RECOVERY OF COSTS FOR PROFESSIONAL SERVICES UNDER THE BRITISH COLUMBIA EXPROPRIATION ACT

B.C. Expropriation Association

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1. INTRODUCTION

In an expropriation proceeding it is assumed that the owner will incur expenses for professional services in advancing the claim for compensation. Modern legislation provides for the owner to obtain reimbursement from the expropriating authority for those costs. However, the costs are often substantial and expropriating authorities are generally reluctant to pay so there are many opportunities for disputes to arise.

This paper examines several cost recovery issues which arise out of the expropriation process. Although many of these issues are applicable across the country, 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 portions of the B.C. Act which relate to cost recovery are currently found in ss. 45 and 48;

Since the Act came into force in late 1987, numerous cost reviews have been conducted by the Expropriation Compensation Board as provided in the Act. Some of those decisions have been considered by the courts on appeal from the Board. The decisions coming out of those reviews and the appeals have laid down guidelines which are of assistance. They have made it easier to predict the outcome in many cases although it will be a long time yet before absolute certainty is achieved;

The comments which follow are nothing more than my own editorial comment on the law as it has developed. It is not intended as a comprehensive text on the subject. My own experience encompasses representation of both owners and authorities so I hope my thoughts will be perceived as balanced and fair;

This topic necessarily examines only two of the three relationships where professional costs are at issue: the relationship between the professional and the owner and the relationship between the owner and the 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. DEFINITIONS

2.1 Statutory provisions

The critical passages of the legislation deal with the right to recovery of costs. Section 45(3) of the *Expropriation Act* says:

> "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:

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

2.2 Professional services

The Act does not refer specifically to "professional services". However, the bulk of an owner's expenses will be for professional services, primarily legal and appraisal. Expenses for professional services must fall within one of the three categories provided in the Act, namely legal, appraisal and other costs. While legal and appraisal services are clearly covered by their own categories, services provided by engineers, foresters, business valuators, planners and agricultural economists, for example, would fall into the "other" category;

In *Neill (No. 4)*, a claim for reimbursement of a realtor's commission was rejected because it was in effect a fee payable only if a negotiated settlement had been reached. A claim for a property consultant's services were 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 too convincing;

Professional services must be rendered in relation to pursuing a claim for compensation if they are to be recovered as "costs" under the Act. Services rendered for some other purpose are not recoverable although it may be difficult at times to know in advance where the line will be drawn;

The Act provides only for reimbursement of costs incurred by an owner. The Act does not give the owner's professional advisors any special status to deal directly on their own account with the authority. What this means in practice is that a professional advisor engaged by an owner must make arrangements for payment directly with the owner and invoice the owner for the services. It is not appropriate to invoice the authority, unless, of course the professional has actually been retained by the authority. In that case, however, the Act would not apply at all;

The Act also does not apply to the relationship between an owner and professional advisor. The Board's jurisdiction to settle cost issues is limited to settling disputes between an owner and authority over the amount of costs to be reimbursed by the authority, not the amount to be paid by the owner to his or her advisors (see *Gerestein* and *Neill (No. 2)*);

2.3 Personal costs

An owner's expenses for travel to consult with professional advisors or to attend an examination for discovery or the compensation hearing are not professional costs as such but they clearly qualify as "other" costs and would therefore be recoverable;

2.4 Distinction between disturbance damages and costs

Disturbance damages can include costs or expenses incurred by an owner arising from the expropriation. In some cases it will not be obvious whether a particular item is disturbance damage or an item for recovery as costs. For example, where there is a partial taking and the owner was engaged in development of the land, 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 serve to advance the claim for compensation there is no reason why they can't be claimed as costs although there is no basis in the Act for claiming them twice. The advantage to the owner in claiming them as costs is that they could be recovered in advance under s. 48. The drawback, however, is that if they are paid as costs, the final land compensation award will be reduced by the value of those costs and the amount of costs paid in advance will increase. That negatively impacts the "costs to compensation" ratio which reduces the owner's chances of successful recovery of other costs;

