

CANADA / JUDGMENT

West Point Rail & Timber Co. v. Tahtsa Timber Ltd.

2025 BCSC 832

COURT

Supreme Court of British Columbia

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2025 BCSC 832 West Point Rail & Timber Co. v. Tahtsa Timber Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

West Point Rail & Timber Co. v. Tahtsa Timber Ltd.,

2025 BCSC 832

Date: 20250502

Docket: S03401

Registry: Abbotsford

Between:

West Point Rail & Timber Co.

Plaintiff

And

Tahtsa Timber Ltd.

Defendant

Before: The Honourable Justice Stephens

Reasons for Judgment

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Place and Dates of Trial:

Port Coquitlam, B.C.

November 18-22 and 25-28, 2024

Place and Date of Judgment:

Abbotsford, B.C.

May 2, 2025

Table of Contents

Overview.. 4

Issues. 6

Factual Background.. 7

Certain Agreed Background Facts. 7

Further Factual Background. 10

Physical Aspects of the Rail Line. 10

Siding Agreements. 11

Further Historical Background to the Tahtsa Land and the Rail Line. 11

Tahsta's Agreement with Coastal Gas Link. 13

Expert Evidence. 14

Plaintiffs' Expert 14

Keenan Hopson. 14

Defendant's Experts. 15

Rosa Shih. 15

Brian Pauluzzi 15

Credibility and Reliability. 17

Issue 1: Does West Point have the power to expropriate a SRW over the Tahtsa Land under the Railway Act?. 18

Legislation - The Relevant Provisions. 18

Discussion.. 20

Principles of Statutory Interpretation. 20

Application of Statutory Interpretation Principles. 22

Conclusion on Statutory Interpretation - West Point's Asserted Expropriation Powers. 24

If West Point had the Statutory Power to Expropriate, has it Complied with the Statutory Scheme?. 25

Issue 2: Fixture vs Chattel 26

Legal Principles: Fixture vs Chattel 26

Findings: Fixture vs Chattel 29

Issue 3: What Measure of Compensation Would be Payable to Tahtsa for the SRW?. 30

Plaintiffs' Objection to Rosa Shih's PLG Addendum Memorandum.. 31

Defendant's Objection to Mr. Hopson's Report 33

Legal Framework - Compensation for Expropriation under the Railway Act 34

Overview of the Parties' Positions re Compensation Quantum.. 37

Finding - s.33(a) of Expropriation Act 38

Compensation Findings. 39

Experts' Selection of Comparable Sales. 41

Conclusion - Compensation Approach and Quantum.. 41

Issue 4: Compensation for Pre-Expropriation Disturbance Damages. 44

Other Claim(s) Outside the Scope of this Action. 47

Expropriation Costs. 48

Conclusion and Orders Granted.. 48

Overview

[1] This action asks whether the plaintiff West Point Rail & Timber Co. ("West Point"), a company operating an industrial railway at a siding and spur facility in Houston BC, can expropriate pursuant to the Railway Act, RSBC 1996, c. 395 (the "Railway Act") neighbouring land owned by the defendant Tahtsa Timber Ltd. ("Tahtsa") in order to acquire a statutory right of way ("SRW") for a railway line which runs to West Point's facility. From this question (if it were answered in the affirmative) arises the questions of who owns the physical rail line

and how much compensation must West Point pay to Tahtsa for expropriating the SRW pursuant to the Railway Act.

- [2] An approximately 2,300 ft railway line covering approximately three acres runs over the western edge of a 66-acre parcel of land (described as Lot 2 District Lot 334 Range 5 Coast District Plan EPP5877) owned by Tahtsa (the "Tahtsa Land"). This 2,300 ft railway runs north-south, adjacent to Morice River Road, and is operated by West Point as part of a continuous rail line totalling approximately 21,780 feet long (the "Rail Line"). The Rail Line is used to transport rail cars to West Point's facility at the civic address 1300 Morice River Road (the "1300 Morice River Road Property") in Houston, BC.
- [3] Tahtsa acquired the Tahtsa Land, situated close to Highway 16, in March 2013, and at that time the Rail Line was on its land - indeed, the Rail Line has run over that land since about 1983, formerly servicing a sawmill which was on the 1300 Morice River Road Property. Tahtsa says it owns the infrastructure of the Rail Line used by West Point - referred to as a railway "siding" -- that runs over the Tahtsa Land as a fixture on the Tahsta Land. West Point disagrees and contends that instead West Point owns the siding which sits on the Tahtsa Lands which it operates as part of the Rail Line.
- [4] West Point purchased the 1300 Morice River Road Property, located to the south of the Tahtsa Land, where the Rail Line terminates, in July 2018. West Point operates an industrial railway at its siding and spur facility and its business includes rail loading, unloading, and storage.
- [5] In 2022, Tahtsa blockaded the Rail Line over the Tahtsa Land preventing passage of rail cars. That blockade was subsequently removed, and then West Point purported to expropriate a SRW over the Tahtsa Land on which the Rail Line sits, pursuant to the Railway Act, which has led to this action. Among other things, West Point seeks an order that approximately \$34,000 compensation be paid to Tahtsa for the SRW expropriation and that this Court order Tahtsa to execute a SRW granting rights to West Point. Tahtsa opposes West Point's action, submits there is no power of expropriation, but if there were such a power, compensation for the SRW over its land should be substantially higher than \$34,000.
- [6] West Point does not currently have a SRW over the Tahtsa Land for the Rail Line. It is through this action and the related expropriation process that West Point seeks to acquire a SRW over the Tahtsa Land.
- [7] For the reasons which follow, I dismiss West Point's action on the threshold basis that West Point does not have the power to expropriate a SRW over the Tahtsa Land under the Railway Act. In the event I am wrong in that threshold conclusion, I nevertheless go on to express my views on the evidence as to the appropriate measure of the compensation for expropriation had West Point had the power to expropriate a SRW from Tahtsa under the Railway Act.

- [8] However, in these Reasons, I do not make any findings as to whether West Point has been, or is currently engaged in, actionable trespass on the Tahtsa Land. There is no claim or counterclaim filed by Tahtsa for trespass before me at trial. I was advised at trial by West Point that if the expropriation were to fail, it may assert other claims, which are not before me in this action, and nothing in these Reasons expresses any view on the merit of any such asserted claims.
- [9] Instead, these Reasons address West Point's action to assess compensation for a purported expropriation of a SRW over the Tahtsa Land pursuant to the Railway Act, including whether the Rail Line constitutes a chattel or a fixture on the Tahtsa Land.

Issues

- [10] West Point sought the following relief in its closing submissions:
1. By consent, that term 2.2 be struck from the form of statutory right of way terms of instrument (the "Instrument") that were enclosed as Schedule B of the notice from West Point served on Tahtsa dated October 25, 2022.
 2. The amount of compensation payable with respect to the intended acquisition of the statutory right of way provided for in the Instrument is \$34,930 (the "Compensation").
 3. Within 2 business days of receiving payment of the Compensation, Tahtsa will deliver an executed and registerable copy of the Instrument to West Point.
 4. West Point may apply to the Court for such further and other orders that may be required or requested by the Land Title Office in order to effect the registration of the Instrument.
 5. West Point will pay to Tahtsa real estate appraisal costs pursuant to the Expropriation Proceeding Costs Regulation, B.C. Reg. 98/2005, at Scale 2 and Appendix B, and other costs of the proceeding pursuant to Appendix B of the Supreme Court Civil Rules, B.C. Reg. 168/200 at Scale B.
- [11] As reflected in the relief sought, the action is one for determination of compensation under the Railway Act, the Expropriation Act, R.S.B.C. 1996, c. 125, and the Compensation Act Procedure Rule, for West Point's expropriation of a SRW over the Tahtsa Land.
- [12] In my view, this action raises these issues:
1. Does West Point have the statutory power to expropriate the SRW on the Tahtsa Land from Tahtsa pursuant to the Railway Act?
 2. Who owns the physical Rail Line sitting on the Tahtsa Land: is the physical Rail Line sitting on the Tahtsa Land a fixture, or a chattel?
 3. If West Point can expropriate a SRW over the Tahtsa Land pursuant to the Railway Act, what measure of compensation is payable to Tahtsa for expropriation?

4. Subsumed within issue 3 is whether West Point's past and current use of the Rail Line on the Tahtsa Land entitles Tahtsa to compensation for that as part of compensation for expropriation, and, if so, in what quantum?

