BRITISH COLUMBIA

APPENDIX "A"

April 19, 2002

Mr. C. Edward Hanman
Cox, Taylor
Barristers and Solicitors
3rd Floor, 26 Bastion Square
Victoria, British Columbia
V8W 1H9

Dear Ted:

Re: Dispute Resolution Initiative

Further to our recent telephone conversation, I am writing to you in your capacity as President of the British Columbia Expropriation Association to seek the Association's participation in the design of a process that will diversify the Board's current adjudicative role in the resolution of expropriation compensation disputes.

As I explained, the Board wishes to incorporate into its mandate in the near future some mechanisms and procedures to facilitate earlier resolution of such disputes. This initiative is also a directed outcome of the government's recent core services review.

The overall objectives are to reduce delay, expense and inconvenience in the pre-hearing and hearing processes before the Board, and to encourage the parties to attempt to achieve a fair and final settlement. I should perhaps emphasize at this point that the Board in no way contemplates changes to its process that would have the effect of diminishing the rights of the parties to have their compensation dispute determined by the Board following a full hearing. Rather, the intended effect would be to enhance those rights through a more efficient administrative process and by offering a wider range of possibilities for dispute resolution.

Among the more obvious options which might be considered for inclusion in the Board's procedures are more regular and directive caseflow management conferences, the institution of settlement conferences, and the provision of interest-based mediation.

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EXPROPRIATION COMPENSATION BOARD

Robert W. Shorthouse, Chair
Sharon I. Walls, Vice Chair

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Several months ago the Board struck an ad hoc committee of its members to consider possible issues around the design and implementation of this initiative, including any legislative or regulatory amendments that might be necessary or desirable. Members of the committee have also had exploratory discussions with the dispute resolution office and secretariat and with the policy, planning and legislation division, both within the Ministry of Attorney General.

The Board feels strongly that it would be highly desirable to involve "stakeholders" in the area of expropriation throughout the design stage. While we have looked at some models and initiatives used in other venues and jurisdictions, we appreciate that any design for this Board must take into consideration the interests of the parties who appear before us. We would place high value upon hearing the perspectives and suggestions of those experienced in expropriation compensation matters that come before the Board. Since the membership of your Association comprises lawyers, real estate appraisers, business valuators, land agents, and other professionals who work in the field, and who are retained by either expropriated owners or expropriating authorities, it has seemed logical and appropriate to us to reach out to the Association in the first instance to obtain stakeholder input. We may also wish to consider broader public consultation in due course.

The Board would be most appreciative if, through some convenient means, you could canvass your membership as to their views on the Association's participation with the Board on this initiative. Assuming that the Association is prepared to participate in some way, we are of course interested in hearing the views of as diversified a cross-section as possible. We also recognize that not everyone actively involved in the expropriation field participates in the activities of the Association, and would welcome any thoughts you may have as to how the views of such individuals might be brought forward. Please feel free to circulate this letter to your membership. If it would facilitate matters, the Board is also prepared to have the letter, or a similar outline of our initiative, placed on its website.

You may recall that a few years ago the Association took the lead in creating a liaison committee comprising several of its executive members together with the chair and vice chair of the Board. The principal object was to consider ways of improving the processes of, and practice before, the Board. Unfortunately, the liaison committee ceased to function before it could effect any substantive results. We suggest that a liaison committee, comprising both members of the Association and members of the Board's ad hoc committee, may be a convenient vehicle for carrying this project forward. There are currently six members on the Board's ad hoc committee, and to this might be added a similar number of representatives from the Association to maintain balance and keep the overall size within manageable bounds.

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If practically possible, the Board would like to be able to launch the consultative process on this initiative during May, 2002. If there is to be something like a liaison committee formed, we would propose trying to schedule an initial discussion and planning meeting sometime during that month, preferably in person, and either in Vancouver or Victoria.

On behalf of the Board, I wish to thank you and the other members of the Association in advance for giving this matter your consideration. I look forward to hearing from you at an early opportunity.

