

**Ministry of Attorney General
Dispute Resolution Office**

**Consultation Document
For Discussion Purposes Only**

October 18, 2006

The Dispute Resolution Office, Ministry of Attorney General, invites comments on the attached consultation document concerning proposed amendments to the cost provisions of the *Expropriation Act*.

Overview

The attached consultation paper proposes amendments to the *Expropriation Act* that will change how costs are awarded to property owners who contest the amount paid in compensation for an expropriation. The proposals seek to accomplish two key objectives:

- Put property owners who have acted reasonably back to the position they were in prior to the expropriation; and
- Discourage property owners from taking procedural steps that are disproportionate to the value of their claim or are otherwise unreasonable.

Invitation to Comment

Thank you for taking the time to review and comment on the proposed amendments to the *Expropriation Act*. **Please provide written comments and suggestions by January 31, 2007.** They should be forwarded to:

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Please forward this consultation document to anyone you think may be interested in commenting on the proposals.

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Dispute Resolution Office**

**CONSULTATION DOCUMENT
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**Proposed Amendments to
the Cost Provisions of the *Expropriation Act***

October 18, 2006

OVERVIEW

The cost provisions of the *Expropriation Act* (the "Act") have undergone several changes over the years, including:

- provisions to award actual costs;
- the adoption of an expropriation cost tariff; and
- the current application of the Supreme Court tariff.

We wish to review the current cost structure of the Act to ensure that it promotes the fair resolution of expropriation disputes. We suggest that a fair resolution of an expropriation dispute must:

- fully (or nearly fully) indemnify claimants with legitimate claims to additional compensation; but also
- discourage claimants from invoking an amount of process that is disproportionate to the value of the claim or is otherwise unreasonable.

This paper will review the background and policy of the Act, briefly review the expropriation cost provisions of other Canadian jurisdictions and will propose amendments to the Act.

BACKGROUND

Since 1987, and prior to recent amendments, all expropriation cases were under the jurisdiction of the Expropriation Compensation Board (the "Board"). The cost regime for expropriation cases allows persons whose land was expropriated to recover the legal and appraisal costs necessarily incurred by that person for the purpose of asserting their claim for compensation. If the compensation awarded to a property owner (other than for business losses) is greater than 115% of the amount paid by the Expropriating Authority (the "EA"), the EA must pay the owner's costs.¹ If the compensation awarded is 115% or less than the amount paid, costs may be awarded to the owner.² The factors to consider in assessing the amount of costs are:

- the number and complexity of the issues;

¹ The *Act*, s. 45(3), (4).

² *Ibid.* s. 45(5).

- the difference between the amount awarded and the advance payment; and
- the manner in which the case was prepared and conducted.³

The practice of the Board, however, was to award nearly all of a claimant's costs in all cases,⁴ and prior to 1999 those costs were the actual legal and appraisal costs incurred. Except for "Injurious affection"⁵ cases, the Act only allows costs to be awarded to the property owner. Reimbursing a property owner for the substantial costs incurred in contesting the amount of an expropriation order is sound policy. Doing so without regard to the reasonableness of the owner's claim, however, is problematic. It encourages unnecessary litigation and is a disincentive to resolve cases. If there is no risk in asserting a questionable claim, why not try?

In 1999, the Tariff of Costs Regulation was enacted to address this issue by limiting the allowable reimbursement of a property owner's legal costs. (Real estate appraisal costs are treated separately.)⁶ The tariff allows for a higher scale of costs than those allowed for court actions. The change did not solve the problem, however, because, in practice, the Board rarely used its discretion to assess the reasonableness of claimed costs.⁷ Even claimants who did very poorly in litigation (i.e. they were awarded much less than they claimed) were awarded the bulk of their costs.⁸

In 2003, as part of the government wide Administrative Justice Project (AJP), the functioning of the Board was broadly reviewed. The AJP report concluded that the Board's decision making process was protracted and inefficient and recommended transferring jurisdiction over expropriation cases to the Supreme Court. The AJP report, however, did not address the issue of costs.

On March 18, 2005 legislation was brought into force to transfer jurisdiction over expropriation cases from the Board to the Supreme Court. The new Compensation Action Procedure rule sets forth (among other things), the following:

- If costs are payable, they are to be assessed (subject to transitional rules for earlier cases) under Appendix B of the Supreme Court Rules.

³ The Act, s. 45(10).

⁴ Based upon a review of a sample of reported cases, the Administrative Justice Project review of the Expropriation Board and upon consultation with Legal Services Branch lawyers and private practitioners in Vancouver, Victoria and other Vancouver Island communities. All of the private practitioners we spoke to had considerable experience in the field and have represented both claimants and expropriating authorities.

⁵ Claims for consequential damages to non-expropriated property caused by the expropriation.

⁶ There is a separate tariff for real estate appraisal costs in schedule 2 of the Expropriation Proceedings Costs Regulation.