Factual Background

Certain Agreed Background Facts

- [13] The following is taken from the agreed statement of facts, which is Exhibit 1 at trial.
- [14] Since on or about August 28, 2020, West Point has been a rail and timber company as contemplated in s. 218(1)(c) of the Land Title Act, R.S.B.C. 1996, c. 250.
- [15] Since on or about July 25, 2018, West Point has been the registered owner of the lands with civic address 1300 Morice River Road, Houston, which lands have the following legal description: Legal Description: Lot 1 District Lots 2100 and 2099 Range 5 Coast District Plan EPP66545 Except Part in Plan EPP78917. The parties refer to this as 1300 Morice River Road Property.
- [16] West Point purchased the 1300 Morice River Road Property, as well as some other parcels, from West Fraser Mills Ltd. ("West Fraser").
- [17] In or about 1977, a company called British Columbia Development Corporation was the registered owner of what is now the 1300 Morice River Road Property, which was intended for the operation of a sawmill and related facilities. Grading, ballasting and track (the "Rail Line") was physically installed on a series of properties in the District of Houston including the following:
- (a) The 1300 Morice River Road Property owned by British Columbia Development Corporation; and
 - (b) District Lot 334, which was at the time owned by Northwood Pulp Limited, and was parent parcel to the Tahtsa Land, along with Lot 1 and Lot 3 shown in plan EPP5877.
- [18] The track was provided by Canadian National Railway Company ("CN").
- [19] British Columbia Development Corporation leased the 1300 Morice River Road Property to Houston Forest Products Ltd. ("HFP") to operate a timber mill. On or about November 1, 1981, HFP entered into a siding agreement with CN concerning the operation and maintenance of the Rail Line. The siding agreement provided that in addition to the costs of maintenance of the Rail Line, HFP would pay annual rent to CN in respect of HFP's use of the Rail Line, with track materials remaining the property of CN.
- [20] A Plan of Railway Right of Way Plan 9273 ("Plan 9273") was deposited in the Land Registry Office at Prince Rupert, BC on November 13, 1979.
- [21] No charge terms creating or respecting a SRW were registered on any of the lands disclosed in Plan 9273.

- [22] The Rail Line is a "branch line" or "spur line" that proceeds south from the broader CN rail network at a location near Highway 16 and currently terminates at the 1300 Morice River Road Property
- [23] The Rail Line is approximately 21,780 lineal feet in length, and the portion of the Rail Line located along the western boundary and on the Tahtsa Land is approximately 2,303 lineal feet.
- [24] In June 1983, CN separately contracted with Northwood Pulp Limited for access on and over its lands, including then District Lot 334. This agreement was not registered as a charge on title to District Lot 334.
- [25] In or about the early 2000s, West Fraser became registered owner of the 1300 Morice River Road Property. During the time that it owned the 1300 Morice River Road Property, West Fraser operated a mill on the property and continued to utilize the Rail Line.
- [26] West Fraser entered into a new Master Siding Agreement with CN in respect of the Rail Line, dated June 1, 2006.
- [27] In or about 2010, Canfor, the successor in title or corporate successor to Northwood Pulp Limited subdivided District Lot 334 and sold the Tahtsa Land to Wilson Brothers Enterprises Ltd.
- [28] Neither HFP or West Fraser ever obtained a registered easement or other written agreement from Wilson Brothers Enterprises Ltd. in respect of the Rail Line traversing the Tahtsa Land.
- [29] The Tahtsa Land have at all times remained free and clear of any registered charges respecting the Rail Line, or any SRW, including at the time of the purchase of the Tahtsa Land by Tahtsa.
- [30] On or about August 28, 2020, West Point was recognized as a "railway" pursuant to s. 3(2) of the Railway Act. The Minister issued a certificate to West Point (attached as Ex. O to the Agreed Statement of Facts) entitled Certificate No 2020-006 (the "Certificate").
- [31] On or about June 22, 2022, pursuant to s. 11(1) Part 2 of the Railway Safety Act, S.B.C. 2004, c. 8, the Registrar of Railway Safety issued operating permit 2022-001 to West Point, granting West Point regulatory authority to operate the Rail Line.
- [32] West Point published a notice on September 28, 2022 in the local newspaper, Houston Today.
- [33] On or about November 3, 2022, West Point served on Tahtsa a notice of intention to expropriate (the "Notice") a SRW (the "Proposed SRW") at the Tahtsa Land and formally offered Tahtsa \$92,441.00 as compensation (the "Offer") The Notice attached a proposed instrument for the Proposed SRW and Explanatory Plan of Statutory Right of Way EPP123479. The Proposed SRW area is 1.24 hectares (or 3.064 acres) in size and has a maximum width of 18.296 metres.

- [34] West Point's Notice was accompanied by an affidavit of Mark Rossman, land surveyor, which affidavit included an appraisal report of Godfrey, Branston and Hopson Appraisals.
- [35] The Offer was not accepted by Tahtsa resulting in West Point's commencement of the within proceeding seeking to determine the amount of compensation owed in respect of the expropriation of the Proposed SRW pursuant to s. 53 of the Railway Act.

Further Factual Background

- [36] From the evidence I make these further findings about the factual background.

Physical Aspects of the Rail Line

- [37] The physical structure of the Rail Line is comprised of ballast, which is a rock level base substructure beneath the railway ties, and holds the ties up. The ties are embedded in the ballast. The ties float on the ballast. The entire physical structure of a rail line was referred to at trial as a "siding".
- [38] Ties are wooden pieces that are underneath the rail and support the rail. The rails are fixed to the ties.
- [39] Mr. Groot, a part-owner and operator of West Point, acknowledged in cross examination that it would be a straightforward exercise to remove a track from the Tahtsa Land if one wanted to; a front-end loader would be able to remove them in approximately a day.

Siding Agreements

- [40] Over the years, in connection with the operation of the Rail Line, West Point, and previous owners of the 1300 Morice River Road Property have entered into what is called a "Siding Agreement" with CN.
- [41] West Point currently has a Rail Siding Agreement and Right of Way with CN dated September 1, 2019 over the Rail Line (the "West Point - CN Siding Agreement"), as did West Fraser and HFP before it. The West Point - CN Siding Agreement provides CN with the right to use the siding for railway purposes (s. 11.1); requires West Point to inspect the siding and provide reports to CN (s. 3.2), and permits CN to direct West Point to effect repairs and maintenance to the siding (s. 3.3). It provides that "all rail traffic shipped to and from the Siding is exclusive to CN" (s. 15.1).
- [42] West Point conducts track inspections of the Rail Line (including over the Tahtsa Land) each month, and sends them to the Transportation Safety Board and CN. West Point engages a contractor to conduct maintenance on the Rail Line.

- [43] The Minister's s. 3(2) Railway Act certificate characterizes West Point as a railway operator, stating that West Point is "operating an industrial railway at its siding and spur facility in Houston, British Columbia". That characterization is consistent with s. 3(1) of the Railway Act, which defines "company" for the purpose of that section to include a corporation that owns or operates a railway in British Columbia.

Further Historical Background to the Tahtsa Land and the Rail Line

- [44] The Tahtsa Land was previously part of a larger parcel, since subdivided, initially owned by Northwood Pulp Ltd. ("Northwood").
- [45] On June 1, 1983, Northwood and CN entered into a Rail Easement and Crossings Agreement which, among other things, granted to CN a right of way over the Northwood land (s. 1) (then the larger parcel referred to as District Lot 334). CN covenanted to "lay down, take up, relay, erect, connect, disconnect, maintain and operate trackage in the Easement Area and rail operations thereon in a proper and workmanlike manner and in accordance with good railway practice" (s. 4(a)).
- [46] The Rail Line was built in approximately 1982 or 1983.
- [47] After its construction, the Rail Line was used in connection with the sawmill located on the 1300 Morice River Road Property. Rail cars were unloaded at the mill site.
- [48] The sale to West Fraser occurred in the early 2000s. Around April 2006, West Fraser agreed to purchase the physical infrastructure and steel of the siding of the Rail Line from CN.
- [49] In about 2010, District Lot 334 was subdivided into, among other parcels, the Tahtsa Land. In about 2013, the Tahtsa Land was sold to Tahtsa. All the while, the Rail Line continued to run along the Tahtsa Land.
- [50] In 2013, Tahtsa had discussions with Dunkley Lumber, about possibly transporting logs from the Tahtsa Land by rail to a mill, however those discussions never resulted in an agreement.
- [51] In 2014, Tahtsa blockaded the Rail Line by placing an excavator over the Rail Line crossing the Tahtsa Land, and court proceedings were commenced by West Fraser to end the blockade. This Court granted an interlocutory injunction against Tahtsa on May 20, 2014: *West Fraser Mills Ltd. v. Tahtsa Timber Ltd. et al*, SCBC No. S143450 (Vancouver Registry).
- [52] West Fraser closed its mill in 2015 and then dismantled the mill using the Rail Line to remove scrap metal.
- [53] West Fraser and West Point entered into an Option to Purchase the 1300 Morice River Road Property on June 30, 2016, which West Point exercised on May 25, 2017.
- [54] The District of Houston commenced an expropriation process to obtain a SRW over the Tahtsa Land in 2017, but abandoned that proposed expropriation on or about October 2019.

- [55] On December 20, 2019, West Point and West Fraser entered into an agreement by which West Point purchased railway assets from West Fraser, which included railway assets and several SRWs.
- [56] While, in connection with the purchase of the 1300 Morice River Road Property, West Point has a SRW over other parcels of land over which the Rail Line travels, West Point has no SRW over the Tahtsa Land.
- [57] The Tahtsa Land is zoned Heavy Industrial.

