

Advanced Costs Payments and Additional Exposure

Discussion and Rationale

What are the Authority's Obligations?

- ▶ Award of advance costs was originally conceived of to “level the playing field” between the Authority and the owner.
- ▶ Authority engages with the owner in its own best interest to mitigate or limit impacts, or benefit the project.
- ▶ Everyone would agree that drives some exposure and obligation to make the owner whole.

The Original Principle

- ▶ *Creative Stretch Fabrics Ltd. v District of Pitt Meadows*, (1991) 46 L.C.R. 111

The issue before the Board was: under section 48 (advanced payment of costs) was the owner entitled to those reasonable legal, appraisal and other costs that were incurred prior to the date on which the expropriation notice had been served?

Answer: Yes, so long as they were reasonable.

“... An advance payment of costs enables an owner to obtain the necessary information so as to be in an informed position during the negotiation process, and when necessary, at the expropriation stage. This process does not commence at the time when an owner’s land is compulsorily acquired.”

“... Simply put, it is not reasonable to offer an amount of money for the property of an owner and then refuse to pay that owner the cost of securing his own legal and appraisal opinions, nor would it be desirable to manoeuvre an owner into a settlement without his first obtaining independent professional advice.”

Pre-Hearing Costs (Advanced Payment)

(s. 48 of the *Expropriation Act*, RSBC 1996, c. 125)

- ▶ If there has been a Notice of Expropriation filed, an owner can apply to have the Authority make an advanced payment of:

“costs necessarily incurred by the person for the purpose of asserting his or her claim for compensation or damages.”

- ▶ And if the amount is disputed, it will end up at a Registrar’s hearing and the “reasonableness” assessed (with reference to things like complexity, and the matters in issue).

Lawyers and Appraisers:

Compensation Action Procedure Rule, BC Reg 100/2005

- ▶ Lawyer's costs are assessed according to a tariff in the *Old Supreme Court Rules*.
- ▶ Appraiser's Report costs: *Expropriation Proceeding Costs Regulation, BC Reg 98/2005, Schedule 2.*

	Max Units	1/2 Units	1/3 Units
Rate \$80	\$12,000	\$6,000	\$3,000
Rate \$100	\$15,000	\$7,500	\$5,000
Rate \$120	\$18,000	\$9,000	\$6,000

- ▶ Plus another maximum of 94 units for 6 days in court

Section 3 Agreements change the mechanics, but not the obligation

- ▶ In the event the owner has signed a section 3 Agreement, they likely cannot use section 48 to force an advanced payment of costs.

Section 48 requires a notice of expropriation to have been filed, so you cannot use it if you sign a section 3: *Del's Machinery Ltd. v British Columbia (Minister of Transportation)*, 2011 BCSC 754.

What's a practical workaround for claimant's counsel?

→ ***Demand accounts are paid before committing to sign a section 3 Agreement.***

Post-hearing Costs

(s. 45 of the *Expropriation Act*, RSBC 1996, c. 125)

- ▶ Even if pre-taking costs were not available because the owner chose to sign a section 3 Agreement, if the matter proceeds to hearing it is all back on the table under s. 45.

Exposure to More than Legal “Costs”?

- ▶ The *Expropriation Act* s. 45 and 48 and *Regulations* deal with costs “comprehensively”.

- ▶ But look closely at both sections:

“s.45 (3) ... a person whose interest or estate in land is expropriated is entitled to be paid costs necessarily incurred by the person for the purpose of asserting his or her claim for compensation or damages”.

- ▶ *Compensation Action Procedure Rule*, BC Reg 100/2005 (16) applies to “costs for actions brought under this rule”. It refers to a tariff.
- ▶ The tariff is for specific items of work related to starting an action.

Not for the purpose of asserting a claim for compensation or damages

- ▶ If the lawyer's bill is caused by the expropriation, but it doesn't fall under the tariff items, it looks more like a disturbance damage than a cost claim.
- ▶ Consider:
 - ▶ - reviewing a purchase proposal from the Authority,
 - ▶ - responding to inquiries from the Authority,
 - ▶ - discussions to mitigate impacts or assist the Authority's planning, or
 - ▶ - review/negotiation of a section 3 Agreement.
- ▶ "But for the taking" the owner would not have incurred these expenses.

The Expense of Other Professionals

Expropriation Act, RSBC 1996, c. 125

- ▶ Professionals, such as engineers can present bills that are paid as “advanced costs” under section 48, and others that are properly claimed as disturbance damages.
- ▶ *Whitechapel Estates Ltd. et al v Minister of Transportation and Highways and the Corporation of Delta*, 55 L.C.R. 140

There were three different types of engineering services provided:

1. Modifying the subdivision concept underway;
2. Quantify the claimants’ losses (looking at impacts from the loss of land to the portion of the subject lands lost); and
3. Assessing the impact of other municipal requirements/works.

→ 1 and 3 were potential disturbance damages, and 2 was claimable under s.48

Disturbance Damages Do Not Presumptively Exclude Legal Fees

Under section 34(1)(a) of the *Act* an owner whose land is expropriated is entitled to disturbance damages that include “reasonable costs, expenses and financial losses that are directly attributable to the disturbance caused by the expropriation”.

These are economic impacts. No limit on the type of expense, no general prohibition on legal fees falling under this heading.

34(1)(b) allows for relocation costs, which includes associated legal and survey costs (among other things).

This supports that legal fees are not presumptively excluded from disturbance damages, so long as they are not otherwise captured under the tariff.