Yours truly,

Robert W. Shorthouse
Chair

RWS/sa

APPENDIX "B"

ECB/BCEA LIAISON COMMITTEE ON EARLY DISPUTE RESOLUTION

Preliminary Report of the Case Management Subcommittee

August 19, 2002

The Case Management Subcommittee met by teleconference on July 18 and July 29, 2002. Because Mike Grover was out of the country, Sharon Walls took his place on the Subcommittee, the other members of which are Richard Crosson, Fran Crowhurst, and Bob Shorthouse.

1. Comment on the Current Process

The Subcommittee first reviewed briefly the steps involved in bringing a compensation claim before the Board. While the Act and the Practice and Procedure Regulation appear to contemplate an expedited process, the actual timeframe tends to be much longer.

The Subcommittee also looked at the Board's current case management practice. It was observed that there is no consistency in the current practice, and that case management conferences still often seem to be convened only when the parties request them. The greatest drawback to many of these conferences is the lack of mandatory direction or follow up to ensure that there has been compliance with whatever the parties may have agreed to. They have often been treated as non-binding, "without prejudice" discussions.

2. Design of the New Process

2.1 How Mandatory Should the Process Be?

It was generally recognized that flexibility is needed in the design of an effective case management system for the Board. Smaller, simpler cases scheduled for perhaps 2 or 3 days normally will not require intensive case management whereas longer, more complex cases scheduled for several weeks require closer monitoring. One suggestion was to follow in principle the Supreme Court model, which uses mandatory case management for cases scheduled for more than 19 days and case management only at the request of the parties for shorter cases. However, it was also noted that this distinction is made necessary, in part at least, by the heavy docket of cases in the Supreme Court, a situation which is quite different from that facing the Board. Another difference between Supreme Court trials and Board hearings is that liability is often not in question in a Board hearing. Also, Board hearings are often more heavily weighted toward expert than

lay evidence. As such, case management of a complex loss evalution case might be useful even though it is expected that the hearing would be of shorter duration.

The nature of the claim will also to a significant extent determine the timeframe for bringing cases on to hearing before the Board. In particular, where the case involves complex business loss claims, it may be 2 or 3 years after the taking before the parties can assemble and evaluate the necessary evidence.

2.2 When Should the Board Become Involved?

The foregoing considerations have a bearing as well on the stage at which case management by the Board should commence. Cautions were expressed about the Board intervening too early, and in a sense "over-managing" before the parties have a realistic chance to assess their cases and the lead time they require. There is the potential for running up unnecessary costs and making the entire process too expensive. The earliest point of intervention would be once the parties have exchanged their pleadings, but even then it may be desirable to wait until the point at which the matter is set down for hearing. With business loss claims, it may only be within the final 6 months prior to the scheduled hearing that case management becomes particularly useful.

2.3 How Should Deadlines Be Set?

To the extent that the Board undertakes case management in individual cases, there was general agreement that deadlines should be imposed for various key steps in the pre-hearing process, including exchanging lists of documents, holding discoveries, exchanging expert reports, and amending pleadings. The deadlines should be "generous" but also binding upon the parties, giving more rigour to the process. Professionals tend to work best toward fixed deadlines. Deadlines for providing particulars and discovery should be set at an earlier stage in the pre-hearing process than is often now observed so that the cases to be met are identified well in advance of the hearing and the experts have access to the information they require. The current regulation governing service of expert reports 30 days in advance under the *Evidence Act* should be amended to provide for earlier exchange of such reports.

A particular case management tool which the Board may wish to consider adopting is a mandatory pre-hearing conference, patterned after the pre-trial conferences in the Supreme Court. These are held 30 to 60 days before a scheduled trial in every case and are designed to ensure that the parties are, in fact, ready to proceed. They are not in the nature of settlement conferences.

