

COST RECOVERY UNDER THE BRITISH COLUMBIA EXPROPRIATION ACT

B.C. Expropriation Association

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1. INTRODUCTION

In an expropriation proceeding most owners will incur expenses for professional services to assist in responding to the authority's land requirements. Modern legislation provides for the owner to obtain reimbursement from the expropriating authority for some or all of those costs. However, professional costs can be substantial and expropriating authorities are often reluctant to pay so there are many opportunities for disputes to arise.

This paper examines cost recovery issues arising out of the expropriation process. Although many of these issues are applicable across Canada, some of the comments here are specific to the B.C. *Expropriation Act*, R.S.B.C. 1996, c. 125, so this paper should be read in that context.

The comments which follow are nothing more than my own observations on the law as it has developed. I have not attempted to provide a comprehensive analysis of all aspects of cost recovery. However, my experience includes representation of both owners and authorities so I hope my comments will provide some insight from both points of view.

It is worth pointing out that this paper necessarily examines only two of the three relationships where professional costs may be in dispute: the relationship between the professional and the owner and the relationship between the owner and the expropriating authority. Professionals engaged by authorities are rarely affected by the cost recovery issues examined here. The relationship between professional and authority is essentially the same as any consultant/paying client relationship and the Act has no application.

2. CONCEPTS AND DEFINITIONS

2.1. Statutory provisions

An owner's right to recovery of costs from an expropriating authority is found in s. 45(3) of the *Expropriation Act*:

"Subject to subsections (4) to (6), 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 ...";

Section 45(7) says that such costs shall be:

- (a) "the actual reasonable legal, appraisal and other costs, or
- (b) if the [Cabinet] prescribes a tariff of costs, the amounts prescribed in the tariff and not the costs referred to in paragraph (a)".

Section 48(1) provides:

An owner may, from time to time after an expropriation notice ... has been served on the owner but before the hearing has begun, submit a written bill to the expropriating authority consisting of the reasonable legal, appraisal and other costs that have been incurred by the owner up to the time the bill is submitted.

Section 48(2) provides:

On receiving a bill under subsection (1), the expropriating authority must either promptly pay the bill or apply to have the bill reviewed by a registrar of the court.

...

When the Act came into force in 1987 no tariff was prescribed for purposes of s. 45(7) so the “actual reasonable” standard was applicable initially. The “actual reasonable” standard essentially means the reasonable expense for services which have been provided and for which an owner is liable to pay.

The first tariff regulation enacted was the *Tariff of Costs Regulation*, B.C. Reg. 189/99, which came into effect in 1999. This regulation prescribed separate tariffs applicable to legal and appraisal costs in proceedings before the Expropriation Compensation Board.

In 2005 the Board was abolished and the *Tariff of Costs Regulation* was supplemented by enactment of the *Compensation Action Procedure Rule*, B.C. Reg. 100/2005, and the *Expropriation Proceeding Costs Regulation*, B.C. Reg. 98/2005. The justification for having three separate tariff regulations in effect at the same time is not apparent and provides unnecessary confusion.

To illustrate the way in which these tariffs operate a copy of the *Expropriation Proceeding Costs Regulation* has been reproduced as Schedule 1 to this paper. A review of this regulation reveals that each tariff contains a schedule that defines several discrete professional tasks that would typically be performed in an expropriation proceeding. Each task is assigned a prescribed number or range of tariff units. The tariff also prescribes a range of values for each tariff unit. To determine the amount payable to an owner in any particular case the applicable task and corresponding number of units is determined then multiplied by the applicable unit value.

The tariff regulations also provide for reimbursement of reasonable disbursements and taxes.

2.2. Relationships

Cost recovery is a procedure that must be pursued by an owner against the authority independently of any financial arrangements that may exist between the owner and his or her professional advisors. The court's jurisdiction to settle cost issues is limited to settling disputes between an owner and authority over the amount of costs to be reimbursed and not the amount to be paid by the owner to his or her advisors (see *Nygaard, Gerestein, Interwest, and Neill*).

The Act does not give the owner's professional advisors any special status to deal directly with the authority to obtain payment for services provided to the owner. What this means in practice is that a professional advisor engaged by an

owner must make arrangements for payment directly with the owner. Invoices for those services should be issued to the client and not to the authority.

In practice the task of submitting and pursuing claims for reimbursement of costs normally falls to the owner's lawyer regardless of whether the claim is for services provided to the owner by that lawyer or by other professionals.

2.3. Categories

For purposes of cost recovery the expenses must fall within one of three categories provided in the Act, namely "legal", "appraisal" and "other costs". Legal and appraisal services are clearly covered by the first two categories. Services provided by business valuers, planners, engineers, foresters and agricultural economists, for example, would fall into the "other" category.

