

Agreeing to Disagree: Agreements under Section 3 of BC's *Expropriation Act*

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Agenda



- The options
- History
- Statutory requirements
- Judicial treatment
- Boilerplate terms
- Tailoring bespoke terms

The Options: So you need an interest in land...



Consensual
Agreement



Expropriation under
section 6 of the
Expropriation Act



Agreement under
section 3 of the
Expropriation Act

Why a Section 3 Agreement?

- Avoid compulsory section 6 expropriation
- Avoid delays where only disagreement relates to compensation
- Opportunity to tailor the relationship



History



1858

- *Land Clauses Consolidation Act 1858, c. 18*
- No provision for agreement to disagree



1975

- *Act to Amend the Expropriations Act, R.S.O. 1975, c. 19*
- Ontario is first with “Section 30 Agreements”



1979

- *Expropriation Act, R.S.B.C. 1979, c. 117*
- No provision for agreement to disagree

Ontario's "Section 30 Agreements"

An Act to amend The Expropriations Act

Assented to May 2nd, 1975

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. *The Expropriations Act*, being chapter 154 of the Revised Statutes of Ontario, 1970, is amended by adding thereto the following section:

30a. Where the owner of land consents to the acquisition of the land by a statutory authority, the statutory authority or the owner, with the consent of the other, may apply to the Board for the determination of the compensation to which the owner would be entitled by this Act if the land were expropriated, and the Board may determine the compensation and the provisions of this Act and the regulations respecting the determination of compensation, hearings and procedures, including costs and appeals, apply thereto in the same manner as if the land had been expropriated and for the purpose, subject to any agreement of the parties, the compensation shall be assessed as of the date on which the consent to the acquisition is given.

s. 30a,
enacted

Arbitration
where no
expropriation

Expropriations Act

R.S.O. 1990. CHAPTER E.26

Application, if no expropriation

30 (1) If the owner of land consents to the acquisition of the land by a statutory authority, the statutory authority or the owner, with the consent of the other, may apply to the Tribunal for the determination of the compensation to which the owner would be entitled by this Act if the land were expropriated, and the Tribunal may determine the compensation. 2021, c. 4, Sched. 6, s. 48 (7).

Same

(2) For the purposes of subsection (1), the compensation shall be assessed as of the date on which the consent to the acquisition is given, subject to any agreement of the parties. 2021, c. 4, Sched. 6, s. 48 (7).

History continued



1975

- *Act to Amend the Expropriations Act, R.S.O. 1975, c. 19*



1977

- *Attorney General Statutes Amendment Act, S.A. 1977, c. 9*
- Alberta is second also with “Section 30 Agreements”



1987

- *Expropriation Act, S.B.C. 1987, c. 23*
- Section 3 Agreements introduced

Section 3 Agreement – The Basics



If the owner agrees to transfer or dedicate land

- 3 (1) If an owner or, if there is more than one owner, all owners agree to transfer or dedicate land to an expropriating authority without expropriation, but cannot agree with the expropriating authority on the compensation to be paid,

Section 3 Agreement – The Process



- 3 (1) If an owner or, if there is more than one owner, all owners agree to transfer or dedicate land to an expropriating authority without expropriation, but cannot agree with the expropriating authority on the compensation to be paid,
- (a) Parts 2 to 4, other than section 20, do not apply,
 - (b) the court must determine the compensation to be paid to the owner as if the land had been expropriated under this Act, and
 - (c) unless the parties to the agreement otherwise agree, compensation must be determined effective the date the owner agreed to transfer or dedicate the land to the expropriating authority.

Section 3 Agreement – The Requirements



(2) An agreement under subsection (1) must be in writing and must state

- (a) that the owner consents to the transfer or dedication,
- (b) that compensation must be determined by the court,
- (c) the date set for possession of the land,
- (d) that the owner must take the necessary steps to transfer or dedicate the land to the expropriating authority, and
- (e) that the expropriating authority must make an advance payment under section 20.