3. GENERAL ISSUES

3.1 Final cost reviews (s. 45)

The Act gives the Board 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 or where the land compensation issues are settled without the assistance of the Board. In other cases, the Board 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 guarantees 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 of the professional expenses have been incurred;

At a final review the Board 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 Board 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;

The Board has held that a final review requires an examination of all accounts for which an owner may have sought reimbursement at any time. This includes accounts which were paid previously by way of advance payments. In some cases, particularly where the matter has been outstanding for many years, this can present a practical obstacle for the owner who may have difficulty locating the professionals who provided the services and whose evidence may be required to prove the reasonableness of the charges;

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, the Board would have exercised the discretion to award costs and apparently in each case the Board found that it was reasonable for the Claimant to have advanced the claim in spite of the lack of success;

Some professionals find the cost recovery process more adversarial than they are accustomed to. This is not surprising given the legislation. In fact, many authorities treat a professional account simply as an offer to be countered. Authorities often assume that because the authority is required to pay the owner's costs, each of the owner's professional advisors will overcharge knowing that the owner will not have to pay the account;

3.2 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. As noted elsewhere, 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 which were foreseen by the Law Reform Commission are illusory;

The main risk to the owner is that professional services will not be reimbursed in full and that the owner will not know for sure until after the expenses have been committed. The Act does not contain any mechanism for an owner to seek approval for an expense from the Board 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 Board has jurisdiction to conduct a review under s. 48 for purposes of determining the appropriate amount to award as an advance payment. The Board has 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 information is usually necessary as a condition of reimbursement. An authority is only required to pay reasonable costs so it follows that some evidence of what services have been provided must be disclosed to establish that the costs claimed are in fact reasonable. Since the authority is never required to provide similar information to the owner, this provides the authority with an advantage that owners often see as unfair. An owner could avoid this problem by not seeking advance payment of costs. However, that comes with a penalty because the interest which accrues on the professional accounts (or imputed interest on the owner's own funds used to pay the accounts) cannot be recovered until after the cost claims have been submitted. Further, many owners will not be able to find professionals willing to wait for the case to be settled and are unable to fund professional expenses out of their own resources;

The third risk to the owner which I have identified is that even though there are strong incentives under the Act to take advantage of the advance payment provisions, the Board has frequently 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. Authorities face little risk in delaying their responses to s. 48 cost claims other than possible payment of interest costs on the delayed payments;

Another disincentive for owners to pursue advance payment of costs is that an authority may simply refuse to pay any cost claim without a s. 48 review being first conducted no matter how small the account may be. The owner is faced with the burden of proof even where the authority has scheduled the s. 48 review: see *Ferguson*. On small claims the cost of professional services for preparation and attendance will often exceed the amount of the cost claim under review, particularly where the authority has forced the owner to prove every aspect of the cost claim. Previous Board decisions leave little hope for full recovery of those costs of participation;

The Act permits advance payment of costs only where they have been incurred and claimed from the authority prior to commencement of the compensation hearing. Since a substantial portion of professional costs will be incurred during the compensation hearing and Board decisions are often delayed, an

owner may be forced to finance those costs over a lengthy period of time without any right to advance payment at all. Given the financial significance attached to the commencement of the compensation hearing some claimants submit their final pre-hearing cost claims to the authority in the hearing room moments before the Board assembles to conduct the hearing. Also, it is not surprising that some disputes have arisen as to whether a hearing had commenced before the cost claim was submitted. The recent decision in *Glendale* is a good example of this.

3.3 Full indemnity

The general policy of the Act is to provide an owner with full indemnity in relation to professional costs. 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 *Creative Stretch*, the Board stated:

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

However, this policy has some potential for abuse as implied by a statement from Taxing Officer McBride in *Lenjo*:

> "I am inclined to agree...with counsel for the respondent that the claimant's counsel seems to have had an unusually large number of meetings with the appraiser.... While I have always tried to be careful not to suggest that solicitors have done unnecessary work or have done necessary work in a time-consuming manner, especially in dealing with matters about which I have had no personal experience, I have been driven, through a series of these taxations, to the conclusion that, with the pot of gold at the end of the rainbow, in the form of...the *Expropriations Act*, glistening in the distance, many solicitors acting for claimants seem to have conducted themselves in an expansive manner such as to suggest an acute awareness that their clients will not be required to pay their bills."