Tahsta's Agreement with Coastal Gas Link

- [58] In February 2019, Coastal Gas link ("CGL") sought to use the tracks for a pipeline project, in order to transport by rail and store material on the 1300 Morice River Road Property. In February 2019 CGL entered into a temporary SRW Agreement with Tahtsa directly to pass over the Tahtsa Land; and a SRW in favour of CGL was registered on title to the Tahtsa Land for a duration of approximately 30 months until August 31, 2021.
- [59] A separate Temporary Infrastructure Site Lease was entered into between West Point and CGL on August 2020.
- [60] In connection with these agreements, CGL paid for upgrades to the Rail Line, including the portion over the Tahtsa Land. According to West Point, West Point hired the railway maintenance contractor, with the railway upgrades being invoiced to West Point, but then paid for by CGL.
- [61] Tahtsa has not itself performed maintenance on that part of the Rail Line which runs over the Tahsta Lands; instead, West Point has done so. Tahtsa does not have any siding agreement with CN, or authorization from the Minister, to operate the Rail Line over the Tahtsa Land.
- [62] After the CGL SRW expired on August 31, 2021, Tahtsa renewed discussion with West Point about there being no SRW in favour of West Point to run the Rail Line over the Tahtsa Land. West Point continued to use the Rail Line over the Tahtsa Land for its business. Tahtsa then blockaded the Rail Line in 2022.
- [63] That blockade was taken down, and then West Point commenced an expropriation process and brought this related legal proceeding.

Expert Evidence

- [64] Three experts testified at trial in regard to the quantum of compensation payable to Tahtsa for expropriation of a SRW.

Plaintiffs' Expert

Keenan Hopson

- [65] Keenan Hopson testified as an expert for the plaintiff, and was qualified as an expert in real estate appraisal and valuation, including the assessment of compensation of under the Expropriation Act. He applied a Direct Comparison Approach to valuation. He assumed the Rail Line was passing over the Tahtsa Land in the before-taking scenario in his valuation analysis.
- [66] In his opinion, as set out in his report dated August 22, 2024, the total estimate of compensation payable to Tahtsa as of August 1, 2024, if Tahtsa owns the rail is \$112,777; and is \$34,930 if West Point owns the rail.
- [67] Mr. Hopson also prepared an expert report responding to the expert report of Brian Pauluzzi, one of the defendant's experts. Among other things, he opined that the Subdivision Development Approach ought not to be used in the valuation analysis, and the preferred methodology was the Direct Comparison Approach.

Defendant's Experts**Rosa Shih**

- [68] Rosa Shih testified as an expert for the defendant, and was qualified to give opinion evidence as an expert in the field of development planning and assembling associated costs of development as a component of a feasibility analysis.
- [69] She provided an opinion in the form of a land use assessment, which she stated had a focus on evaluating the development potential (e.g. subdivision) of the property after the taking, which includes the imposition of a SRW for rail purposes on the property. She prepared two-lot, three-lot and six lot subdivision concepts in her assessment. She opines that these three subdivision concepts "are reasonable development options for the Property" (s. 6.0).
- [70] In an addendum report dated August 9, 2024, Ms. Shih also provided general costing estimates associated with the subdivision of the property. These costs were used by Mr. Pauluzzi in his valuation opinion report. West Point objects to this addendum report.

Brian Pauluzzi

- [71] Brian Pauluzzi also testified as an expert for Tahtsa, and was qualified to provide opinion evidence at trial as an expert in the field of real estate appraisal and valuation as it relates to the determination of compensation under the Expropriation Act.
- [72] He assumed there was no Rail Line running over the Tahtsa Land, fronting that land adjacent to Morice River Road, in the before-taking scenario, facilitating subdivision into smaller industrial parcels:

Given the current zoning and land use regulations, parcel size, established and potential use, the highest and best use of the subject property prior to the taking was a large holding industrial use with the ability to subdivide into smaller industrial acreages. [p. 72]

[73] Correspondingly, he opines that in an after-taking scenario, with a SRW for the Rail Line over the Tahtsa Land, subdivision of the Tahtsa Land is impaired due to loss of frontage and access on Morice River Road, detracting from the property's highest and best use:

The removal of Morice River Road frontage is considered detrimental to the highest and best use of the site given that ease of subdivision and access is now removed. Furthermore, subdivision of the subject lands, in the "after" scenario, would require construction of a roadway into the site in order to obtain access and frontage to each lot if one were to consider a 6 or 7 lot subdivision as indicated in the "before" scenario above. This would incur a loss of land for roadways and increase the cost of subdivision, potentially to the point of it becoming infeasible or uneconomic. Regardless, the presence of the SRW creates an impairment to configuration and utility. [p.72]

[74] He utilized a Direct Comparison Approach and Subdivision Development Approach to valuation in the before-taking scenario, and a Subdivision Development Approach on the after-taking scenario. He opines that:

the apportioned value of the proposed acquisition area and compensation relating to the project impact on the market value of the remaining property as at October 25, 2022, is estimated at \$1,350,000. The rail improvements are estimated at \$800,000. Occupational Rent is estimated at \$208,300 for the period of September 1, 2021 to October 25, 2022 and additional rent of \$178,000 per annum, or \$14,833 per month up to date of trial. [emphasis in the original]

[75] Mr. Pauluzzi also provided an opinion based on a "proportional share method", an apparent reference to the statutory minimum amount of compensation for a partial taking provided for in s. 40(3) of the Expropriation Act (pp. 123, 137). However, it is not obvious that Mr. Pauluzzi's proportional share calculation comported with the formula for calculating a statutory minimum for compensation under s. 40(3) of the Expropriation Act.

[76] Mr. Pauluzzi also provided opinions in responding reports to the expert reports of Mr. Hopson.

[77] The expert reports of Mr. Hopson and Mr. Pauluzzi contained references to Expropriation Act provisions. In my Reasons, I place no weight on any views expressed by these experts as to the interpretation of provisions of the Expropriation Act, which are questions of law for the court to determine.

Credibility and Reliability

[78] The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, as follows:

- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [Farnya]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).
- [79] As explained by this Court in *Hardychuk v. Johnstone*, 2012 BCSC 1359, credibility and reliability are distinct assessments:
- [10] The typical starting point in a credibility assessment is to presume truthfulness: Halteren. Truthfulness and reliability are not, however, necessarily the same. A witness may sincerely attempt to be truthful but lack the perceptive, recall or narrative capacity to provide reliable testimony. Alternatively, he or she may unconsciously indulge in the human tendency to reconstruct and distort history in a manner that favours a desired outcome. There is, of course, also the possibility that a witness may choose, consciously and deliberately, to lie out of perceived self-interest or for some other reason. Accordingly, when a witness's evidence is demonstrably inaccurate the challenge from an assessment perspective is to identify the likely reason for the inaccuracy in a cautious, balanced and contextually sensitive way.
- [80] I found the lay witnesses at trial, including Mr. de Groot of West Point and Mr. Posselt of Tahtsa, to be credible witnesses. I find they were trying to be truthful in their evidence. However, there were a number of agreements spoken about in testimony; I place no weight on the witnesses' s views about the interpretation of any agreements in evidence which were explicitly or implicitly elicited in their testimony.
- [81] I also found the three expert witnesses to be professional in their evidence. Each were confronted in cross examination with alleged errors, inaccuracies and deficiencies with their opinions. I found they answered those questions honestly and professionally and I did not detect advocacy which would justify my discounting any of their opinions altogether. However, concerns as to the weight of substantive aspects of their opinions will be addressed below.

Issue 1: Does West Point have the power to expropriate a SRW over the Tahtsa Land under the Railway Act?

[82] West Point does not submit that Part 7 applies to it by virtue of the Minister's certificate under s. 3 of the Railway Act. West Point instead takes the position that it has the authority to expropriate under Part 7 of the Railway Act because it has authorization to operate a railway under a "special Act". West Point relies on the definitions of the word "company" and the phrase "special Act" in the Railway Act to ground this interpretation. West Point submits that the "Railway Safety Act is a special Act within the meaning of the Railway Act" since it "authorizes the issuance of an operating permit" (para. 140, written submissions). Since West Point was issued an operating permit under s. 11 of the Railway Safety Act, it contends it is a "company" within s. 1 of the Railway Act. As stated in their submissions:

Upon the issuance of the Permit under the Railway Safety Act, West Point was authorized to operate the Rail Line, and as such, became a "company" within the meaning of the Railway Act

[83] Tahtsa's position is that West Point does not have the authority to expropriate under Part 7 of the Railway Act.

Legislation - The Relevant Provisions

[84] Part 7 of the Railway Act confers on a "company" the powers of acquisition of land by expropriation: ss. 34 to 63 of the Railway Act. The word "company" in the Railway Act is defined in s. 1 to include a company authorized by the Railway Act or a "special Act" to construct, own or operate a railway:

"company" means a company within the meaning of the Business Corporations Act that is authorized by this Act or a special Act to construct, own or operate a railway; [emphasis added]

[85] A "special Act" is, in turn, defined in s. 1 to be an Act "authorizing" the construction and operation of a railway:

"special Act" means any Act authorizing the construction and operation of a railway;

[86] Section 3(2) of the Railway Act confers on the Minister the power to declare by certificate that certain provisions apply to any "company". However, such an authorization may render only certain provisions of the Railway Act applicable to a s. 3 "company": s. 3(3) states that only "to the extent set out in the certificate" the Railway Act will apply to the company named in the certificate and to its railway.

[87] Section 3 provides its own definition of the word "company" for the purposes of that section, as including a corporation that constructs, owns or operates a railway and to "which, except for this section, this Act would not apply". I set out s. 3 in full below:

3 (1) For the purposes of this section:

"company" means a person, firm or corporation that owns, constructs or operates, or intends to own, construct or operate, a railway or tramway in British Columbia and to which, except for this section, this Act would not apply, and includes a corporation empowered to act as a carrier of passengers and freight;

"railway" means a railway or tramway subject to the legislative authority of the Legislature, and includes any undertaking of a company subject to that authority which is by any certificate of the minister designated as a railway.