There was some discussion around whether the Board should have the power to dismiss a claim for "want of prosecution" by the claimant or, in effect, to award "default judgment" where the respondent has failed to file a reply. It was agreed that these are drastic remedies available in the courts only when strict tests are met, and that their adoption by the Board would almost certainly require legislative amendment.

2.4 How Should Applications for Adjournment Be Treated?

If the foregoing practices are adopted, the Subcommittee considers that late adjournments, which frequently are the result of one or other of the parties not being ready, should become the exception. The view was also expressed, however, that the parties should be accorded considerable leeway with respect to consent adjournments.

2.5 How Should Case Management Directions Be Enforced?

The Subcommittee was of the view generally that a case management system can only be effective if there are some mechanisms available for enforcing attendance at conferences and compliance with directions given. It was felt on the one hand that, for example, being precluded from leading evidence where there has not been compliance with disclosure deadlines might be too draconian. On the other hand, costs consequences might be more appropriate. Several suggestions were made, including (a) amending section 47 of the Act to include cost as well as interest penalties for causing unreasonable delay in proceedings; (b) allowing a respondent's costs with respect to one or more steps in a proceeding to be awarded against a claimant; and (c) amending the general entitlement to costs provision under section 45 of the Act.

2.6 How Should the Costs Involved Be Dealt With?

With respect to the costs of case management or pre-hearing conferences themselves, the Subcommittee reviewed the Tariff of Costs Regulation and observed that there are no items which properly address such costs. It would be appropriate to add such an item, particularly where there is flexibility built into the case management system and some recognition of risk with respect to costs for parties who conduct themselves inappropriately.

2.7 Should the Parties Themselves Be Present?

The Subcommittee was of the view that the parties themselves, as well as their legal counsel, should be present at case management and pre-hearing conferences. This would ensure that the parties themselves are more engaged in the process as well as being informed as to what is going on.

2.8 What Restrictions Should Apply to Board Members?

There would seem to be no significant impediment in the way of having the Board member who conducts case management or pre-hearing conferences in a case sit later sit on the panel hearing the case, provided that these conferences are not conducted on a "without prejudice" basis, are not settlement conferences, and are not considering evidence. This would also seem to apply to having the member hear interlocutory applications in the matter. Some inquiries will be made as to how these matters are dealt with in the court system.

APPENDIX "C"

ECB/BCEA LIAISON COMMITTEE ON EARLY DISPUTE RESOLUTION

Report of the
ADR Subcommittee

The ADR Subcommittee is composed of Firoz Dossa, Ted Hanman, Judy Reynier, Gwen Taylor and Suzanne Wiltshire. This report is a result of subcommittee meetings and discussions with the whole committee.

1. Comment on Current Negotiation Process Prior to Filing of Form A

   The steps in the acquisition process prior to the filing of a Form A were reviewed. Points of interest brought out included:

   - Increasing use of interest based negotiation. Need to address emotional climate.
   - Whether negotiation leads to consensual agreement, s. 3 agreement or s. 6 expropriation notice, basic principles are:
     -market value is test
     -Owner receives same amount regardless.
   - It is important that an Owner understands the limitations the authority is under and that unrealistic expectations be reduced.
   - In a partial taking or where business loss is involved an Owner may wish to delay settlement to assess the impact of the project after its completion and this is often the reason for a s. 3 agreement.
   - Bringing in a third party to negotiate often leads to success –fresh focus/approach and gives file a high priority.

2. New Process Design

2.1 Types of Cases after Form A Filed:

There are number of different types of cases:

- Claim filed to protect interests, solution expected. May not need intervention.

- Claim filed, but no subsequent activity. Authority has already paid and has no interest in pushing so case may sit unless there is intervention.

- Case needs maturation/aging. Timing of intervention needs consideration.

- Issues clear, parties have stagnated. Intervention needed to resolve.

- Case unlikely to settle because of complexity, previously undecided point of law, sticky issues, etc. Intervention may or may not resolve.