This quote is frequently cited by authorities at cost review hearings. While the quote is entertaining, fear of abuse could explain in some cases the reluctance of many authorities to promptly pay claims for reimbursement of costs;

The risk of abuse however, is adequately controlled by the review process available under the B.C. Act;

Under the B.C. Act, the policy of full indemnity is currently implemented with the words "actual" and "reasonable":

> s. 45(7) The costs payable ... are
>
> (a) the actual reasonable legal, appraisal and other costs, or
>
> (b) if the Lieutenant Governor in Council prescribes a tariff of costs, the amounts prescribed in the tariff and not the costs referred to in paragraph (a).

The tariff referred to in (b) has never been established.

Whether this means the actual amount billed to and lawfully recoverable from the owner by the professionals engaged by the owner or some lesser amount has been the subject of judicial debate elsewhere;

One view was expressed by Taxing Office McBride in *Kolbrich (No. 1)*:

> "The matter of the cost of experts is perhaps the most difficult and perplexing of any of the costs of expropriation. The claimant must engage the services of appraisers and other specialists. He has no choice. He did not ask to be expropriated nor did he create the system of arbitration. He merely had the temerity to own some real estate that the state later decided to acquire. After he has incurred the expense of engaging appraisers and establishing his right to compensation he is then told that he has paid them too much, or, more accurately, that they have charged him too much. He is told that they used the wrong approach, that they should not have used the subdivision approach, or that they should have or that they used the wrong or too many comparables. All this flows from the supposition that the claimant has control over the activities of the appraiser.
>
> The real problem is that the claimant is the victim of a system created by the state. As I have said, he must employ appraisers, town planners and other experts if he is to have any hope at all of being adequately compensated for the taking of all or part of his land.
>
> So it is necessary for the claimant to employ experts. Where does he find them? The most commonly employed experts seem to be appraisers and town planners. There are very few of either species of experts practising in the Metropolitan Toronto area. Very few when one considers the number of expropriations that have taken place over the

last 20 years or so. The same experts are employed by either the expropriating authority or the claimant in case after case after case. They know what the Land Compensation Board will accept and what will not be accepted or they should know. Claimants cannot be expected to know. If an appraiser says he considers it essential or advisable to adopt a particular approach to compensation most claimants are almost forced to accept his advice and to instruct him to proceed accordingly. So he does a great deal of work, runs up a very large fee, and has some, most or all of his work rejected by the Board. Then the expropriating authority complains about the claimant's disbursements and says he has paid his appraiser too much. What is a landowner supposed to do when faced with this kind of situation? ...

Really the one consideration that makes the taxation of the experts' accounts impossible is the fact that if such an account is reduced on taxation the expropriating authority need pay to the claimant only the reduced amount but the claimant must pay the full amount to the expert. Indeed in many cases he already has paid the account in full before the taxation. Why should I reduce the costs payable by the party which has created the need for an arbitration proceeding and add it to the financial burden to be borne by the claimant personally? Surely it would not be an impossible task to work out a system of taxation of experts' accounts where the experts would be required to accept the taxed amounts. There is something a little weird about a system of taxation that is binding on the claimant but is of no consequence to the very person who has drawn the account that is taxed and who expects it to be paid.

In my opinion, if the claimant has acted reasonably in hiring his experts he is entitled to be fully reimbursed for payment for their services even if they have charged him too much or their services were in fact of little value. But he must have acted reasonably in engaging them."

On appeal in *Kolbrich (No. 2)*, the Ontario High Court of Justice did not agree with Taxing Officer McBride, stating:

"If the decision of the master is correct, there is nothing to stop an appraiser from using his retainer as a carte blanche for any fee his conscience will allow.

I cannot accept that as the state of the law. In my view there must be a consistent approach on the part of the taxing master in applying the test of reasonableness to the solicitor's fee account and the expert's account.

The pertinent regulation provides for the test on a *quantum meruit* basis.