- (2) The minister may by certificate declare that the provisions of this Act as may be designated in the certificate apply to any company.
- (3) On the taking effect of and to the extent set out in the certificate, this Act applies to the company named in the certificate, and to its railway.
- (4)[Repealed 2004-51-37.]
- (5) [Repealed 2003-39-96.]
- (6) Subject to the Railway Safety Act, a company must not operate a railway in British Columbia except with the consent in writing of the minister and subject to conditions the minister may impose.

[Emphasis added]

[88] The Railway Safety Act is a separate enactment which applies to "railway company", which is defined as a "company that has received an authorization under section 3 of the Railway Act", such as West Point: s. 1 of the Railway Safety Act. The Railway Safety Act prohibits a railway company from operating a railway unless the company has a valid permit issued by the registrar under s. 11: s. 10, Railway Safety Act. Section 11, in turn provides that the registrar may issue a permit to a railway company to operate a railway:

Registrar may issue permit

11 (1)The registrar may issue a permit to a railway company in response to an application under section 10 if the registrar considers the applicant capable of operating the railway in a safe manner.

- (2) If the registrar issues a permit, the registrar may
 - (a) exempt the permit holder from the application of any adopted provisions or from a regulation or any part of a regulation made under section 9 (2) (b), or from both, and
 - (b) establish terms and conditions that apply to the permit.
- (3) A permit holder must comply with
 - (a) the adopted provisions that apply to the permit holder,

- (b) the terms and conditions that apply to the permit holder's permit, and
- (c) any order or directive made to the permit holder by a railway safety inspector acting under the authority of a provision adopted under section 4.
- (4) The registrar, at any time by notice in writing, may
 - (a) vary or cancel an exemption granted to a permit holder under subsection (2) (a), and
 - (b) exempt a permit holder from additional adopted provisions or regulations under subsection (2) (a).

Discussion

Principles of Statutory Interpretation

- [89] Statutory interpretation is governed by the modern principle of interpretation: the words of an enactment "are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *British Columbia v Musqueam Block F Land Ltd.*, 2023 BCSC 157 at para. 56 [Musqueam Block F]; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26 [Bell ExpressVu], citing Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at 87; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 1998 CanLII 837.
- [90] Put another way, "[t]hose who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose": *Benchwood Builders, Inc. v. Prescott*, 2025 ONCA 171 at para. 15, quoting *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 118.
- [91] The plain meaning of the text is not in itself determinative: *Seabridge Gold Inc. v British Columbia*, 2025 BCSC 558 at para. 44 [Seabridge], citing *La Presse inc. v. Quebec*, 2023 SCC 22 at para. 23 [La Presse].
- [92] It is a "principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter" (*Bell ExpressVu* at para. 27, citing *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 at para. 52) and the Legislature's intent: *Musqueam Block F* at para. 54.
- [93] I therefore interpret the relevant provisions of these two statutes - the Railway Act and Railway Safety Act -- including to achieve coherency between them.
- [94] Further, the "power of an expropriating authority should be strictly construed in favour of those whose rights have been affected" and that expropriation legislation "should be read in a broad and purposive manner": *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, 1997 CanLII 400 (SCC), [1997] 1 SCR 32, at paras. 20-23.

Application of Statutory Interpretation Principles

[95] West Point was granted the Certificate pursuant to s. 3(2) on August 28, 2020. However, the Certificate does not include Part 7 expropriation powers within the provisions of the Act which are applicable to West Point. I quote the Certificate below:

WHEREAS West Point Rail & Timber Co. Ltd., a company registered under the Business Corporations Act (Number: BC0955807) in the Province of British Columbia, is operating an industrial railway at its siding and spur facility in Houston, British Columbia;

NOW THEREFORE pursuant to Section 3(2) of the Railway Act being Chapter 395 of the Revised Statutes of British Columbia 1996;

1. The following provisions of the Railway Act shall apply to the railway operations of West Point Rail & Timber Co. Ltd. in Houston, British Columbia:

Part 1

Parts 12 to 14 inclusive

Parts 24 to 26 inclusive

Part 32

Part 37

Part 46

[96] The provisions of the Railway Act apply "to the extent set out in the certificate": s. 3(3) of the Railway Act. The Certificate only designates certain limited provisions of the Railway Act to apply to West Point--not expropriation powers under Part 7. Therefore, if West Point is to have expropriation powers as a "company" as defined throughout the Railway Act, it must be by virtue of conferral of powers on it under a "special Act".

[97] West Point contends that the Railway Safety Act is a "special Act" and that, as holder of a s. 11 permit under the Railway Safety Act, it is authorized to operate a railway by a "special Act" and is therefore a "company" as defined in s. 1 for the purposes of the entire Railway Act. As a result, West Point contends, the entirety of the Railway Act is applicable to West Point, including the provisions of Part 7. This is despite the fact that its s. 3(2) Railway Act Certificate does not declare Part 7 to apply to it.

[98] I disagree with West Point's submission.

[99] I find that the Railway Safety Act is not a "special Act" within the meaning of the Railway Act and that West Point's Operating Permit under the Railway Safety Act does not render Part 7 Railway Act expropriating powers applicable to West Point.

- [100] I find that textual considerations are not determinative as to whether the Railway Safety Act is a special Act.
- [101] However, turning to context and purposive considerations, I find that the Railway Safety Act is not a "special Act" because such an interpretation better coheres with the legislative scheme.
- [102] Section 3 permits the Minister to declare that only certain provisions of the Railway Act are applicable to a company. That is the case for West Point's certificate. However, s. 11(1) of the Railway Safety Act gives the registrar a discretion to issue an operating permit to any company that has a s. 3 Railway Act permit (stating, in part, "The registrar may issue a permit to a railway company "). This is because s. 1 of the Railway Safety Act in turn defines "railway company" to mean "a company that has received an authorization under section 3 of the Railway Act".
- [103] West Point's interpretation would mean that the Minister's power in s. 3 to limit those provisions of the Railway Act which are applicable to a s.3 company would be negated by the issuance of a s. 11 Railway Safety Act permit. In effect, once a s. 3 Railway Act company is issued a s. 11 Railway Safety Act permit, it would become a "company" for the purposes of the entire Railway Act, including Part 7 - reversing any restriction made by the Minister in a s. 3 certificate as to the applicability of part of the Railway Act to that company.
- [104] It is a principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage: *Seabridge* at para. 59, citing *British Columbia v. Philip Morris International, Inc.*, 2018 SCC 36 at para. 29. West Point's interpretation would render the Minister's authority to limit the application of the Railway Act functionally of no effect, since it would remain in effect only in the time period between a s. 3 certificate under the Railway Act being granted and a permit being issued under s. 11 of the Railway Safety Act. I decline to accept such an interpretation, since it does not align with the legislature's intent to grant the Minister the authority under s. 3 to limit the provisions of the Railway Act applicable to a company.
- [105] Similarly, this would also not accord with the legislature's purpose.
- [106] The Railway Act has multiple parts, including the statutory power of expropriation in Part 7. A purpose of s. 3 within the overall scheme of the Railway Act is to permit the Minister to decide, in their discretion in the circumstances, what provisions of the Railway Act ought to apply to a s. 3 company, and whether certain Railway Act provisions should not apply to such a company.
- [107] West Point's interpretation would be at odds with this legislative purpose. The Minister would be able to limit the application of the Railway Act's provisions only for the period of time prior to when a registrar subsequently approves an application for a Railway Safety Act permit (a permit expressly contemplated by the Railway Safety Act). This would be a substantial truncation of the Minister's discretionary authority under s. 3 of the Railway

Act, and would run counter to the legislature's purpose in conferring a power on the Minister to restrict the application of certain provisions of the Railway Act to a s. 3 company.

Conclusion on Statutory Interpretation - West Point's Asserted Expropriation Powers

[108] Textual considerations of the definition of "special Act" are not conclusive, but the consideration of context, purpose and the overall scheme of the relevant provisions of the Railway Act and the Railway Safety Act lead to the conclusion that the Railway Safety Act is not a "special Act" within the meaning of the Railway Act.

[109] The Minister declared certain provisions of the Railway Act were applicable to West Point's railway operations, but not Part 7 expropriation powers. Those Part 7 expropriation powers therefore do not apply to West Point, whether by virtue of the s. 3 certificate or by a "special Act".

[110] West Point submitted, albeit in the context of its submissions as to ownership of the rail infrastructure, that:

To jeopardize the actual utility of the Rail Line on the basis of a 45 year-old administrative error could set an impractical precedent, compromising other works essential to trade and commerce should a similar error be discovered elsewhere in the future.

[111] However, the interpretation of statutory authority must be grounded in the enactment itself, and the legislative choices made in that enactment: Seabridge at para. 96. In my view, interpreting the relevant statutory provisions, West Point does not have the statutory power under Part 7 of the Railway Act to expropriate a SRW on the Tahtsa Land.

[112] In the result, I find that, construing the Railway Act and Railway Safety Act, in the circumstances of this case, that West Point does not have the power to expropriate Tahtsa Land pursuant to Part 7 of the Railway Act, and that the action should be dismissed on this basis.

[113] If I am wrong in that conclusion, and West Point instead does have an expropriation power under Part 7 of the Railway Act, I go on, to provide my views on the other issues arising in the trial of this action including as to the assessment of the quantum of compensation had West Point had the power under Part 7 of the Railway Act to expropriate a SRW from Tahtsa.