An owner's expenses associated with the determination of compensation such as travel expense to attend a hearing is not a professional cost but it may qualify as "other" costs and be recoverable.

2.4. Distinction between disturbance damages and costs

Disturbance damages are recoverable pursuant to ss. 34 and 40. This will include costs, expenses or losses incurred by an owner that are attributable to the expropriation. This creates an opportunity for overlap with the cost recovery provisions of the Act.

In some cases it will not be obvious whether a particular claim should be treated as disturbance damage or an item better suited for recovery as costs. For example, where there is a partial taking and the owner was engaged in development of the subject property, some professional costs may have been incurred primarily in relation to the development rather than in relation to pursuing the claim for compensation. Those items may be recoverable as disturbance damages if they were incurred to mitigate losses or were expenses rendered useless by the taking. However, if some portion of those expenses also served to advance the claim for compensation the expense may qualify for treatment as costs.

3. GENERAL ISSUES

3.1. Scope

Professional services must relate to the assertion of a claim for compensation if the expense is to be recovered as costs under the Act. This follows from the wording found in s. 45(3). It would appear that services rendered for some other purpose would not be recoverable. However, this requirement has been interpreted quite broadly in some cases, at least during the pre-tariff period.

In *Creative Stretch* the Board stated:

"An owner cannot participate in the negotiation process in a meaningful way without advice from various professionals."

In that case the Board determined that the Act contemplated reimbursement of expenses for professional services provided to an owner before service of a Notice of Expropriation but after the authority's indication of its interest in acquiring the owner's land. Professional services provided at that stage would

typically involve reviewing the authority's proposal, exploring opportunities for mitigation of the impacts and making attempts to negotiate an agreement.

In *Tidmarsh* the B.C. Supreme Court said:

"I think an appropriate starting point is the proposition that the objective of the costs provisions of the *Expropriation Act* is to ensure as best as possible that the party being expropriated is made economically whole, not only with respect to the property that is taken, but also for the expenses reasonably incurred in the setting of the compensation."

In *Trepke* a cost award was made for legal costs associated with securing the appointment of a committee and obtaining a court order approving the transfer of land to the expropriating authority.

In *Summit* a cost award was made for legal costs associated with advising an owner on the income tax implications of an expropriation.

On the other hand, in *Nygaard* a claim was presented for legal costs associated with administration of the estate of a mortgagee which was required to permit transfer of title from the owner to the authority pursuant to a s. 3 agreement. This claim was rejected apparently because it was not incurred in relation to the assertion of the claim for compensation.

Also, in *Creative Stretch*, the Board denied a claim for legal services relating to the preparation and filing of a consolidation plan because that task was not related to the expropriation.

With enactment of a tariff in 1999 the scope of costs eligible for reimbursement became less certain. For example the tariff clearly applied to legal and appraisal costs but did not address the third category available, namely "other costs". In *C.R. All Trucks* the Board concluded that other costs continued to be governed by the actual reasonable standard.

It appears the enactment of tariffs has restricted the scope of cost recovery that was available during the early years of the *Expropriation Act*. However there is still some uncertainty left that may be examined in future cases.

One issue that must be noted is that the tariffs do not provide any units for professional services provided to an owner in relation to reviewing an authority's offer and negotiating an agreement. In fact during this phase of an acquisition the *Expropriation Act* is not directly applicable. However some authorities have learned from experience that owners who have access to professional services at an early stage are more likely to co-operate with the process thus reducing the likelihood of protracted litigation and corresponding expense at a later date. In this situation an authority may provide a commitment to reimburse an owner for the expense of legal and appraisal services. In my experience this approach is to be encouraged.

It should also be noted that some expenses awarded as costs in earlier cases that would not be recoverable under the tariff regime might be recoverable as disturbance damages instead. For example, the income tax advice awarded as legal costs in *Summit*.

3.2. Final cost reviews (s. 45)

The Act gives the court jurisdiction to conduct a cost review after all land compensation issues have been settled. A final review is conducted only where the parties cannot agree on the amount of costs payable by the authority to the owner.

Owners are not entitled to recover costs in all cases. An owner is entitled to costs as of right only where the additional land compensation awarded is more than 115% of the advance payment. In other cases, the court has a discretion to award either all or a portion of the owner's reasonable costs. As a result, the Act does not provide any guarantee of cost recovery to an owner until after the land compensation issues have been resolved. This, of course, does not happen until after virtually all professional expenses have been incurred.

At a final review the court is required by statute to consider:

- 45(10)(a) the number and complexity of the issues
- (b) the degree of success, taking into account
 - (i) the determination of the issues, and
 - (ii) the difference between the amount awarded and the advance payment under section 20(1) and (12) or otherwise;
- (c) the manner in which the case was prepared and conducted.