⁷ Based on consultation with lawyers mentioned in note 4, above.

⁸ For example, in a case reported in September, 2005, *Associated Building Credits v. Ministry of Transportation and Highways*, MOTH paid \$2.6 million in 1996 to the claimant. The claimant sought additional compensation of \$28 million and the end result was an additional compensation award of about \$20,000. The Board, noting that the award was less than 1% more than the amount paid in compensation, nevertheless awarded plaintiff all of its legal costs prior to the first hearing in December, 2003, 90% of its legal costs after that date, and 50% of the expert appraiser's costs.

- Supreme Court Rule 57 on costs applies, meaning that “costs follow the event,” but no special costs are allowed.⁹
- If real estate appraisal costs are payable, they are to be assessed (subject to transitional rules) under the Expropriation Proceeding Costs Regulation.

THE POLICY BEHIND THE ACT

The *Act* was preceded by a 1971 *Report on Expropriation* completed by the Law Reform Commission of British Columbia.¹⁰ The report recommended a single expropriation statute to replace an outdated English *Lands Clauses Act* and other statutes. The LRC and other reports on expropriation emphasize the ways in which expropriation cases differ from other types of cases, including:

- The government represents not only the general public but also the person whose land is being taken. Therefore it must endeavor to protect that person’s interests as well as it can.
- There is a great inequality of bargaining power resulting from the vast difference in resources between the government and a private citizen.¹¹
- The claim is not the same as two parties haggling over the price of land in a normal market place bargain, but in “the fulfillment by the state of its obligation to repair the injury caused to particular individuals for the public good, and to minimize the loss, inconvenience and disturbance to the life of its citizens to as great an extent as possible.”¹² This means owners should be put in the same economic position they were in before the expropriation.

A REVIEW OF THE OTHER CANADIAN JURISDICTIONS

How do the other jurisdictions in Canada deal with costs in expropriation cases?

1. Are actual costs awarded or are cost tariffs used?

Only PEI and Newfoundland/Labrador pay costs to successful owners under a tariff. All of the other jurisdictions in Canada pay reasonable actual costs to successful owners.

2. What is the threshold of success?

- New Brunswick, Nova Scotia, Newfoundland/Labrador, all three territories and Canada pay owners their actual costs if they do better than the amount paid or offered by the EA.
- Ontario requires the EA to pay the owner’s actual costs if the board award is at least 85% of the amount offered by the EA.

⁹ Rule 57(9). However, in cases where substantial damages are claimed but the plaintiff only receives nominal damages, costs are often reduced or not awarded.

¹⁰ The report is available on the BC Law Institute website at:

<http://www.bcli.org/pages/publications/lrcreports/frameset.html?http://www.bcli.org/pages/publications/lrcreports/summary5.html>

¹¹ Cited in Boyd, above, p. 144.

¹² *Ibid.*

- Alberta requires the EA to pay actual costs unless the Board determines that “special circumstances” exist to justify the reduction or denial of costs.
- Manitoba, Saskatchewan and PEI do not set out any threshold— costs are discretionary in all cases.

3. What costs are payable if the threshold is not met?

- The legislation in Ontario, New Brunswick, Northwest Territories and Nunavut indicates that if owners are unsuccessful, the issue of costs is discretionary.
- Canada’s legislation states that reasonable costs are to be paid to unsuccessful owners and costs on a solicitor-client basis are to be paid to successful owners.
- Nova Scotia grants costs to unsuccessful owners up to the date of the EA’s offer but no costs afterward.
- Yukon states that no costs are to be paid to an unsuccessful owner unless otherwise ordered by the tribunal.
- As stated above, in Manitoba, Saskatchewan and PEI, costs are discretionary in all cases.
- Newfoundland/Labrador requires unsuccessful owners to pay costs.

4. Are costs awarded against owners?

- Only Newfoundland/Labrador specifically requires costs (on a tariff) to be assessed against owners who do not obtain an award greater than what was paid by the EA.
- Alberta, Manitoba, Nova Scotia and Yukon have no provision to allow costs to be assessed against owners.
- The legislation in New Brunswick, Ontario, PEI, Saskatchewan, Northwest Territories and Nunavut allow costs to be assessed against any party. The assessment of costs against owners, however, is rare.¹³

5. What factors are considered in assessing costs?

The most detailed list of factors to consider in assessing costs is in the Nova Scotia expropriation legislation. The criteria are:

- the number and complexity of the issues;
- the conduct of any party that tended to shorten or unnecessarily lengthen the duration of the proceeding;
- any step in the proceeding that was improper, vexatious, prolix or unnecessary;
- the reasonableness and relevance of appraisal and other expert reports, including the cost of the reports;
- the skill, labour and responsibility involved;

¹³ *Ibid.*, p. 509.

- the amount of the award or settlement;
- any other matter relevant to the question of costs.