If West Point had the Statutory Power to Expropriate, has it Complied with the Statutory Scheme?

[114] Tahtsa argues:

There are two additional procedural matters of difficulty. First, is the section 2.2 of the SRW (now withdrawn). Second, is the defects in the gazetting (ASOF Exhibit1 Tab Q) which purports to identify a deposited plan to correspond with the taking

- [115] The first stated difficulty has been resolved by West Point's withdrawal of s. 2.2 of the Proposed SRW.
- [116] The second stated difficulty flows from the fact that West Point has used a 1979 plan that "that encompasses this and three or four other parcels", although the defendant does not claim to have been prejudiced by this.
- [117] The applicable provisions for notice are ss. 48 and 50 of the Railway Act.
- [118] In my view, there has been substantial compliance with this statutory procedural provision, and it is not something on its own that would have rendered ineffective West Point's purported expropriation.
- [119] Even if there were not strict compliance with this provision, having regard to the principles set out in *Safeway Trucking Ltd. v Office of the British Columbia Container Trucking Commissioner*, 2023 BCSC 589 at paras. 33, 38-42, quoting *Society Promoting Environmental Conservation v. Canada (Attorney General) (C.A.)*, 2003 FCA 239, I would have concluded that, in the absence of any prejudice to Tahtsa, this would not have rendered the expropriation ineffective.

Issue 2: Fixture vs Chattel

- [120] Determining the amount of compensation for the expropriation of a SRW requires assessing whether the physical track on the Tahtsa Land is owned by Tahtsa. I find that the physical railway line infrastructure on the Tahtsa Land is not a fixture owned by Tahtsa, but a chattel which belongs to West Point.

Legal Principles: Fixture vs Chattel

- [121] "Fixtures are chattels that become attached to real property and pass with the transfer of title to real property": *P.S. Sidhu Trucking Ltd. v Elima Enterprises Ltd.*, 2020 BCSC 1062 at para. 78 [*P.S. Sidhu Trucking*].
- [122] The test for distinguishing between a chattel and a fixture was set out in *La Salle Recreations Ltd. v. Canadian Camdex Investments Ltd.* (1969), 1969 CanLII 740 (B.C.C.A.), 4 D.L.R. (3d) 549 at 554 and *Zellstoff Celgar Ltd. v. British Columbia*, 2014 BCCA 279 at para. 9, which adopt the principles from *Stack v. T. Eaton Co.* (1902), 4 OLR 335 at 338 (Div. Ct.)"
- (1) That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as shew that they were intended to be part of the land.
 - (2) That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels.

- (3) That the circumstances necessary to be shewn to alter the prima facie character of the articles are circumstances which shew the degree of annexation and object of such annexation which are patent to all to see.
- (4) That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.
- (5) That, even in the case of tenants' fixtures, put in for the purposes of trade, they form part of the freehold, with the right, however, to the tenant, as between him and his landlord, to bring them back to the state of chattels again by severing them from the soil, and that they pass by a conveyance of the land as part of it, subject to this right of the tenant.

See also: P.S. Sidhu Trucking Ltd at para 79.

[123] "[I]ntention, insofar as it can be derived from degree and purpose of attachment, is integral to the characterization of an item as a fixture or a chattel": *dos Reis v. Ring*, 2012 BCSC 122 at para 30.

[124] However, the subjective intention of the party affixing the items, or the parties, are not determinative; *Zellstoff Celgar Limited v. British Columbia*, 2013 BCSC 1108 at para. 21 [Zellstoff SC] states:

These principles presume that an item affixed to the land in any manner is a fixture unless the degree and purpose of its annexation objectively demonstrate otherwise. The subjective intention of the party affixing the items, or of the parties to the transaction, are not determinative. In *Melluish (Inspector of Taxes) v. B.M.I. (No. 3) Ltd.* (1995), [1996] A.C. 454 (U.K. H.L.), the House of Lords held as follows (at 473):

... the intention of the parties as to the ownership of the chattel fixed to the land is only material so far as such intention can be presumed from the degree and object of the annexation. The terms expressly or implicitly agreed between the fixer of the chattel and the owner of the land cannot affect the determination of the question whether, in law, the chattel has become a fixture and therefore in law belongs to the owner of the soil.

See also: *Scott v. Filipovic*, 2015 BCCA 409 at para. 24 ("the subjective intention of the parties is not relevant"); and *dos Reis v. Ring*, 2012 BCSC 122 at para. 31 ("A person's subjective intention is not of note")

[125] Instead, objective intention matters: "[t]he determination of whether a chattel has been transformed into a fixture is a matter of intention, objectively determined": *Scott v. Filipovic*, 2015 BCCA 409 at para. 19, quoting Bruce Ziff, *Principles of Property Law*, 6th ed. (Toronto: Carswell, 2014) at 118. Whether "an object is a chattel or a fixture is determined by operation of law": *Scott* at para. 20.

[126] Justice Gropper in *P.S. Sidhu Trucking* stated: "A chattel may be attached both for the purpose of the better use of the land and the better use of the chattel. If so, the court must discern the dominant or true object of the annexation": at para 81, citing *Zellstoff SC* at para. 75.

[127] In *dos Reis Dorgan J.* characterized the analysis as a two-step process:

[27] The test for the classification of an item as fixture or chattel in *La Salle* turns on two steps: first, a *prima facie* categorization based on the item's annexation to the real property; second, an analysis of the degree and purpose of annexation.

[28] The first stage merely gives a *prima facie* category. Where an item is even lightly annexed, it appears to be a fixture. Generally, buildings are found to be fixtures. Where an item's annexation depends largely on its own weight, the item is presumed to be a chattel.

[29] However, the second stage of analysis can overturn this by considering the degree and purpose of the item's annexation. An item might be strongly annexed, but annexed ultimately for its own better use as a chattel, or it might be firmly annexed for enhancement of the land -- making it a fixture.

[128] *Dorgan J.* in *dos Reis* at para. 30 also stated that the degree of annexation of an item to the land is relevant to the strength of rebutting evidence required at the second stage, when determining an item's characterization as fixture or chattel:

the less damage to the realty and to most aspects of the item, the more likely the item is a chattel. Generally, where an item is strongly annexed, the rebutting evidence and argument of attachment for its better use need to be strong. Vice versa, where an item is clearly detached or only slightly annexed (as the carpet in *La Salle* was found to be), any rebutting evidence and argument that it is there to enhance the land must be strong in order to displace the *prima facie* characterization.

[129] *Canadian Credit Men's Trust Association Limited v Ingham*, 1932 CarswellBC 79 (SC) 3, 1932 CanLII 442 (B.C.S.C.), *aff'd* 1933 CarswellBC 60 (C.A.) concerned whether a rail track was a fixture or chattel. However, I find it not of assistance determining this issue in this action. I regard the issue before me to require consideration of the particular facts of this case, which are different than the circumstances in *Canadian Credit*.

[130] The parties also referred to other cases on the fixture/chattel point. However, those cases turned on their own particular facts and are of not of assistance in the present case: see e.g. *Alberta v. Hansen*, 2000 ABCA 334 (dispute with respect to a dam); and *Cando Contracting Ltd. v. Sarnia (Rural Municipality No. 221)*, 2002 SKQB 40 (dispute over a security interest in rails, ties, and related property).

[131] While notice to a purchaser of the presence of an object has at times been referred to in the fixture-chattel jurisprudence, I do not find that an assessment of the evidence whether Tahtsa had notice of the existence of the Rail Line prior to purchasing the Tahtsa Land to be

of assistance in making this determination in the present case: see e.g. *Kuzyk v Hook Outdoor Advertising*, 1993 carswellAlta 842, [1993] AJ No 327 at paras 7, 10-11; *D & K Equipment Distributors Ltd. v KG's Palisade Restaurant Ltd* 1977 Carswell BC 55 (C. Ct.), 2 B.C.L.R. 362 at para 15.

Findings: Fixture vs Chattel

- [132] Following the approach in *dos Reis*, I find that that Rail Line is affixed to the ground, making it prima facie a fixture. However, at the second stage of the analysis, I find, considering the degree and purpose of the item's annexation, that the object of the annexation is as part of the Rail Line for the better use of the 1300 Morice River Road Property, and not the Tahtsa Land, making it a chattel.
- [133] The object and purpose for which the Rail Line was originally installed, and is currently used, was for the use and benefit of the 1300 Morice River Road Property. The track has historically served, and continues to serve, that purpose virtually exclusively. West Point currently has a permit from the Minister for "operating an industrial railway at its siding and spur facility" which is serviced by the Rail Line over of the Tahtsa Land.
- [134] I find that the object and purpose of the physical Rail Line running over the Tahtsa Land is for the use and benefit of the Rail Line itself operated by West Point, serving the property at its terminus which West Point currently owns.
- [135] The defendant relied on that portion of the 1983 Rail Easement and Crossings Agreement between Northwood and CN, which provided that a single railway line "will be used for only for ingress to and egress from the industrial development known as Houston Forest Products, or to service industrial development occurring immediately adjacent to the Easement Area " (s. 6(vii); emphasis added). This would imply that that Rail Line was intended to be used for adjacent properties, such as the Tahtsa Land. However, it is to be recalled that subjective intention of the parties is not relevant: *Zelstoff* para. 21.
- [136] Instead, looked at objectively, in the context of the Rail Line's actual use, I find the Rail Line over the Tahtsa Land to be a chattel.
- [137] I therefore find, in the circumstances of this case, that the Rail Line over the Tahtsa Land is a chattel, and not a fixture.