These statutory criteria place a heavy emphasis on the final result and much less emphasis on what may have been known to the owner at the time when the decision to incur the expense for professional services was made. That, combined with the fact that the review is conducted at the end of the process, allows the court to use perfect hindsight to evaluate the reasonableness of an owner's expenditures. Evaluation by hindsight gives the authority a significant advantage in many cases.

This concern has been tempered somewhat by enactment of tariffs. Despite the requirements of s. 45(10) the tariffs provide much less room for the exercise of discretion at a final cost review of legal or appraisal costs than is available under the actual reasonable standard.

The "degree of success" criteria does not imply that a direct relationship must exist between costs recovered and additional compensation recovered because there have been cases where it was determined that the owner had been overpaid on compensation and costs were still awarded. In those cases however it was found that it was reasonable for the owner to have advanced the claim in spite of the lack of success.

3.3. Interim cost recovery (s. 48)

The Act provides for reimbursement of professional costs before the compensation claim is finally resolved. This is termed "advance payment of costs" in the Act. Such payments would be in advance relative to the final determination of compensation but of course not in relation to the rendering of the services or incurring of the expense. The expense must have been incurred before reimbursement can be obtained from the authority.

This provision is unique to B.C. The advance payment feature appears to be desirable at first glance because it provides a source of funds up front which might allow an owner to meaningfully participate in the process and thereby level the metaphorical "playing field". It also adopts in part the recommendations of the 1971 Law Reform Commission's *Report on Expropriation*. However, it is not without risk to the owner and as implemented by the Act, the benefits that were foreseen by the Law Reform Commission are illusory.

The main risk to the owner is that the owner will not know for sure the extent to which costs will be reimbursed until after the expenses have been committed. The Act does not contain any mechanism for an owner to seek approval for an expense in advance. If an owner knew in advance that a particular expense would not be recoverable he or she might decide not to proceed with it. Authorities get the advantage of perfect hindsight in this regard.

Although the Act provides for advance payment of costs, an owner who has received an advance payment cannot treat the advance payment as a final determination of anything. The court has jurisdiction to conduct a review under s. 48 for purposes of determining the appropriate amount to award as an advance payment. It has been held however, that such reviews are not final and are subject to reconsideration after the amount of compensation has been finally determined. In fact, in *Underhill*, the Board reduced the amount of an appraisal account during a final review even though it had ordered payment in full of the same account during an earlier s. 48 advance payment review.

Another risk to the owner is that disclosure of some information about the manner in which the claims are being prepared may be necessary as a condition of reimbursement. Since the authority is never required to provide similar information to the owner, this provides the authority with an advantage that owners could see as unfair. An owner could avoid this problem by not seeking advance payment of costs. However, that comes with a penalty because the owner must bear the cost of financing those services.

The third risk to the owner which I have identified is that even though there are strong incentives under the Act for owners to take advantage of the advance payment provisions, there are some practical difficulties. In some early cases the Board discounted heavily the professional costs incurred by owners in pursuing those rights: *Underhill* and *Hampton* are good examples. Frequently owners find that the authorities proceed very slowly in response to s. 48 cost claims. Without frequent prompting or the threat of scheduled s. 48 review hearings, many authorities do not move at all, yet frequent prompting and preparation for and attendance at s. 48 reviews consumes significant professional time and additional expense for the owner that cannot be recovered. Authorities face little risk in delaying their responses to s. 48 cost claims.

3.4. Retainer agreements

A written retainer agreement is always desirable for professionals who are engaged to act for an owner. This is particularly so in the current tariff regime where an owner is unlikely to obtain full reimbursement for the actual cost of legal and appraisal services.

A retainer agreement which provides for payment of money up front before work is actually performed may be a good idea for the professional but will only be

possible if the owner is able to do so out of his or her own pocket. Otherwise there may be a considerable delay before the owner obtains money from the authority for those services.

3.5. The role of counsel

The Board concluded in *343146 B.C. Ltd.* that a lawyer will be the professional responsible for coordinating and instructing a team of other professionals on behalf of the owner. Often this is true but not always. Sometime, an owner will engage the experts independently and without legal representation or perhaps a lawyer will be engaged only in the final stages of hearing preparation.

3.6. Evidence required

Under the current tariff regime the reasonableness of hourly rates is no longer a consideration when considering claims for reimbursement of legal and appraisal costs.

Detailed time records appear to be essential as it is one of the very few means which the court really has to conduct the review. Professionals should anticipate this requirement. Unfortunately, I have found that many professional accounts disclose nothing more than a brief narrative and generic statement of the tasks performed together with a rounded sum for the fee. This type of account invites criticism and is not helpful for cost recovery purposes.

