr. Coley-Donohue relied on differences and similarities between the Lands and the comparable properties he took into account. This analysis did not depend on the highest and best use; he took into account the actual marketplace factors he considered differentiated the property from other comparable property

sales in the area. Presumably, and of these properties possess the same “highest and best use” characteristics.

[148] Injurious affection claims must be proven by a demonstrated reduction in market value and cannot be assumed: see *Schiebel v. Hope (District)*, 2014 BCSC 949 at para. 20.

[149] I accept that the benefits of the project to the lands, including creation of the frontage road, improved access, and altered traffic patterns are to be taken into account. Moreover, claimants are required to prove the evidence relied upon in any market evaluation to substantiate the conclusions of an appraiser’s opinion and the court must be reluctant to rely on any opinion when it is presented without supporting evidence: see *Fritz v. Sicamous (District)*, 2004, CarswellBC 2550 (B.C.E.C.B.) at para. 83-85; *Lulu Island Holdings v. Greater Vancouver Sewer and Drainage District*, 2007 BCSC 938 at para. 104.

[150] Overall, I am satisfied that Mr. Coley-Donohue’s lack of knowledge of the streets and access corridors in this area, his unproven assumptions concerning traffic noise, dirt, pollution, exhaust and light rendered his opinion unreliable. His testimony did not support his conclusion that the distance between the property and an arterial road had any impact on market value. Similarly, his failure to ascertain the impact of noise, pollution, exhaust, light emanating from 176 Street in the vicinity of the lands before the taking renders his opinion concerning the impact of those factors on the post taking value of the lands unproven.

[151] The purpose of the *Act* is to compensate an owner, as far as money can assist, to ensure the expropriated landowner will be in no worse economic position because their property has been taken away. In my view, Mr. Coley-Donohue’s pre-taking valuation may be sound but he has simply not proven the assumptions on which his post taking valuation is based. The difference between the market value of the lands taken, the remainder Lands and the pre-taking value of the Lands should equate to the advance payment plus the post taking market value of the remainder and the plaintiff has not met the burden of proving the opinion relied.

[152] The concept of highest and best use is inherently taken into account by prospective purchasers and the marketplace. In the end, in order to ensure that the plaintiff is no worse off after the taking, only those losses proved should be paid to him.

[153] Concerning the potential of losing one lot, it is important to note that the loss of one developable lot in the plan does not equate to the market value of that lot. In the post taking analysis involving nine lots, lots 1-6 are somewhat larger than the pre-taking size of lots 1-6. There is an increase in anticipated sale prices based on the additional size of lots; this was demonstrated clearly in Mr. Ho's second report. Thus the total loss to the plaintiff would be something less than the loss of one pre-taking lot. In any event, the plaintiff decided not to make its case in this proceeding based on the potential market value of one less lot in the subdivision. I assume that the plaintiff accepts that the reason a prospective purchaser would pay less in the after taking scenario is based on the fact that fewer lots could be created on the lands.

[154] There is some evidence that the lands had been listed for sale by the plaintiff in the years before the taking but had been withdrawn and then relisted. There is no evidence from the plaintiff in this case about the details of those listings or any market response.

[155] In the result, Mr. Coley-Donohue's opinion that the pre-taking value of the Lands based on his use of comparables number 2 and number 5 at \$16.00 per square foot (the pre-taking value of the lands was \$1,460,000) may have been flawed but the report fails because of his flawed assessment of changes in status of the Lands after taking, in comparison with number 2; I conclude that the per square market value of the remainder lands was not reduced after the taking.

[156] In my view Mr. Ho's before taking estimated value of \$1,680,000 (\$18.40 per square foot) and after taking assessment of the Lands at \$1,622,000 (\$18.77 per square foot), is likely more reliable because it suggests a modest depreciation in the remainder caused by the taking.

[157] When Mr. Coley-Donohue applied the downward adjustment of the plaintiff's lands to \$13.50, he fundamentally misconceived the post taking exposure changes and conclude there was little reduction in the remainder because of the taking. I accept that there may be some impact on the market value of the property based on the subdivision prospects outlined by Mr. Ho and Mr. Rooney but I do not take their evidence as proof of the after taking loss on market value; that evidence is an indication only of what might happen and the underlying assumptions are based on an unproven hypothetical possibilities.

[158] Mr. Coley-Donohue opined that the after taking value was only \$1,167,000 (\$13.50 per square foot).

[159] On balance, I conclude that Mr. Coley-Donohue's valuation of the lands before taking at \$16 per square foot was not reliably reduced to \$13.50 per square foot after the taking. Mr. Ho opined that the loss in value after taking was 3.5% of the pre-taking value and Mr. Coley-Donohue opined that the reduction was 20%.

[160] Overall, the plaintiff failed to prove the lands diminished in value after taking by any amount. On this basis alone, her claim should fail.

[161] Although Mr. Ho's opinions as to value were higher than Mr. Coley-Donohue's opinion in the before and after taking scenario, I accept Mr. Ho's opinion on the point that the per square foot value of the remainder after taking was equal to or higher than the per square foot value before taking and reject Mr. Coley-Donohue's contrary opinion.

[162] If the diminution in the fair market value of the remainder of the Lands based on the before taking value derived from the Coley-Donohue's report (\$1,460,000) is reduced 3.5% (the difference calculated by Mr. Ho), the reduction in value would be \$51,000. This is relatively consistent with Mr. Ho estimates of \$58,000 based on his higher evaluations.

[163] Overall, I conclude that the plaintiff's loss was \$ 58,000 which is less than the minimum payment required under the *Act*. She received \$88,800 as an advance

payment and I conclude that the loss in the fair value of the Lands is \$58,000. Thus, after subtracting the advance payment from the \$ 58,000, she will not recover any award in this proceeding. Subject to any further argument to be made on the question of costs, the defendant is entitled to costs at Scale B.

“Armstrong J.”