2.2 Function of Mediation

Even where overall resolution would appear unlikely, mediation process could:

- define issues/take issues off table
- clarify positions
- lead to agreement on facts
- provide for reality testing
- clarify thinking/better understanding of case/improved risk assessment
- resolve some issues or even all
- define structure for hearing.

Involvement of the Owner early in the process seen as helpful to resolution. Need to ensure Owner at table.

2.3 Incentives to Mediate

The following are not mutually exclusive.

From the authority's perspective incentives were seen to be closure, certainty of result, assessment of best and worst alternatives to a negotiated solution, and where unresolved issues, better ability to estimate costs for budgeting/allocation purposes.

From the owner's perspective incentives were seen to be earlier resolution, certainty of result, collaborative result, ownership of result, decreased cost, ability to address emotional side/hidden interests/reality testing.

2.4 Cautions and Concerns

Concerns included:

- perception that parties are expected to move, leading to perception that claimants get more through mediation
- additional step meaning possible delay, increase in costs
- parties may not engage in meaningful mediation
- confidentiality issues

- issues not amenable to negotiation.

Possible ways to address concerns included:

- ensure mediation is well controlled by the service provider/neutral
- require actual participation / formal preparation in advance of mediation to ensrue parties understand case.
- include owner in process; the clients must be present.

2.5 Confidentiality

Confidentiality is usual in mediation and is invariably one of the terms included in an agreement to mediate along with the understanding that the mediator cannot be called as a witness. It encourages full disclosure/exploration of the issues/concerns of the parties and promotes resolution. From the authority's perspective, it was noted that in order to have maximum flexibility non-disclosure was desirable.

The committee acknowledged that expropriating authorities could be subject to disclosure through Freedom of Information requests. It was noted that negotiated settlements were likely to give rise to similar concerns but this did not preclude the inclusion of a confidentiality clause in settlement agreements. Standard wording would provide an exception in the event of an order for disclosure by a court of competent jurisdiction.

From the authority's perspective it was noted that in negotiated settlements the details of the deal will get out if an owner wants them to even with a confidentiality provision and the solution is to make settlements consistent.

It was concluded that there was no bar to including an appropriately worded confidentiality clause in the agreement to mediate. The mediator might wish to note the possibility of disclosure under FOI.

2.6 Mandatory?

Mandatory mediation in all cases was considered to be inappropriate. It was not seen to be the Board's role to save an owner from his own inactivity. Since some cases might fall by the wayside, mandatory mediation of all cases could have a negative financial consequence for authorities.

The consensus was that mediation should be mandatory at the option of either party or at the direction of the Board. Even where one party needed to be prodded or was reluctant, this would bring the parties together for discussion and result at a minimum in better issue definition, etc. Requirement for formal preparation would avoid time wasting and progress the case.

2.7 Model

Noting the concerns raised and discussed the consensus was that the model that would serve the parties best is interest based mediation at the option of either party or at the direction of the Board.

The mediation process is linked to case management and the timing of mediation could be canvassed in the case management.

Reality checking and caucusing were seen as useful tools in the mediation model.

To ensure parties would be prepared, parties would be required to deliver mediation briefs prior to mediation. This would assist resolution by ensuring parties had focused on the case.

The presence of Owners was also seen as enhancing opportunities for resolution.

Confidentiality/neutrality provisions would be incorporated into the agreement to mediate.

The consensus was that the mediator could be a Board member or other person appointed by the Chair to conduct the mediation. This would allow for flexibility.

Mediation involves disclosures/concessions and the mediator is injected into the process to apply their skills to resolution. In the event the case went on to a hearing it was felt it would not be appropriate for the mediator to be a member of the panel hearing the case. The same considerations were not considered applicable to someone conducting case management. However, given the sometimes adversarial nature of case management and the use of orders in case management it was felt that the mediator and case manager should be different persons.

Other models were considered. Concern was expressed with the use of neutral evaluation or expert evaluation unless both parties agreed to use such a model. The use of other models by mutual agreement would not be precluded and could be arranged in the course of case management.