3.7. Relevance of the authority's costs

In some cases, authorities have attempted to justify their payments for an owners' professional costs on the basis of the amount which the authority has paid to retain similar expertise.

In *Lenjo*, an Ontario case, the authority had argued that the owner's appraisal costs should not exceed that paid by the authority to its own appraiser. Taxing Officer McBride stated:

"I cannot imagine a more obviously irrelevant piece of evidence. How could the amount charged to a large and powerful expropriating authority by its appraiser for his services in responding to a claim for compensation have any bearing on what another appraiser, engaged by the claimant, would or should charge for his services in advancing the claim for compensation?"

This issue was considered in several B.C. cases during the pre-tariff regime (see *Phoenix*, *McKinnon* and *Underhill*) with somewhat conflicting results.

In *Ferancik*, the authority did not attempt to lead evidence about its own costs but it did hire an appraiser for the express purpose of giving evidence at a cost review hearing. The appraiser had not otherwise been involved with that case. The evidence was essentially a critique of the owner's appraisal costs and the Board accepted some of that evidence in reducing the charges from the amounts billed.

This issue appears to have limited importance to tariff cost recovery.

4. SPECIFIC ISSUES

4.1. Contingency agreements

There is nothing in the *Expropriation Act* that prevents a lawyer from entering into a contingency agreement with an owner. In this respect an expropriation matter would be treated in the same way as in any other litigation, at least during the current tariff regime.

Contingency fees are a significant problem for experts however in that they will undermine the expert's credibility and for that reason should not be used.

4.2. Appraisers

In a pre-tariff decision the Board rejected an authority's attempt to reduce an appraisal account based on the size of the appraisal report. In *Ferancik* the authority claimed the account was unreasonable because the actual analysis took up only 30 out of the 216 pages in the report and because only three comparables were used in the appraiser's direct comparison analysis and only two in his subdivision development approach. The Board stated:

"The second point raised by Mr. Goulden concerns Langley's arguments dealing with the numbers of comparable sales used and the number of pages of actual analysis versus overall content. I am not persuaded by Langley's reasoning. It is not reasonable to assess the services of an expert appraiser based on such factors as the thickness of the report or the number of comparables. It is not hard to imagine a compelling and useful professional opinion that was succinctly and sparsely written and that zeroed in on a few well-chosen and applicable comparables. Similarly, the board has seen more than one extremely lengthy opinion replete with numerous comparable sales, that has proven ultimately to have been inadequately prepared and analyzed and therefore of little assistance as a piece of evidence. The reviewer of costs needs to be concerned if a report is not thorough, complete or well-analyzed, or if it contains errors such as proceeding on an assumption not founded in the evidence. The reviewer should not, however, be concerned merely on the basis of the length of the report or the number of comparables it uses."

A common issue in cost recovery cases is the "cost to compensation" ratio. In *Stevenson* (a Nova Scotia case) the court noted that appraisal services are expensive, that where the property involved is of considerable value in relation to the expenses, an acceptable balance between value and expense may be achieved, but the balance may be very tenuous when the property or damage is of limited value. My observation is that the amount of work required to carry out an appraisal assignment depends very little on the value of the property involved and very much on the issues to be addressed and the effort required to conduct the necessary research rather than the value of the property. In the *Ingham* case it was held that the *Expropriation Act* does not permit a downward adjustment to a cost award to reflect a small net award of comparison.

Generally, appraisal services may be used in three different phases of a compensation claim: report preparation, hearing preparation (assisting counsel with review of the other appraisal evidence) and attendance at the hearing (to

assist counsel and to give evidence). In a pre-tariff case the Board approved appraisal accounts for services rendered by an appraiser in each of these phases: see *Ferancik*. Appraisal tariff items are also available at present for each of these three phases.

4.3. Other consultants

In *Neill* a claim for reimbursement of a realtor's commission was not allowed because it was in effect a contingency fee payable upon successful negotiation of a settlement. In this case the realtor's efforts were not successful and compensation was eventually determined by the Expropriation Compensation Board. It appears the realtor treated the Board's award of compensation as an event triggering entitlement to a fee but the Board did not agree.

A claim for reimbursement of the cost for a property consultant's services was rejected in *343146 B.C. Ltd.* In that case, the Board held that a property consultant's services were not recoverable because they duplicated services which the lawyer was expected to perform. However, in *Hampton*, the Board did allow recovery of charges for the services of a property consultant who assisted the claimant's counsel in negotiating a settlement of the compensation claim. It appears that in *Hampton*, the authority had itself used the services of a property consultant to negotiate the settlement with the Claimant's consultant so the authority's argument that the claimant's reliance on a property consultant was unreasonable was not convincing.