(3) If the agreement under subsection (1) is made so that the expropriating authority can construct, extend, widen or alter a highway, the owner must dedicate the land covered by the agreement, and

Judicial Treatment of Section 3

- prior to 2004 amendments: “the board must determine the compensation to be paid to the owner...”
- 2004 to present: “the court must determine the compensation to be paid to the owner...”



Does the Section 3 Agreement process constitute an expropriation?

NO

Sutherland v. The Corporation of the Township of Langley,
1997 CanLII 2764 (BCSC)

- Issue: whether owner can rely on provision of *Municipal Act* that deemed existing buildings and structures to conform to land use bylaws following partial taking.
- Court: The wording of section 3 states that the transfer is “without expropriation”

"**expropriate**" means the taking of land by an expropriating authority under an enactment **without the consent** of the owner, but does

3 (1) If an owner or, if there is more than one owner, all owners agree to transfer or dedicate land to an expropriating authority **without expropriation**, but cannot agree with the expropriating authority on the compensation to be paid,

Does the limitation period under section 25 apply?



Owner deemed to have accepted payment

25 If an application is not made to the board to determine compensation **within one year after payment is made under section 20**, the owner **whose land was expropriated** is deemed to have accepted that payment in full settlement of his or her claim for compensation, and proceedings to determine compensation must not be brought by that owner.

Does the limitation period under section 25 apply?

YES

Williams v. British Columbia (Ministry of Transportation and Highways)
(2001) E.C.B. 32/97/213

- Arguments against application:
 - Section 25 states that the provision applies in cases of expropriation
 - Limitation periods are restrictive of citizens' rights of action and should be interpreted narrowly and in favour of claimants
 - Section 3 agreements are helpful to the expropriating authority so should be no need to oblige owners to comply with time limit
- Court: There is no expropriation, but since section 25 falls within Part 5, and that part is not excluded by section 3, the limitation period applies.

Can owner seek recovery of costs under section 48?



Advance payment of costs

48 (1) An owner may, from time to time **after an expropriation notice or an order under section 5 (4) (a) 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.

(2) 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.

(3) If the expropriating authority fails to comply with subsection (2), the owner who submitted the bill **may apply to a registrar of the court to have the bill reviewed.**

Can owner seek recovery of costs under section 48?

NO

Del's Machinery Ltd. v. British Columbia (Ministry of Transportation),
2011 BCSC 754

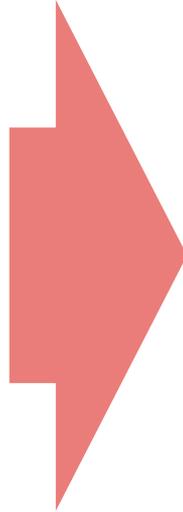
- The prerequisites for section 48 to apply have not been met.
- Owner's option is to commence a compensation proceeding.

[18] I agree with those decisions. The first prerequisite to a review under s. 48 is an expropriation notice or an order under s. 5(4)(a). That has not occurred in this case. A s. 3 agreement does not give that right and does not trigger a review under s. 48. Counsel for the appellant argues that there is a need to read the *Act* so as to apply s. 48 to a s. 3 agreement as a matter of fairness. I disagree. The *Act* puts in place a very comprehensive scheme for compensation and adjudication of legal and appraisal costs. The interpretation argued for would be inconsistent with the detailed provisions in s. 45 and the *Act* as a whole.

Drafting Section 3 Agreements: Common Terms

- Section 3(2) requirements
- Effective date for determination of further compensation
- Licence for access until registration date
- Restrictions on transfer until registration date
- Waiver of strict appraisal requirements
- Owner's representations and warranties:
 - ✓ No other interest holders
 - ✓ Residency under *Income Tax Act* ...
- Agreement to execute necessary documents
- Confirmation of opportunity to obtain independent legal advice
- Entire agreement clause

Moving from boilerplate to bespoke



Drafting Section 3 Agreements: Bespoke Terms

- Costs to Owner beyond section 20 payment
- Works to be performed by Authority or paid for by Authority for benefit of Owner or Owner's property
- Agreed-upon steps to mitigate disturbance
- Flexibility / Certainty respecting project plans
- Addressing unusual site-specific circumstances with more certainty
- Securing other access rights
- ...



Questions



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