> The learned master failed to apply that test and in my view he erred in law."

Quantum meruit is an expression which means the reasonable value of a service without regard for any agreement which might exist between the parties. This judicial exchange illustrates both sides of the issue quite nicely;

In B.C. the Act has been interpreted to impose a *quantum meruit* standard: see *Neill (No. 4)*. In fact, most accounts reviewed by the Board are reduced to some degree;

3.4 Retainer agreements

Although written retainer agreements do not appear to be commonplace, I would strongly advise all professionals to obtain written retainer agreements before work commences. In addition to reducing the opportunity for disagreement at a later date over how, when and by whom the professional will be paid, a written agreement will make cost recovery easier for the owner if a review should be conducted;

Retainer payments, ie. payments made in advance of the professional services being provided, are not recoverable by the owner from the authority. This is true whether or not the retainer payment is held in trust and applied to future accounts. In *Brietzke* the Board decided that it has no jurisdiction to conduct a review unless the services have actually been provided. This interpretation makes it easier for the Board to conduct its function but makes it riskier for the owner, and perhaps the expert (depending upon the retainer agreement), who will not know whether the services will be recovered until after they have been provided. Interim accounts can reduce but not eliminate this risk;

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 until such time as the services have actually been rendered and invoiced. At that point the costs should be recoverable from the authority;

Accommodation provisions are sometimes incorporated into retainer agreements. This is an agreement whereby the professional agrees to accept as payment the amount which the owner is able to recover from the expropriating authority as costs for those services. Such agreements carry an element of risk to the professional since there is a possibility that the normal charges for those services will be considerably greater than the eventual recovery. However, there are many owners who are unable or unwilling to spend their own funds to pay for professional services except to the extent that they can recover the cost from the authority. Other risks to the professional include the fact that an advance payment might be collected by the owner and paid out but following

the final s. 45 review the owner could be told by the Board that the advance payment was too high and a portion must be repaid. An accommodation agreement should specify who is to bear that risk. There is a case from Alberta where the authority argued at a final cost review hearing that because the appraiser's right to be paid was contingent upon recovery of costs from the authority there was no legal liability on the owner to pay the appraiser and therefore the authority should not be required to reimburse for the services. Fortunately for the appraiser, the Court did not agree (see *Cabre)*.

3.5 The role of counsel

The Board appears to have 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

The Board has stated that the same details are required to support an appraisal account as for a legal account at a review hearing. However, in my experience, appraisal and other expert accounts are less likely to be supported by detailed time records than are legal accounts and more likely to survive intact. Hourly rates are not often challenged on the non-legal accounts as is also true of the total amount of time recorded on the assignment, although appraisal accounts have been reduced on occasion: the *Ferancik, Jones and Cokato* decisions are examples of this;

When reviewing the content of professional accounts, the Board appears to treat lawyer's accounts much more critically than that of any other professional. This trend has never been expressly acknowledged in any decision. However, the implication is that more evidence will usually be required to support the reasonableness of a legal account than is required for others;

Detailed time records appear to be essential as it is the only means which the Board really has to conduct the review. Professionals should anticipate this requirement. 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 desirable 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' appraisal (or other expert) costs on the basis of the amount which the authority has paid to retain similar expertise;

In *Lenjo*, 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 turned his attention to the authority and 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?"

The B.C. Board has considered this issue in several cases to date.

In *Phoenix* the Board was reviewing an owner's appraisal account. It stated:

> "having dispensed with [the authority's] objections to the account, I find no other basis on which to reduce the account as presented. The time spent strikes me as reasonable .... In addition, I take some comfort from the fact that [the appraiser's] accounts are less than [the authority's] own total appraisal expenses."

apparently accepting that the authority's costs had some relevance;

In *McKinnon* the Claimants sought to have discovery of the authority's legal accounts for the purpose (presumably) of showing that the authority had spared no expense in defending the compensation claim thereby assisting the claimant to justify the reasonableness of their own costs by comparison. The Board rejected that application on several grounds, one of which was that the Board was not persuaded that the authority's costs would be relevant or useful in determining reasonableness of the Claimant's costs. The *Phoenix* decision was not mentioned;

In *Underhill* the Board again expressed reservations about the usefulness of such evidence although it did not wholly reject the approach;

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;

Although there is obvious conflict between these Board decisions, I suggest that the correct approach is that the authority's own expenses are simply not relevant. However, an authority may want to use the approach of hiring an expert specifically for purposes of the cost review hearing as occurred in *Ferancik*.