4.4. Disbursements

The amounts which have been allowed for disbursements are not prescribed by the tariffs. The court's function is to decide reasonableness based on the facts of each case although some amounts frequently claimed such as copying charges will typically be awarded at the same rate as applicable to other litigation.

4.5. Interest

During the pre-tariff period interest was awarded on costs where the expropriating authority was slow in paying claims for reimbursement. However, the tariffs expressly prohibit allowances of interest on cost awards.

4.6. Appeal costs

According to the 1993 decision of the B.C. Supreme Court in *Hruschak* the costs of pursuing appeals or other proceedings in court are not recoverable under the *Expropriation Act* even if those proceedings arise out of or relate to expropriation matters. Recovery of these costs is governed by the rules applicable to the appeal or other court application.

The law can be more generous to owners when an owner succeeds in an expropriation appeal. This is due to the fact that the tariff regime does not apply. A successful owner is likely to obtain an award of costs based on the owner's actual reasonable expenses (see *Bayview Builders and Holdom*). However, unlike in proceedings pursuant to the *Expropriation Act*, an owner who is not successful on an appeal may be liable to pay the authority's costs.

In 2011 the Supreme Court of Canada held in *Alliance Pipeline* that an owner was entitled to recover costs associated with several related proceedings in a

compensation claim pursued under the *National Energy Board Act*. The owner was awarded actual reasonable costs throughout all of the proceedings. While this appears to be consistent with the treatment of appeal costs found in *Bayview Builders* and *Holdom*, it may lead to re-examination of the scope of costs that can be awarded during the initial compensation hearing.

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SCHEDULE 1
Expropriation Proceeding Costs Regulation

B.C. Reg 98/2005
[includes amendments up to B.C. Reg. 112/2010, May 1, 2010]

Contents

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Schedule 1

Schedule 2

Definitions

1 In this regulation:

"Act" means the *Expropriation Act*;

"board" means the Expropriation Compensation Board;

"board proceeding" means a proceeding that was brought by filing an application with the board under section 2 of the Expropriation Compensation Board Practice and Procedure Regulation, B.C. Reg. 452/87, before March 18, 2005;

"compensation decision" means a determination under section 26 (1) of the Act, and includes a determination of the entitlement to, and the scale of, the costs that are or may be payable in relation to the proceeding in which the determination is made;

"compensation hearing" means a hearing for the purpose of arriving at a compensation decision, but does not include

- (a) a pre-hearing conference,
- (b) an interlocutory hearing, or
- (c) a hearing under section 45 or 48 of the Act;

"costs" means real estate appraisal costs or legal costs;

"court" means the Supreme Court;

"in-progress board proceeding" means a board proceeding if one of the following applies:

(a) the board held a compensation hearing in the board proceeding after August 1, 2004 and before March 18, 2005 and the board has not yet rendered its compensation decision in that proceeding;

(b) there has been an appeal to the Court of Appeal in relation to the board proceeding and the appeal has been heard, in whole or in part, before March 18, 2005;

(c) before March 18, 2005, a hearing in the board proceeding was scheduled to commence after March 17, 2005 and before January 1, 2006;

"reviewer" means, in relation to a determination of the amount of costs under section 45 of the Act or a review of costs under section 48 of the Act, the registrar of the court who is making the determination or conducting the review;

"tariff" means the tariff of costs set out in the Appendix;

"unset board proceeding" means a board proceeding that is not an in-progress board proceeding.

Application

2 This regulation applies to costs payable under section 45 or 48 of the Act but only,

(a) in the case of legal costs, if those costs

(i) were incurred on or after June 28, 1999, and

(ii) are payable in relation to an unset board proceeding, and

(b) in the case of real estate appraisal costs, if those costs

(i) were incurred on or after June 28, 1999, and

(ii) are payable in relation to an unset board proceeding or in relation to a compensation action, within the meaning of the Compensation Action Procedure Rule, brought under subrule (7) or (10) of that rule.

Tariff of costs

3 (1) If legal costs and real estate appraisal costs are payable under the Act, they must be assessed as follows:

- (a) legal costs must be assessed under Schedule 1;
- (b) real estate appraisal costs must be assessed under Schedule 2.

(2) When making an assessment of legal costs under section 45 or 48 of the Act, the reviewer must allow those costs under the tariff in Schedule 1 that were proper or reasonably necessary to conduct the board proceeding.

(3) If costs are payable under section 45 of the Act, the court may fix the scale, from Scale 1 to 3 in section 4 (1), under which the costs will be assessed.

(4) The court may order that legal costs be assessed on a different scale from real estate appraisal costs, and may order that one or more steps in the board proceeding be assessed under a different scale from that fixed for other steps.