Issue 3: What Measure of Compensation Would be Payable to Tahtsa for the SRW?

- [138] Evidence regarding the appropriate quantum of compensation for expropriation of a SRW was adduced from the experts who testified at trial. I assess that evidence below to arrive at an amount of compensation, in the event that Part 7 of the Railway Act had applied.

Plaintiffs' Objection to Rosa Shih's PLG Addendum Memorandum

[139] West Point argued that the August 9, 2024 memorandum from Rosa Shih (the "PLG Memorandum") is not admissible as an expert report pursuant to R. 11-6 of the Supreme Court Civil Rules and in the alternative, if admitted, it, and any other conclusions based on, ought to be afforded very little weight. West Point also argues, among other things, that the conclusions in the PLG Memorandum are not sufficiently reliable to warrant consideration by this Court. It submits that "the PLG Memorandum ought not to be admitted, or in the alternative, if admitted, the unit costs and calculations set out therein ought to be struck". It argues that the core factual basis on which the PLG Memorandum, and in turn the NCA Appraisal, rest, is not proven. West Point submits that, if admissible, such costing information should be afforded little to no weight.

[140] The formal requirements of R. 11-6(1) are mandatory: *Cowichan Tribes v Canada (Attorney General)*, 2019 BCSC 1986 at para. 19.

[141] However, R. 11-7(6) provides that

(6) At trial, the court may allow an expert to provide evidence, on terms and conditions, if any, even though one or more requirements of this Part have not been complied with, if

(a) facts have come to the knowledge of one or more of the parties and those facts could not, with due diligence, have been learned in time to be included in a report or supplementary report and served within the time required by this Part,

(b) the non-compliance is unlikely to cause prejudice

(i) by reason of an inability to prepare for cross-examination, or

(ii) by depriving the party against whom the evidence is tendered of a reasonable opportunity to tender evidence in response, or

(c) the interests of justice require it.

[142] In *Cowichan Tribes v Canada (Attorney General)*, Justice Young stated the principles applicable to admitting expert evidence which includes hearsay:

[21] The British Columbia Court of Appeal in *Mazur v. Lucas*, 2010 BCCA 473 ("Mazur") summarized the law pertaining to the admissibility of expert reports containing hearsay evidence:

[40] From these authorities, I would summarize the law on this question as to the admissibility of expert reports containing hearsay evidence as follows:

- An expert witness may rely on a variety of sources and resources in opining on the question posed to him. These may include his own intellectual resources, observations or tests, as well as his review of other experts' observations and opinions, research and treatises, information from others - this list is not exhaustive. (See Bryant, *The Law of Evidence in Canada*, at 834-835)
 - An expert may rely on hearsay. One common example in a personal injury context would be the observations of a radiologist contained in an x-ray report. Another physician may consider it unnecessary to view the actual x-ray himself, preferring to rely on the radiologist's report.
 - The weight the trier of fact ultimately places on the opinion of the expert may depend on the degree to which the underlying assumptions have been proven by other admissible evidence. The weight of the expert opinion may also depend on the reliability of the hearsay, where that hearsay is not proven by other admissible evidence. Where the hearsay evidence (such as the opinion of other physicians) is an accepted means of decision making within that expert's expertise, the hearsay may have greater reliability.
 - The correct judicial response to the question of the admissibility of hearsay evidence in an expert opinion is not to withdraw the evidence from the trier of fact unless, of course, there are some other factors at play such that it will be prejudicial to one party, but rather to address the weight of the opinion and the reliability of the hearsay in an appropriate self-instruction or instruction to a jury.
- [22] At a hearing considering the admissibility of expert evidence, the question is whether the report, taken as a whole, is capable of providing the court with the assistance that is required and is sufficiently reliable to merit consideration by the trier of fact: *Maras v. Seemore Entertainment Ltd.*, 2014 BCSC 1109 ("*Maras*") at para. 19; *Keefer Laundry Ltd. v. Pellerin Milnor Corporation*, 2007 BCSC 899 at para. 18.
- [143] The defendant relies on *Pinch v. Hofstee*, 2015 BCSC 1887, where the court permitted experts to file an affidavit to comply with formal requirements. Here, Ms. Shih testified at trial and was cross-examined by West Point.
- [144] The unsigned PLG Memorandum, without an appended instruction letter, was provided by Ms. Shih as an addendum memo to her Land Use Assessment report dated August 6, 2024. The contents of the PLG Memorandum does concern a subject matter - costing of subdivisions - which is related to her qualified expertise at trial. She was cross examined on that memorandum, mitigating the procedural prejudice to West Point by being permitted to test the weight of any facts or opinion in this PLG Memorandum. The PLG Memorandum did not provide tender costs, but instead general costs for subdivision.
- [145] Ms. Shih testified that the reason the PLG Memorandum was not officially signed by her was because she did not prepare costs but assembled the costs, so it was not for her to actually sign it.

[146] I acknowledge that the PLG Memorandum is comprised entirely of hearsay from an unnamed source as to costing information who did not testify at trial. While I admit the PLG Memorandum in the interests of justice pursuant to R. 11-7(6)(c), I consider the weight of this evidence in accordance with the principles in *Mazur v. Lucas* as set out in *Cowichan*. There is merit to West Point's submission that there is a lack of reliability to this evidence in the PLG Memorandum, and diminished weight should be given to it.

Defendant's Objection to Mr. Hopson's Report

[147] Tahtsa objects to the admissibility (and weight) of Mr. Hopson's report on the grounds that he failed "to state facts/identify those facts on which the opinion is based"; he evinced advocacy and lack of objectivity (relying on *White Burgess Lenyule Inman v. Abbott and Haliburton Co.*, 2015 SCC 23); he did not question, and accepted, misadvised instructions (for example, by making the "implicit assumption that the rail infrastructure existed as a control on the land in the before"); and that the nature and scope of the opinion exceeds the stated qualifications, in that he appeared to make hydrologic opinions and sterilized 14 acres of land resulting in "speculative conclusions".

[148] I reject Tahtsa's admissibility objection, and find that Mr. Hopson's report is admissible opinion evidence. I find that he sufficiently set out the facts on which his opinion was based; and that Tahtsa has failed to demonstrate he lacked objectivity, or engaged in advocacy, such as to lead to the inadmissibility of his evidence. I find these and Tahtsa's other objections are matter for assessment of the weight of Mr. Hopson's evidence.

Legal Framework - Compensation for Expropriation under the Railway Act

[149] The Expropriation Act applies to the determination of the amount of compensation under the Railway Act: *Railway Act*, s. 53(2).

[150] Section 40(1) of the Expropriation Act set out the general compensation scheme that applies in partial takings cases. It essentially provides that the compensation is equal to the market value of the expropriated land, plus the reduction in market value of the remaining land, and disturbance damages:

Partial takings

40 (1) Subject to section 44, if part of the land of an owner is expropriated, the owner 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. [emphasis added]

[151] Market value in a partial taking may be determined on a before-and-after approach, subject to a check as against a statutory minimum:

40 (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) the owner retains land contiguous to the expropriated land, or
 - (b) the owner owns land close to the land that was expropriated, the value of which was enhanced by unified ownership with the land expropriated. [emphasis added]

[152] Section 32 of the Expropriation Act states the definition of market value: "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."

[153] A determination of market value involves an assessment of its "highest and best use": *Lulu Island Holdings Ltd. v. GVSDD*, 2007 BCSC 938 at para. 38.

[154] The date of acquisition of the land is set out in s. 49(2) of the Railway Act which reads, in part: "if the company does not actually acquire title to the land within one year from the date of the deposit, then the date of the acquisition is the date with reference to which the compensation or damages must be ascertained".

[155] This court in *Lulu Island* referred to the following criteria for highest and best use at para. 40:

The reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, financially feasible, and that results in the highest value.

There are four criteria embodied in this definition: legal permissibility, physical possibility, financial feasibility and maximum profitability.

- [156] Appraisal evidence is highly relevant to the determination of compensation, but the court is not limited to accept one expert's opinion versus another. As explained by Fitzpatrick J. in *Spera (Lynn Creek) Holdings Ltd. v North Vancouver (District)*, 2024 BCSC 1395 at para. 70:
- [70] Before turning the appraisals themselves, it is worth emphasizing the well-worn statement that the process of determining real estate values, even by qualified appraisers, is an art, not a science. Many relevant authorities to that effect were cited in *Hanlon BCSC* at paras. 37-41 and 55.
- [71] At the end of the day, the appraiser's view is one of opinion, not fact. The strength of the opinion will rest on the information used by the appraiser and the valuation approach taken to answer what is a hypothetical question. The Court's determination of what the valuation is under the Act will largely depend on the presider's view of the appraisal evidence.
- [72] It is important to keep in mind that the Court's task is not necessarily to accept the opinion of Appraiser A versus Appraiser B. The Court may accept all, some or none of the opinions offered in arriving at its valuation. This is evident enough from *Hanlon BCSC* at para. 60 where the Court arrived at a valuation less than what Ms. Hanlon sought but above what the District sought.
- [157] Real estate valuation is "as much an art as a science", and "is not exact": *Chen v. Langley (Township)*, 2024 BCSC 154 at paras. 126-127. Accordingly, the court retains some discretion in fixing market valuation for compensation purposes, to adjust valuations as it considers appropriate on the evidence to fix a property's fair market value: see e.g. *Chen* at paras. 155-157.
- [158] Section 33 of the Expropriation Act sets out certain matters not to be considered in the market value assessment, including the "anticipated or actual purpose for which the expropriating authority intends to use the land":

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

- (a) the anticipated or actual purpose for which the expropriating authority intends to use the land,
- (d) an increase or decrease in the value of the land resulting from the development or prospect of the development in respect of which the expropriation is made,

See also *Lulu Island*, paras. 45-48 (compensation to be assessed without reference to any decrease in value of the subject property caused by the scheme for which the expropriation forms an integral part).