APPENDIX "D"

ECB/BCEA LIAISON COMMITTEE ON EARLY DISPUTE RESOLUTION

Preliminary Report of the Tariff Cost Subcommittee

The Tariff Cost Subcommittee are Tony Capuccinello, Brian Davies, James Goulden and Sharon Walls.

Provision for costs for case management

The current Tariff schedule for legal costs provides for the following number of units per day. It is expected that most case management conferences would be less than 2½ hours and therefore the number of units would be halved.

13	interlocutory applications		preparation
	unopposed	4	2
	opposed	5	3
15	cost application/ settlement of order	4	2
17	pre-trial conference	3	2

It is notable that the court tariff provides for 1 to 5 units for pre-trial or settlement conference or a mini-trial and 1 to 3 units for preparation for same.

Item 17 needs to be amended to provide for a pre-hearing or case management conference.

As to the appropriate number of units, there was some difference in opinion.

i Option one was to leave case management conferences at 3 units. Some case management conferences may not warrant more than 3 units.

ii Option two was to increase the fixed units to 4. One of the reasons for increasing the number of units to 4 was to make it in line with unopposed applications in item 13 since the equivalent of consent orders may arise out of case management. Another reason to increase the number of units to 4 was to encourage claimants to participate in case management.

iii Option three was to allow more discretion to the board. As indicated above the court tariff permits 1 to 5 units for a variety of pre-trial conferences ranging from simple procedural pre-trial check lists to mini trials. This would

give some flexibility to award more costs for a more wide ranging case management.

There is no provision in schedule 2 for units for appraisers to attend a case management. It was agreed that there may be no reason for an appraiser to attend many case management conferences where procedural matters were the main focus of attention. See below for further discussion of appraiser's participation under settlement conferences.

Provision for costs for settlement conferences

Currently item 22 in schedule 1 of the Tariff for legal costs provides for 15 units a day for a maximum of 60 units for negotiations that actually produce a settlement.

It was suggested that in order to encourage parties to participate in settlement negotiations that there be some provision for providing costs for settlement conferences where full settlement was not the result. As indicated above, the court tariff provides for 1 to 5 units for pre-trial or settlement conference or a mini-trial and 1 to 3 units for preparation. Unlike case management conferences most settlement conferences would be more than 2½ hours and therefore the number of units would be for each full day of attendance.

i Option one would be to have a separate provision for settlement conferences with for example, 5 units per day, and preparation at 3 units per day of attendance. This provision could be subject to the number of units rising to 15 units per day (including preparation?) for a settlement conference if the case actually settles.

ii Option two would be to have one provision to include both case management and settlement conferences with discretion to the board to award 1 to 5 units and 1 to 3 units for preparation. Again this provision could be subject to the number of units rising to 15 units per day for a settlement conference if the case actually settles.

During discussion at the ADR meeting it was suggested that more units should be provided for mediation, possibly a range of 1 to 10 units.

With respect to appraisers, two of the sub-committee members voiced the view that they had participated in or organized meetings between appraisers or with appraisers that had proved very useful in settling the case. It was suggested that appraisers be entitled to the same number of units as counsel for attending settlement conferences where there had been some agreement for their participation.

Use of costs to enforce case management

While adding items in the existing tariff schedules for claimants' costs is relatively uncontentious, using costs to enforce case management, especially if claimants have the

risk of paying the respondent's costs, will be more controversial. There was agreement that if the risk was limited to occasions where the claimant had behaved irresponsibly or unreasonably in failing to meet directions or orders of the board that this would be less controversial.

If a party fails without adequate reason to meet deadlines for procedural steps that were directed or ordered at a case management conference, for example, the recommendation was that they should lose any costs for that case management conference. Clearly this implies that the party is a claimant. We did not discuss what happens if a respondent fails to meet a deadline. I assume that at a minimum the claimant would be entitled to their costs.