Scale of costs

4 (1) When fixing the scale of costs, the court must have regard to the following principles:

- (a) Scale 1 is for matters of less than ordinary difficulty or importance;
- (b) Scale 2 is for matters of ordinary difficulty or importance;
- (c) Scale 3 is for matters of more than ordinary difficulty or importance.

(2) When fixing the appropriate scale under which costs will be assessed, the court may take into account any of the following:

- (a) whether a difficult issue of law, fact or construction is involved;
- (b) whether a difficult appraisal issue is involved;
- (c) whether an issue is of importance to a class or body of persons, or is of general interest;
- (d) whether the result of the board proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.

(3) Subject to section 3 (3), if

- (a) costs are payable under section 45 or 48 of the Act, or
- (b) payment of assessed costs has been agreed to on a settlement but no scale has been fixed or agreed to,

the costs must be assessed under Scale 2 unless a party, on application, obtains an order of the court that the costs be assessed under another scale.

(4) For the purpose of determining legal costs under Schedule 1, the value allowed on an assessment is as follows:

- (a) Scale 1 - \$100 for each unit;
- (b) Scale 2 - \$140 for each unit;
- (c) Scale 3 - \$180 for each unit.

(5) For the purpose of determining real estate appraisal costs under Schedule 2, the value allowed on an assessment is as follows:

- (a) Scale 1 - \$80 for each unit;
- (b) Scale 2 - \$100 for each unit;
- (c) Scale 3 - \$120 for each unit.

(6) If an item in a tariff provides for maximum and minimum numbers of units, the reviewer has the discretion to allow a number within that

range of units, and must have regard to the following principles when assessing costs:

- (a) one unit is for matters on which little time should ordinarily have been spent;
- (b) the mid-point of the range is for matters on which an average amount of time should ordinarily have been spent;
- (c) the maximum number of units is for matters on which a great deal of time should ordinarily have been spent.

(7) If an item in a tariff provides for

- (a) an amount for each day but the time spent during the day is less than 2 ½ hours, only ½ of the amount is allowed for that day,
- (b) an amount for each day but the time spent during the day is more than 5 hours, the amount allowed for that day must be increased by ½ of the amount, or
- (c) an amount for preparation for an attendance but the time spent on the attendance is less than 2 ½ hours, only ½ of the amount for preparation is allowed.

Expenses and disbursements

5 (1) In addition to the costs allowed on a review under a tariff, the reviewer may allow a reasonable amount for expenses and disbursements that were necessarily and properly incurred in the conduct of the board proceeding.

(2) Subject to subsection (4), if tax is payable by a party in respect of legal costs or real estate appraisal costs, the reviewer must allow an additional amount calculated on the monetary value of the units assessed equal to the percentage rate of tax payable.

(3) Subject to subsection (4), if tax is payable by a party in respect of expenses or disbursements, the reviewer must allow an additional amount to compensate for that tax, which additional amount must be determined by multiplying the percentage rate of the tax by the monetary value of the expenses or disbursements as assessed.

(4) If a person claims an additional amount under subsection (2) or (3) for tax imposed under Part IX of the *Excise Tax Act* (Canada) payable on legal costs or real estate appraisal costs or on expenses or disbursements, that person must provide proof that

(a) the person is not a registrant under the *Excise Tax Act* (Canada), and

(b) the person is not entitled to and cannot claim reimbursement of any tax imposed under Part IX of the *Excise Tax Act* (Canada) paid in respect of the costs, expenses or disbursements to which the additional amount claimed relates.

(5) In the absence of the proof required by subsection (4), no additional amounts for tax imposed under Part IX of the *Excise Tax Act* (Canada) payable on costs, expenses or disbursements is allowed under subsection (2) or (3).

(6) An allowance must not be made for interest on legal costs or real estate appraisal costs or expense or disbursement claims.

[am. B.C. Reg. 112/2010, App. s. 6.]

Appendix

Tariff of Costs

Schedule 1

Legal Costs

Item	Description	Units
Instructions and investigations		
1	Correspondence, conferences, instructions, investigations or negotiations by a claimant relating to a board proceeding, whether before or after commencement, for which provision is not made elsewhere in this tariff	Minimum 1 Maximum 20
2	Reviewing and advising in relation to an agreement under section 3 of the Act if	
	(a) no agreement entered into	1

	(b) agreement entered into		3
3	Reviewing and advising in relation to a payment made under section 20 of the Act, for each payment		2
4	Instructing expert witness if witness prepares a report, for each expert (maximum of 3 witnesses, without leave)	Minimum	1
		Maximum	5
5	Every process for commencing and prosecuting a board proceeding before the board or the court	Minimum	1
		Maximum	10