[159] In the "land expropriation context", the "market value may reflect a higher and better use of the land than its current state -- in other words, recognizing the land's development potential": *St. John's (City) v. Lynch*, 2024 SCC 17 at para. 32 [St. John's].

Overview of the Parties' Positions re Compensation Quantum

- [160] West Point submits that, "there are multiple issues with Mr. Pauluzzi's analysis". It submits, among other things, "there are recognized concerns with respect to the lack of reliability of the land development (subdivision) approach in determining market value. In this case, there are too many unknowns to apply it with any degree of reliability".
- [161] Tahtsa submits, that Mr. "Hopson's work cannot be relied upon at all and his failures are at every step of the process". Among their arguments include that Mr. Hopson's use of a trend line on page 57 of his 2024 report contained a methodological error when analyzing comparable sales (as set out in page 28-29 of Mr. Pauluzzi's response report).
- [162] I assess compensation based on the assumption that s. 2.2 of the Proposed SRW is removed from it (as sought by West Point at trial).
- [163] A main dividing line between the experts' approach is whether the value of the SRW should be assessed assuming a potential subdivision of the Tahtsa Land. West Point rejects such an approach, and relies on caselaw commentary that, in the presence of only "subdivision potential", this methodology is "speculation added to speculation": *Whittaker v. British Columbia Hydro & Power Authority*, 1973 CarswellBC 321, 6 L.C.R. 289 at para. 21; see also Professor Todd's comments that the approach is attended by uncertainty and volatility: E Todd, *The Law of Expropriation and Compensation in Canada*, pp. 218-219; see also *Yin Wan Enterprises Ltd. v. City of Richmond*, 2008 BCSC 146 at para. 36-37 for criticisms of the development approach.
- [164] West Point further points to comments in *on Sequoia Springs West Development Corp v. British Columbia (Minister of Environment, Lands & Parks)*, 2000 Carswell BC 2889 [Sequoia Springs], rev'd on other grounds 2003 BCCA 8, that the BC Expropriation Compensation Board has frequently rejected the "Development Approach": at para. 52.
- [165] Further, Mr. Hopson has opined that a subdivision approach ought not be used because, among other things, he was of the view that there is flooding risk on the Tahtsa Land which sterilizes 14 acres of land; and he assumed there was regular flooding. There is evidence that the Tahtsa Lands are in fact within a flood plain.
- [166] However, Tahtsa submits that this subdivision approach is nevertheless appropriate, relying on *Sequoia Springs West Development Corp*, where a development approach was "reluctantly" relied on by the B.C. Expropriation Compensation Board in the absence of other evidence: at paras. 51, 55.

[167] Tahtsa's expert, Mr. Pauluzzi, relying on the opinion of Ms. Shih, values compensation for the SRW on the basis of a subdivision approach. Mr. Pauluzzi describes the subdivision development analysis as a species of the income capitalization methodology for land valuation for compensation assessment purposes.

Finding - s.33(a) of Expropriation Act

[168] Section 33(a) provides that the "anticipated or actual purpose for which the expropriating authority intends to use the land" shall not be taken into account when determining the market value. In this case, the Rail Line is already on the Tahtsa Land. That is an historical fact, dating back decades, pre-dating the more recently commenced purported expropriation of a SRW by West Point. Yet, the purported expropriation nevertheless has a railway purpose.

[169] In my view, on the facts of this case, interpreting s. 33(a) in accordance with the principles of statutory interpretation stated above, including placing weight on the plain meaning of the wording of s. 33(a), I find the existing presence of a railway on the Tahtsa Land ought not be taken into account in the before-taking scenario.

Compensation Findings

[170] I find neither expert's opinion provides a wholly satisfactory basis to value the SRW pursuant to the Expropriation Act.

[171] For Mr. Hopson's opinions:

- (a) He assumed that the railway tracks were on the Tahsta Land in the before scenario, for example by stating there were only two access points over the train tracks at p. 43 of his first report, and page 46 of his second report. Assuming there was a railway track operating on the Tahtsa Land in the before taking scenario is at odds with s. 33(a) of the Expropriation Act, as stated above. I find that Mr. Hopson's assumption that a railway was on the Tahtsa Land, would tend to decrease the value of the Tahtsa Land in the before-taking scenario, decreasing the quantum of compensation to Tahtsa for expropriation when compared with the after-scenario.
- (b) His report referred to the highest and best use of the Tahtsa Land as "that of a light industrial/agricultural property" (first report, p. 44; p .47 of second report). But, the property is zoned Heavy Industrial, not agricultural.
- (c) He discounted the possibility of a subdivision approach to valuation, in part because of flooding risk on the lands (assuming there was flooding regularly), without a significantly thorough investigation of that. This resulted in effectively sterilizing a portion of the Tahtsa Land from a valuation perspective with no subdivision potential. I do not give significant weight to his views about flooding risk.

[172] For Ms. Shih's opinions:

- (a) There has been no formal application for a subdivision on the Tahtsa Land.
- (b) Her evidence is that if a subdivision application were submitted, then there would be a review by and comments from the District of Houston, where further conditions could be imposed on any subdivision application.
- (c) Aspects of any proposed subdivision would have to be confirmed by an approving officer and with a civil engineer.
- (d) Service levels of the District of Houston for new subdivisions include stormwater drainage management requirements (Shih report, Appendix I, District of Houston Subdivision and Development Servicing Bylaw, Schedule A "Service Levels"). It is not clear whether these could be implemented in the case of the Tahtsa Land.
- (e) In general, there was an absence of evidence, that all the pre-requisites for subdivision as set out in Ms. Shih's report could be met.
- (f) With respect to her addendum report, given that she did not sign it for the reasons she expressed, and that it includes the views of an individual who did not testify at trial, I give this costing evidence diminished weight.

[173] For Mr. Pauluzzi's opinions:

- (a) he relies on a subdivision development approach (including the opinions from Ms. Shih) which is attended by significant uncertainty that a subdivision could be achieved for the Tahtsa Land.
- (b) He analyzed the subdivision development on the basis of a seven-year absorption period for subdivided parcels. There was not strong evidence that such parcels would be absorbed in the Houston market over seven years.
- (c) His use of a subdivision development approach, which has a significant measure of uncertainty that it could come to fruition, in my view tends to overstate the market value of the property and of compensation payable to Tahtsa for expropriation of a SRW.

Experts' Selection of Comparable Sales

[174] There was also disagreement between the parties as to the other's expert's use of comparable sales used to conduct market valuation assessments.

[175] While I do not regard my task to readily second guess comparable land sales transactions chosen by these qualified experts which appear reasonable and are within their area of expertise, I do have concerns with some aspects of each of the experts' comparable sales:

[176] Mr. Hopson used some comparable sales data for agricultural properties, but the Tahtsa Land is zoned M2 Heavy Industrial, which I find to be problematic from a comparable sales perspective.

[177] Further, Mr. Pauluzzi relied on a collapsed sale for one of his comparables (page 101 of his report). I did not find his explanation for doing so persuasive.

Conclusion - Compensation Approach and Quantum

[178] There is considerable uncertainty as to whether the Tahtsa Land could be subdivided in the manner contemplated in Mr. Pauluzzi's and Ms. Shih's reports.

[179] The uncertainty about actualizing a subdivision is reflected in, among other things, the contingent nature of Ms. Shih's opinions. For example, she opined that in a before-taking scenario (assuming no Rail Line was on the Tahtsa Land), "the Property could have been subdivided with unhindered access onto Morice River Road for each proposed lot so long as the subdivision met the District of Houston's development criteria (e.g., zoning, subdivision and servicing requirements, flood protection)" (s. 5.1; emphasis added). Also, in the after-taking scenario, Ms. Shih's subdivision layouts were subject to several material contingencies (s. 6.0).

[180] Overall, the subdivision approach is speculative, including being subject to comments from an approving officer upon review of a subdivision application which has not been made. In addition, the costs used to drive the subdivision development compensation assessment, from the addendum report, used by Mr. Pauluzzi in his valuation report, I give little weight.

[181] Mr. Pauluzzi's compensation opinion, in my view, overstates the compensation for a SRW on the Tahtsa land.

[182] On the other hand, Mr. Hopson valued the SRW based on there being a railway track on the Tahtsa Land, which is a feature of the purpose of the scheme which West Point intends to use for the land. I find doing so to be contrary to s. 33(a) of the Expropriation Act, which requires no account be taken of it. This detracts from the weight of the opinions on value in this report. This assumption tends to lower the market value of the Tahtsa Land in the before and understate compensation payable for a SRW. (In saying this, I am not expressing any criticism of Mr. Hopson; the application of s.33(a) concerns a legal issue.)