It was also recommended that we draft the rule so that the claimant faced the chance of paying the respondent's costs for a case management conference that was wasted because of the claimant's non-compliance.

The Ontario paper on possible options for costs for tribunals contains a statement about the purpose of costs that might be of assistance for the board's proposed rules about costs for case management. The Ontario paper suggested including some narrative reflecting the substance of this statement.

> The purpose of costs is to discourage irresponsible conduct by a party and thereby ensure respect for the tribunal's process.

We did not get a chance to discuss whether it made sense to use costs more generally following settlement conferences in a similar way to Calderbank letters. The board has permitted Calderbank letters as a factor to be considered where it has discretion on awarding costs. However, on the facts in the cases where Calderbank letters have been considered to date, the board has not yet relied on a Calderbank letter to reduce costs.

Statutory amendments

If the amendment is made for claimants to face the risk of paying the respondent's costs in limited situations arising out of case management conferences, there would need to be an amendment to section 45 of the Act.

If a claim partly settles and part of the advance payment was for the settled claim then it might be more difficult for the claimant to meet the 115% minimum under section 45(4) (or the 90% maximum in section 46(4)). This might act as a disincentive for claimants to settle part of the claim.

If these sections were amended so that both sides of the equation were comparing the same claims it would preserve the intent of sections 45(4) and 46(4) and eliminate any impediment to partial settlement. For example, if a disturbance damage claim settled then any advance payment to do with that disturbance damage would be excluded.

A possible amendment of section 45(4) might be:

> 45(4) If the compensation awarded to an owner, other than for business losses, is greater than 115% of the amount paid by the expropriating authority under section 20 (1) and (12) or otherwise, **excluding payments that had been made by the expropriating authority in respect of claims that were settled and therefore not considered by the board,** the authority must pay the owner his or her costs.

A similar amendment could be made to section 46(4).

This assumes that any advance payment by an authority allocates sums to different claims.

We also discussed possible amendments to section 47. Section 47 allows for penalty interest provisions for unreasonable delay by either party and there is an ability to add costs to this provision.

APPENDIX "E"

EXPROPRIATION COMPENSATION BOARD

Proposed Changes to the *Expropriation Act*

(For Discussion Purposes Only)

1. To Broaden the Authority of Part Time Members

An amendment would be sought to section 53 of the Act, headed "Expropriation Compensation Board". Section 53(4) currently provides:

> 53 (4) The chair may appoint a panel of the board consisting of 3 members, to hear any matter before the board, and if a panel has been appointed,
> (a) the chair must appoint one of the members of the panel to preside, and
> *(b)* the panel has the jurisdiction of the board with respect to matters under the Act that come before it.

The proposed amendment would authorize the chair also to appoint a sole member to hear any matter before the Board and would give the sole member, if so appointed, the jurisdiction of the Board with respect to matters under the Act that come before the member.

The policy objectives underlying the proposed amendment are:

- to facilitate the Board's current initiative to introduce early dispute resolution into its processes by allowing a member to conduct case management, mediation and case settlement conferences, with the power to make binding orders and directions.

- To improve the timeliness of decision making processes by allowing, at the chair's discretion, the wide range of interlocutory matters that often precede a compensation hearing, and which presently can only be heard and decided by the chair or the vice chair acting alone, also to be heard and decided by other members of the Board acting alone.

2. To Authorize Rules for Case Management and ADR Processes

An amendment would be sought to section 27 of the Act, headed "Powers and duties of the board". Section 27(1) currently provides:

27 (1) The board may, subject to the approval of the Lieutenant Governor in Council, prescribe rules, consistent with this Act, that govern the board's practice and procedure and the exercise of its powers.

The proposed amendment would specifically authorize a change to the *Practice and Procedure Regulation* to incorporate rules governing case management, mediation, and settlement conferences, and to make attendance mandatory.