Discovery

6	Process for obtaining discovery and inspection of documents	Minimum	1
		Maximum	10
7	Process for giving discovery and inspection of documents	Minimum	1
		Maximum	10
8	Process for delivering interrogatories	Minimum	1
		Maximum	10
9	Process for answering interrogatories	Minimum	1
		Maximum	10

Examinations

10	Preparation for examination of a person coming under Item 11 for each day of attendance		
	(a) by party conducting examination		3
	(b) by party being examined		2
11	Attendance on examination of a person for discovery, on affidavit, for each day		
	(a) by party conducting examination		6
	(b) by party being examined		5

Applications

12	Preparation for an application referred to in Item 13, for each day of hearing, if the hearing has commenced		
	(a) unopposed		2

	(b) opposed		3
13	Interlocutory application or other application for which provision is not made elsewhere in this tariff, for each day		
	(a) if unopposed		4
	(b) if opposed		5
14	Preparation for attendance referred to in Item 15, for each day of attendance		2
15	Attendance before the board, the court or a reviewer to settle an order or to assess costs, for each day		4
16	Preparation for attendance referred to in Item 17, for each day of attendance		2
17	Attendance at a pre-trial conference, for each day		3
Hearing			
18	Preparation for trial, if board proceeding set down, for each day of trial, to a maximum of 30 units		5
19	Attendance at trial or of an issue in a board proceeding, for each day		10
20	Written argument, if requested or ordered by the board or the court	Minimum	1
		Maximum	10
Miscellaneous			
21	Process for setting board proceeding down for trial		1
22	Negotiations, mediation and process for settlement, discontinuance, or dismissal by consent of any board proceeding if settled, discontinued, or dismissed by consent as a result of the negotiations, for each day, to a maximum of 60 units		15
23	Travel by a solicitor to attend any trial, hearing, application, examination or other analogous proceeding if held more than 40 km from the place where the solicitor carries on business, for each day of travel by the solicitor		2

In addition, reasonable travelling and subsistence expenses must be allowed as a disbursement

Schedule 2

Real Estate Appraisal Costs

Item Description	Units
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Instructions			
1	Correspondence, conferences, instructions or meetings with a claimant and counsel relating to a board proceeding, whether before or after commencement, for which provision is not made elsewhere in this tariff	Minimum	1
		Maximum	20
Inspection and research			
2	Inspect and research subject property	Minimum	1
		Maximum	30
3	Market research, including all necessary attendances	Minimum	1
		Maximum	20
4	Inspection of comparable properties	Minimum	1
		Maximum	20
Analysis and report preparation			
5	Analysis of data and preparation of a report or reports	Minimum	1
		Maximum	60
Hearing			
6	Preparation for trial, if board proceeding set down, for each day of necessary attendance of appraiser, to a maximum of 30 units		5
7	Attendance at trial of board proceeding or of an issue in an board proceeding, for each day of necessary attendance of appraiser		10
8	Travel by an appraiser for necessary attendance at any trial, hearing, application, examination or other analogous proceeding if held more than 40 km from the place where the appraiser carries on business, for each day of travel by the appraiser		2
	In addition, reasonable travelling and subsistence expenses must be allowed as a disbursement		

[Provisions of the *Expropriation Act*, R.S.B.C. 1996, c. 125, relevant to the enactment of this regulation: section 54]