[183] In an expropriation context, market value can take into account "development potential" of the subject land: St John's at para. 32. While speculative, given Ms. Shih's opinions which I give some weight, I am not persuaded there is no "development potential" at all in the form of a potential subdivision of the Tahtsa Land; I do not find that subdivision of the Tahtsa Land is not possible in the before- or after-taking scenarios. I note Mr. Hopson opined that the Tahtsa Land "could be subdivided", but discounted it in part because there were only two access points due to the Rail Line.

- [184] In my view, on a balance of probabilities, there is subdivision "potential" on the Tahtsa Land, which is a relevant consideration in assessment of market value. In my view, highest and best use does not require an absolute certainty of a potential land use. Instead, I regard there to be sufficient evidence to consider subdivision of the Tahtsa Land as a "highest and best use" in that there is some evidence that it is reasonably probable: Lulu Island para 40.
- [185] I would apply the principle that an "expropriated owner is entitled to economic reinstatement" (E. Todd, *Law of Expropriation and Compensation in Canada*, 2nd ed., p.110), and that the "whole purpose of the Expropriations Act is to provide full and fair compensation to the person whose land is expropriated": *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, 1997 CanLII 400 (SCC), [1997] 1 SCR 32 at para. 33 [Dell Holdings]. I find that I should, in some measure, take into account the possibility of a subdivision when assessing compensation for the SRW. Also, assessment of market value is not exact: Chen at para. 126. In my view, the uncertainty as to whether a subdivision could be achieved may be factored into an overall assessment of compensation.
- [186] While this is not a case where there is "no evidence" of value other than the development approach (see *Sequoia Springs* at para. 55), there is nevertheless not satisfactory evidence adduced by the plaintiff solely to base a compensation quantum finding. This is also not a case like *Yin Wan Enterprises Ltd. v. City of Richmond*, at paras. 38-40, where the development approach was rejected as "too speculative" and where both appraisers were able to use another valuation approach.
- [187] In such circumstances, notwithstanding its speculative quality (though passing the threshold of reasonably probable), I rely in some measure on the subdivision development approach in my analysis of compensation for the SRW. I do so on the basis that Mr. Pauluzzi's opinion overstates the quantum of compensation for the SRW under s. 40(1)(a) and s. 40(1)(b)(i), and Mr. Hopson's understates it.
- [188] I take a blend of the opinions regarding compensation in these reports to assess compensation for the SRW. In my view, taking a weighted average of the values in the reports makes permissible use of the expert evidence at trial, which can be given some weight, but allows for diminished weight to these opinions, and mitigates the frailties - including the underestimation of compensation in one, and overestimation of compensation in the other -- in both the reports to arrive at a just quantum for compensation purposes.
- [189] I assign lesser weight to Mr. Pauluzzi's compensation assessment calculation, as opposed to Mr. Hopson's, due to the speculative nature of the subdivision development approach, the risk of potential flooding recognizing that the Tahtsa Land are within a flood plain, and the diminished weight to be given to subdivision costs from the PLG Memorandum.
- [190] In my view, a weighted average of the reports, giving 75% weight to Mr. Hopson's report, and 25% to Mr. Pauluzzi's report, to be appropriate.

[191] This leads to the following assessment of s. 40(3) Expropriation Act compensation as of the date of trial:

Mr. Hopson: $0.75 \times \$34,930$

= \$26,197

Mr. Pauluzzi: $0.25 \times \$1,350,000$

= \$337,500

Total

\$ 363,697

[192] Since Tahtsa does not own the physical Rail Line, I would make no award for the value of rail improvements as reflected in Mr Pauluzzi's report and as sought by Tahtsa in the amount of \$800,000.

[193] In sum, I find that West Point does not have the power to expropriate a SRW from Tahtsa under the Railway Act. However, had I found that West Point did have the statutory power to expropriate the SRW from Tahtsa, I would have assessed s. 40(3) compensation to be paid to Tahtsa at \$363,697 (net of pre-expropriation disturbance damages, discussed below).

Issue 4: Compensation for Pre-Expropriation Disturbance Damages

[194] There would remain the question whether Tahtsa would be also entitled to compensation in the shadow period prior to the expropriation pursuant to s. 40(1)(b)(ii) of the Expropriation Act, and if so at what quantum.

[195] Tahtsa contends that, even though this is not a trial of a notice of civil claim or counterclaim seeking damages from West Point for trespass, it is nevertheless entitled in this action to disturbance damages for West Point's trespass prior to the date of expropriation in the "shadow period" of the expropriation, relying on Dell Holdings. It submits that "Occupational Rent in the amount of \$178,000 per annum since September 1, 2021 is claimed up to the date of trial (38 months) \$563,666.67".

[196] In Dell Holdings, the Court stated that, damages to be awarded must be the "natural and reasonable consequence of the expropriation": at para. 28. The Court went on to state that the "approach to damages flowing from expropriation should not be a temporal one; rather it should be based upon causation. It is not uncommon that damages which occurred before the expropriation can in fact be caused by that very expropriation.": at para. 38. The Court awarded damages in the shadow period of an expropriation *at para. 45) since "Dell suffered damages because its development business was curtailed for more than two years while the Authority determined which portion of its land was needed for the GO Station".

- [197] As I read the Railway Act, in this case the determination of compensation for the proposed taking by a court would crystallize the expropriation: Railway Act, ss. 53, 56(1), 58. Thus, the time from the commencement of the expropriation process to the date of the court's determination of compensation would be a pre-expropriation phase.
- [198] In my view, disturbance damages for West Point's use of the land sought to be expropriated, in a pre-expropriation phase, would be available to Tahtsa had West Point the power to expropriate land pursuant to Part 7 of the Railway Act.
- [199] In the context of West Point's action, being one for assessment of compensation for expropriation, and not an action by Tahtsa for trespass, I choose to characterize this head of damage as for pre-expropriation disturbance damages pursuant to s. 40(1)(b)(ii) of the Expropriation Act.
- [200] In my view, the period of time for a shadow period disturbance damage claim - a claim which flows from the Expropriation Act -- should be linked to the time at which Tahtsa had actual notice of the threat of expropriation by West Point under the Railway Act.
- [201] West Point submits that "this trespass claim is limited by the Limitation Act, that no rent can be payable for or calculated on the basis of West Point's use of its own Rail Line; and that the rental rates advanced by Tahtsa are inflated." It submits that any claim in trespass that Tahtsa may have is limited to a claim for use after October 25, 2022.
- [202] In my view, there being no prior threats of expropriation by West Point, the commencement of the expropriation process should be the starting point for disturbance damages in the shadow period from a causation perspective: *Associated Building Credits Ltd. v. British Columbia (Minister of Transportation and Highways)*, 2007 BCCA 546 at para. 50, per Smith J.A.
- [203] I find it unnecessary to decide if a limitation period applies, or not, to Tahtsa's claim for disturbance damages. In my view, compensation during the "shadow period" would flow from the date of service on Tahtsa of a notice of intention to expropriate on November 3, 2022, giving notice to it of the commencement of the expropriation process.
- [204] From and after that date, in an expropriation scenario, I would find Tahtsa suffered compensable disturbance damages under the Expropriation Act from the railway passing over the Tahtsa Land.
- [205] I find that an occupational rent to be an appropriate measure for disturbance damages.
- [206] Mr. Pauluzzi valued the monthly occupational rent for the land portion of the Tahtsa Land at \$1,500 per month. (I would give no award for occupational rent of the railway improvements, which I have found are not owned by Tahtsa.)

[207] West Point contended that, "the rental amount payable for the temporary use of 3.064 acres of land would be in the range of \$2,500 to \$3,670 a year." This is based on "Mr. Hopson's concluded underlying land value of \$12,000 per acre", being approximately \$200 to \$300 dollars (an average of \$250) per month.

[208] Applying the same 75-25 weighted average calculation as between the parties' competing positions and expert reports, I find that, if there were a expropriation, \$563 per month (rounded from \$562.50) should be paid as disturbance damages during the shadow period of the expropriation:

0.75 x \$250/ month =

\$187.50/ month

0.25 x 1,500/ month =

\$375/ month

Total

\$563/ month

[209] In sum, had I found that West Point had the statutory power to expropriate the SRW from Tahtsa, I would have given no compensation to Tahtsa for asserted "occupational rent" prior to the notice of the purported expropriation; but would have awarded as disturbance damages to Tahtsa in the shadow period commencing November 3, 2022 following service of the Notice to Expropriate the amount of \$563 per month.

Other Claim(s) Outside the Scope of this Action

[210] In closing submissions, West Point's counsel submitted that since the claim before me was for expropriation, "if this all goes away, then we need to talk about other claims that my client might have on this land".

[211] In these Reasons I make no finding of trespass, and express no views on such a claim if it were characterized as trespass, nor express any views on the merit of any potential claim which West Point asserts it may have against Tahtsa outside of the present action.

Expropriation Costs

[212] Since I have found the Railway Act expropriation process does not apply to West Point's purported expropriation, I decline to make any order of costs pursuant to the Expropriation Proceeding Costs Regulation.

Conclusion and Orders Granted

[213] For the reasons I have stated, West Point's action is dismissed.

[214] If the parties cannot agree on costs they may, within 30 days, submit a request to Supreme Court Scheduling for an appearance before me to make submissions on the matter of costs.

"Stephens J."

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