(1.1) Without limiting subsection (1), the board may prescribe rules governing the conduct of case management conferences, mediation conferences, and settlement conferences, and requiring the parties to a proceeding to attend at such conferences in order to facilitate just and speedy resolution of their dispute.

2. To Broaden the Penalty Provisions under Section 47

An amendment would be sought to section 47 of the Act, headed "Interest penalties for delay", to include costs as well as to address the consequences of non-compliance. Section 47 currently provides:

47 If, in the opinion of the board, an unreasonable delay in proceedings under this Act has been caused by an owner or the expropriating authority, the board may penalize

(a) the owner, by depriving the owner, in whole or in part, of the interest to which he or she is entitled, or

(b) the expropriating authority, by increasing, by not more than double, the interest it is required to pay.

Under the proposed amendment section 47 would be headed "Interest and cost penalties for delay or non-compliance", and would provide:

47. If, in the opinion of the board, an owner or the expropriating authority has caused an unreasonable delay in proceedings under the Act or has failed to comply with orders or directions of the board, the board may penalize

(a) the owner, by depriving the owner, in whole or in part, of the interest or costs to which he or she is entitled, or

(b) the expropriating authority, by increasing, by not more than double, the interest or costs it is required to pay.

3. To Make Cost Entitlement Subject to the Amended Section 47

An amendment would be sought to section 45(3) of the Act, which currently provides for an expropriated owner's entitlement to costs subject to subsections (4) to (6), to incorporate by reference the cost penalty provision under section 47.

Under the proposed amendment, section 45(3) would provide:

> 45 (3) Subject to subsections (4) to (6) **and section 47**, a person whose interest or estate in land is expropriated is entitled to be paid costs necessary incurred by the person for the purpose of asserting his or her claim for compensation or damages.

4. To Incorporate Penalty Costs under Section 45

An amendment would be sought to section 45 of the Act specifically providing that failure to comply with orders or directions of the board arising out of case management conferences could result in a non-complying owner being deprived of costs or having to pay the costs of the expropriating authority or a non-complying expropriating authority having to pay increased costs to the owner in respect of preparation for and attendance at the case management.

Under the proposed amendment, a new subsection would be added to provide:

> (6.1) Notwithstanding subsection (3), if in the opinion of the board an owner or the expropriating authority has failed to comply with an order or direction of the board arising out of a case management conference, the board may in its discretion, penalize
>
> (a) the owner, by depriving the owner, in whole or in part, of the costs to which he or she is entitled in respect of the case management conference, or by ordering that the onwer pay the costs of preparation for and attendance at the case management conference by the expropriating authority; or
>
> (b) the expropriating authority, by increasing, by not more than double, the costs it is required to pay to the owner in respect of the owner's preparation for and attendance at the case management conference.

The *Tariff of Costs Regulation* would be correspondingly amended to provide that the costs of the expropriating authority referred to in (6.1)(a) are costs to be calculated in accordance with the *Tariff*.

5. To Make the Foregoing Amendment Applicable to Advance Costs

An amendment would be sought to section 48 of the Act, headed "Advance payment of costs", to make section 45(6.1) applicable to a a review of advance costs.

Under the proposed amendment, section 48(6) would provide:

> 48 (6) Section 45 **(6.1)**, (7), (11) and (12) apply to reviews under this section.

6. To Address the Effect of Settlement on Entitlement to Costs and Additional Interest

Further to the report of the Costs Subcommittee (Appendix "D", p. 4), an amendment would be sought to section 45(4) to avoid the circumstance where settlement of an issue might lead to a calculation which deprives the owner of automatic entitlement to costs.

Under the proposed amendment, section 45(4) would provide:

> 45 (4) If the compensation awarded to an owner, other than for business losses, is greater than 115% of the amount paid by the expropriating authority under section 20(1) and (12) or otherwise, **excluding payments that had been made by the expropriating authority in respect of claims that were settled and therefore not considered by the board**, the authority must pay the owner his or her costs.

A similar amendment would be sought to section 46(4) with respect to the calculation of additional interest.