SCHEDULE 2**CASE LAW**

1. *343146 B.C. Ltd. v. British Columbia (Minister of Transportation and Highways)*
[1993] EXLAW 44, 50 L.C.R. 221 (B.C.E.C.B.)
2. *Alliance Pipeline Ltd. v. Smith*
[2011] EXLAW 1, 102 L.C.R. 1 (S.C.C.)
3. *Arab v. Halifax (City)*
[1997] EXLAW 5, 63 L.C.R. 138 (N.S.U.R.B.)
4. *Bayview Builders Supply (1972) Ltd. v. British Columbia (Minister of Transportation and Highways)*
[1999] EXLAW 298, 67 L.C.R. 208 (B.C.C.A.)
5. *Brietzke v. British Columbia (Minister of Transportation and Highways)*
[1996] EXLAW 166, 59 L.C.R. 76 (B.C.E.C.B.)
6. *C.R. All Trucks Ltd. v. British Columbia (Minister of Transportation and Highways)*
[2000] EXLAW 309, 69 L.C.R. 197 (B.C.E.C.B.)
7. *Cabre Exploration Ltd. v. Arndt*
(1989), 40 L.C.R. 317 (ALTA Q.B.)
8. *Cokato Dairy & Stock Farms Ltd. v. Fernie (City)*
[1998] EXLAW 266, 64 L.C.R. 242 (B.C.E.C.B.)
9. *Creative Stretch Fabrics Ltd. v. Pitt Meadows (District)*
[1991] EXLAW 25, 46 L.C.R. 111 (B.C.E.C.B.)
10. *Del's Machinery Ltd. v. British Columbia (Minister of Transportation)*
[2009] EXLAW 309, 99 L.C.R. 94 (B.C.S.C. Registrar)
[2011] EXLAW 309 (B.C.S.C.)
11. *Ferancik v. Langley (Township)*
[1997] EXLAW 244, 62 L.C.R. 291 (B.C.E.C.B.)
12. *Ferguson v. British Columbia (Minister of Forests)*
[1998] EXLAW 256, 63 L.C.R. 219 (B.C.E.C.B.)
13. *Gerestein v. Abbotsford (District)*
[1990] EXLAW 16, 43 L.C.R. 262 (B.C.E.C.B.)
14. *Glendale Trading Ltd. v. British Columbia (Minister of Transportation and Highways)*
[1998] EXLAW 269, 65 L.C.R. 50 (B.C.E.C.B.)
15. *Greatbanks v. British Columbia (Minister of Transportation and Highways)*
[1998] EXLAW 270, 65 L.C.R. 20 (B.C.E.C.B.)
16. *Hampton Investments Ltd. v. British Columbia (Minister of Transportation and Highways)*
[1998] EXLAW 271, 64 L.C.R. 284 (B.C.E.C.B.)
17. *Hill v. Nova Scotia (Attorney General)*
[1997] EXLAW 23, 61 L.C.R. 241 (S.C.C.)
18. *Holdom v. British Columbia Transit*
[2006] EXLAW 12, 91 L.C.R. 69 (B.C.C.A.)

19. *Hruschak v. Vernon (City)*
[1993] EXLAW 124, 50 L.C.R. 1 (B.C.S.C.)
20. *Ingham v. Creston (Town)*
[2001] EXLAW 310, 73 L.C.R. 122 (B.C.S.C.)
21. *Interwest Property Services Ltd. v. Pacific Beach Investments Ltd.*
[1998] EXLAW 283, 66 L.C.R. 81 (B.C.S.C.)
22. *Jesperson's Brake and Muffler Ltd. v. Chilliwack (District)*
[1992] EXLAW 142, 48 L.C.R. 161 (B.C.C.A.)
23. *Jones v. Fernie (City)*
[1998] EXLAW 267, 64 L.C.R. 269 (B.C.E.C.B.)
24. *Kolbrich v. Ontario (Minister of Housing)*
(1981), 23 L.C.R. 1 (Ont. S.C. Taxing Officer)
(1982), 25 L.C.R. 261 (Ont. H.C.J.)
25. *Lenjo Enterprises Ltd. v. Toronto (City)*
(1977), 12 L.C.R. 13 (Ont S.C.)
26. *McKinnon v. School District No. 36 (Surrey)*
[1997] EXLAW 214, 61 L.C.R. 9 (B.C.E.C.B.)
27. *Neill v. British Columbia (Minister of Transportation and Highways)*
[1991] EXLAW 26, 46 L.C.R. 123 (B.C.E.C.B.)
[1992] EXLAW 29, 47 L.C.R. 112 (B.C.E.C.B.)
[1993] EXLAW 126, 50 L.C.R. 241 (B.C.S.C.)
[1996] EXLAW 163, 58 L.C.R. 5 (B.C.C.A.)
28. *Nygaard v. Surrey (District)*
[1989] EXLAW 11, 42 L.C.R. 279 (B.C.E.C.B.)
29. *Phoenix Estates Ltd. v. School District No. 63 (Saanich)*
[1996] EXLAW 179, 59 L.C.R. 309 (B.C.E.C.B.)
30. *Stevenson v. Lawrencetown (Village)*
(1994), 54 L.C.R. 91 (N.S.S.C.)
31. *Summit Enterprises Limited v. Kamloops (City)*
[1995] EXLAW 96, 57 L.C.R. 24 (B.C.E.C.B.)
32. *Tidmarsh v. Comox-Strathcona (Regional District)*
[1995] EXLAW 93, 55 L.C.R. 81 (B.C.S.C.)
33. *Trepke v. Matsqui (District)*
[1990] EXLAW 14, 43 L.C.R. 110 (B.C.E.C.B.)
34. *Underhill v. Pemberton Valley (Dyking District)*
[1997] EXLAW 243, 62 L.C.R. 272 (B.C.E.C.B.)

NOTE:

"L.C.R." citations refer to the *Land Compensation Reports* published by Canada Law Book, a division of Thomson Reuters, One Corporate Plaza, 2075 Kennedy Road, Toronto, Ontario M1T 3V4

"EXLAW" citations refer to the Expropriation Law Centre Decisions Service, published by Dicta Legal Services Ltd., #161 – 255 Newport Dr., Port Moody, B.C. V3H 5H1