ANALYSIS

In order to satisfy the policy objectives of expropriation the cost regime should result in the following:

- Claimants who have acted reasonably in contesting the amount of compensation paid should be indemnified for the actual costs, necessarily incurred to make their claim.
- Inflated or unreasonable costs should not be paid.
- Claimants who have invoked an amount of process that is disproportionate to the value of their claim, or who otherwise have acted unreasonably in asserting their claim, should not recover their costs and, in exceptional circumstances, should be required to pay costs.

The original cost regime of the Act contained all of the necessary provisions to accomplish this, but only if the Board exercised its discretion to curtail costs. Under the original version of the Act:

- Claimants with substantial awards (greater than 115% of the payment) were entitled to their actual legal and appraisal costs.
- The award of costs to claimants with less than substantial awards (115% of the payment or less) was discretionary, depending on the circumstances.
- In all cases, claimants were only entitled to reasonable costs, necessarily incurred to assert their claim.

The current regime, however, which adopts the Supreme Court tariff, is a move away from the policy underlying the original intention of the expropriation cost regime because claimants with meritorious claims will not be able to receive full (or nearly full) indemnity. Under the Supreme Court tariff, claimants who recover far more than 115% of the EA's payment will not be able to recover more than the costs allowed by the tariff, as the new legislation excludes the award of special costs. It appears that this was an unintended result. The focus of the AJP recommendations was to allow the Supreme Court to adjudicate expropriation cases. The cost regime was then adopted to be consistent with other Supreme Court matters. The impact, however, on the unique aspects of expropriation cases, was not fully considered at the time.

The relationship between rule 57(9) (costs follow the event) and the 115% rule in the Act, is not clear. The new rules could arguably put expropriation claimants with meritorious claims in a worse position than ordinary litigants. For example, an expropriation claimant who is paid \$1,000,000 in compensation, but believes that the property is worth \$1,200,000, files a Supreme Court action and wins an additional \$100,000. That is still less than 115% of the original payment, so how is the court going to rule on costs? In the ordinary case, there is no doubt that a plaintiff who wins a \$100,000 judgment would be entitled to costs. So, how is the exercise of discretion to award costs in expropriation cases going to be different from the exercise of discretion to award costs in non-expropriation cases?

As expropriation cases are now under Supreme Court jurisdiction, there will most likely be a change in the exercise of discretion to award costs and most practitioners believe that the

Registrar, given its expertise, will be better able to address cost assessments than the Board. But how the court will handle these cases remains to be seen. (Note also that the Notice to Mediate procedures and the expedited procedures in Rule 68 will now apply.)

PROPOSAL

Considering the policy objectives outlined above, the legislation of the other jurisdictions of Canada, and the existing BC Act, the following amendments are proposed:

1. Definitions

- “Pre-Action costs” means all reasonable legal, appraisal and other costs, necessarily incurred by the owner for the purpose of determining the amount of compensation due under the Act.
- “Actual costs” means all reasonable legal, appraisal and other costs, necessarily incurred by the owner for the purpose of asserting his or her claim for compensation or damages.
- “Substantial award” means an award of compensation to an owner, other than for business losses¹⁴, which is greater than 115% of the amount paid by the EA.¹⁵
- “Award” means any award of compensation to an owner, other than for business losses, that is in addition to the amount paid by the EA.

2. Rules:

- The EA must pay all claimants their pre-action costs.
- The EA must pay claimants who receive a substantial award their actual costs.
- The court, in its discretion, must grant owners who receive an award, either:
 - all or part of their actual costs; or
 - their legal costs under Appendix B of the Rules of Court and their real estate appraisal costs under the Expropriation Proceedings Costs Regulation.
- The court, in its discretion, may order that owners who do not receive an award:
 - are to be paid all or part of their legal costs under Appendix B of the Rules of Court and their real estate appraisal costs under the Expropriation Proceedings Costs Regulation;
 - are denied recovery of their costs; or
 - in exceptional circumstances, are required to pay all or part of the costs of the EA.
- In exercising its discretion to determine costs, the court must take the following considerations into account:
 - the number and complexity of the issues;

¹⁴ The exclusion for business losses is in the current act—we have not questioned the validity of this exclusion.

¹⁵ The 115% threshold is in the current act, s. 45(4) and (5).

- the proportion of the amount of costs incurred compared to the value of the case;
- the conduct of any party that tended to shorten or unnecessarily lengthen the duration of the proceeding;
- any step in the proceeding that was improper, unnecessary, or disproportionate to the value of the case;
- the reasonableness and relevance of appraisal and other expert reports, including the cost of the reports;
- the skill, labour and responsibility involved;
- the degree of success or failure, taking into account the amount paid by the EA, the amount of compensation claimed by the owner and the amount awarded by the court; and
- any other matter the court deems relevant to the question of costs.