4. SPECIFIC ISSUES

4.1 Lawyers

Perhaps the most common dispute over legal services is the hourly rate. The Board has approved a wide range of hourly rates in many cases. At one time the cases suggested that there was an upper limit of $175 per hour. However, that approach was cast aside in 1995 in the *Summit* decision. The Board now simply requires evidence to establish reasonableness of the rates claimed;

Claimants have faced problems in proving reasonableness of billed hourly rates for lawyers. Many cases have proceeded without evidence on this issue. Not surprisingly, the results in those cases reflect that. Several cases have proceeded with claimants relying on the annual survey of hourly rates conducted by the Canadian Bar Association. The Board has accepted this evidence with some hesitation. In one case, a Claimant attempted to introduce an expert report which had been prepared specifically to support one lawyer's hourly rate for purposes of the cost review hearing. However, the Board refused to admit the report into evidence;

At this time, the Bar Association annual survey appears to be the most cost effective way to prove reasonableness of hourly rates in spite of its shortcomings. Aside from the usual problems with use of survey evidence, the survey attempts only to measure average rates by seniority in the legal profession without regard for experience in the field of expropriation law even though this is an issue which is clearly very important in a cost review before the Board;

Contingency fees based on a percentage of the amount of land compensation recovered for the claimant are not recoverable under the Act; see *Neill (No. 4)*. There is nothing illegal about a lawyer entering into a contingency fee arrangement with an owner nor is there anything objectionable about percentage fees in the context of the lawyer/client relationship. However, if the owner becomes liable to pay a percentage fee because a contingency has been satisfied, the owner can not be certain of recovering that fee from the authority as costs under the Act. It is not the contingency aspect which creates the problem, rather the problem is created by measuring the value of the legal services as a

percentage of the compensation received. The Board has determined (with approval from the Court of Appeal) that a percentage fee is not a proper measure of the value of the services for purposes of the Act. In *Neill*, the Claimant ended up recovering costs on a *quantum meruit* basis which proved to be less than the percentage fee payable by the claimants. Whether *quantum meruit* cost recovery will be more or less than the percentage fee payable by the owner depends on the facts of each case, although *Neill* appears to be the only case to date where the Board has considered the issue. The implication here for lawyers is that detailed time records should be kept by the lawyer even though a contingency agreement is in place because the time records will almost certainly be required to permit the owner to recover costs for those services;

4.2 Legal assistants

This continues to be a controversial area. The Board has consistently stated that charges billed for the services of a legal assistant are recoverable. However, attempts to recover such charges are usually marked by disagreement over whether the services billed are properly the work of a legal assistant or that of clerical staff;

The most comprehensive decision on this subject is *Ferancik* where a number of specific tasks were approved by the Board as proper work for legal assistants;

4.3 Appraisers

An appraiser's formal designations may affect the recoverable hourly rate for appraisal services. In *Ferancik*, the Board was considering the account of an appraiser who held the designation "CREA" issued by the National Association of Real Estate Appraisers and the designations "DAR" and "DAC" issued by the Canadian National Association of Real Estate Appraisers. He was also a candidate member of the Appraisal Institute of Canada having completed all but the demonstration report requirement for an "AACI" designation. The Board stated that the "lack of a formal AACI designation is a factor that has some relevance to the reasonableness of his hourly rate". The Board stated that the billed rate was too high but avoided deciding what would have been a reasonable rate. It offered no explanation as to how the lack of an AACI designation was relevant;

The Board has rejected an authority's attempt to reduce an appraisal account based on the size of the 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 sparely 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 problem with cost recovery 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;

Under the Act, the Board has evaluated appraisal services using the statutory criteria. In *Summit*, the appraisal costs recovered by the owner were reduced from the actual accounts billed because the Board felt that the accounts were too high in relation to the additional compensation which was obtained and the value of the property at issue. The Board stated:

> "I think it is reasonable to expect that, under normal circumstances, the cost of preparing the appraisal report should bear some relation to the value of the property being appraised. A simple example of this is that a responsible appraiser would not normally spend hundreds of hours and tens of thousands of dollars appraising a right of way that was worth $1,500. While this case is clearly not that extreme, I do question the reasonableness of spending 114.5 hours, and $7,640 in fees, to appraise property at $57,300. This degree of disproportionality still exists when one considers the $8,000 excess of the settlement over the advance payment, alongside the overall appraisal costs of both accounts of $12,924.49.

> Bearing in mind the [statutory criteria] and my previously stated concerns about the [appraisal] report under this particular set of circumstances, I conclude that a more reasonable amount for appraisal costs (for both reports) would be $7,000, inclusive of disbursements and taxes."

This result is certainly at odds with the policy expressed by Taxing Officer McBride in *Kolbrich (No. 1)* discussed above. It also suggests that the reasonableness of appraisal services should vary with the value of the land in question. It is certainly arguable that the legislation requires the Board to take this approach. However, it should also raise some ethical questions for appraisers whose professional organizations tend to view fees billed as a percentage of the value of the land as an ethical breach;

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). The Board has approved appraisal accounts for services rendered by an appraiser in each of these phases: see *Ferancik*;

4.4 Other consultants

The Board has also applied the statutory criteria to the accounts of other professionals. In *Jones* and in *Cokato*, the Board considered the accounts of an agricultural economist. The land compensation awarded in each case was relatively small, in the order of $10,000 each. The consultant's services were essential for the purpose of identifying the agricultural impacts flowing from the partial taking for a sewer pipeline. However the consultant's services were billed in an amount which was approximately the same as the total land compensation. The Board reduced the accounts by a significant amount apparently to achieve a more satisfactory "costs to compensation" ratio. This illustrates the cost recovery problem presented by takings where the total compensation turns out to be relatively small even though that may not have been apparent at the time when the consultant started work. The whole point of these investigations is to determine what the loss is. If the eventual result had been known in advance there would be no need for the report;

4.5 Disbursements

The amounts which have been allowed by the Board for disbursements are not cast in stone and in fact have changed over time. The Board's function is to decide those matters on the evidence before them. Of course, the evidence presented is not always the same which explains variations from case to case;

The highest amount allowed for fax charges to date is $0.50 per page: see *Underhill*. Similarly, the highest amounts allowed to date for photocopies is $0.15 per page;

It appears that a claim was advanced for the cost of parking tickets in *Hampton*. Without explaining how this disbursement was incurred, the Board concluded that it was not recoverable;

4.6 Interest

Tidmarsh is the leading case in B.C. It holds that interest is a recoverable item of costs provided that certain conditions are satisfied, for example, the claimant must have incurred the interest expense. However, the rate of interest is a matter for the Board to determine. Since *Tidmarsh* the Board has routinely awarded interest where the conditions are satisfied. The rate awarded depends in part on the rate payable by the claimant rather than statutory rates, but the Board has not felt itself bound to award the contract rate;

4.7 Appeal costs

The most recent ECB decision on this subject is *Greatbanks*, which restated the Board's previous position that recovery of costs for proceedings in the courts is to be governed by the rules of court and will not be awarded by the Board. The Board's position was upheld previously in *Hruschak*;

The BC Supreme Court applied the policy of the *Expropriation Act* in an appeal from the ECB decision in *Tidmarsh*. Special costs were awarded because the Court found that appeals to the Supreme Court were part of the overall scheme of the Act;

The BC Court of Appeal implied in *Jesperson* that it has discretion to award full indemnity for costs, but it does not appear to have done so in any case to date;

The Supreme Court of Canada recently decided in *Hill* that full indemnity was the appropriate scale of costs to be applied throughout all of the legal proceedings in that case, apparently using the same reasoning as in *Tidmarsh*. The applicable legislation there was the Nova Scotia *Expropriation Act*.

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NOTE:

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