BRITISH COLUMBIA EXPROPRIATION ASSOCIATION

FALL CONFERENCE

OCTOBER 27 & 28, 1995

ON AGAIN OFF AGAIN EXPROPRIATION:
Procedural Difficulties and the Owners Costs Prior to Service of the Expropriation Notice

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On Again Off Again Expropriation: Procedural Difficulties and the Owner's Costs Prior to Service of the Expropriation Notice

Pre-expropriation procedures are carefully laid down in Parts 2, 3, and 4 of the *Expropriation Act* (the "Act"): there must be an expropriation notice served on the owner and registered in the land title office; in some situations an owner is entitled to an inquiry into whether the proposed expropriation of his land is necessary to achieve the objectives of the expropriating authority; and there must be an approval of the expropriation by the approving authority before the land can vest in the expropriating authority. This seemed simple and straight forward enough until the decision of the Court of Appeal in *Casamiro Resource Corporation v. the Queen in Right of British Columbia* (1991), 45 L.C.R. 161. In that case Casamiro was the owner of certain Crown granted mineral claims in Strathcona Park. This allowed the company to explore for minerals and, if successful, establish an operating mine on the lands included within the mineral claims. These rights were curtailed in 1979 by legislation requiring the issuance of a resource use permit before carrying out any work or improvement on any mining claim within what was described as the Strathcona Recreation Area. Then, in 1988, there was an Order in Council denying the issuance of any resource use permits in the area where Casamiro's mineral claims were located. When Casamiro applied for a resource use permit, it was refused.

Casamiro brought an application in the Supreme Court of British Columbia for a declaration that the Order in Council denying the resource use permit was an expropriation of its interest in the Crown granted mineral

claims and for a determination that compensation was to be assessed pursuant to the *Act*. The application was successful and the Crown appealed. In denying the appeal, Southin J. A. stated at 169-170:

> This order in Council has . . . . reduced the Crown grants to meaningless pieces of paper. Thus, the Lieutenant-Governor in Council is an "expropriating authority" within the meaning of the Expropriation Act, S.B.C. 1987, c. 23 (index c. 117.1), which has taken land without the consent of the owner. The fact that the Lieutenant-Governor in Council does not call his act an expropriation and has not followed the procedures laid down in the Expropriation Act, does not deprive the owner of the rights given to the owner by s.9 and following of the Expropriation Act.

So, we can have an expropriation without following the procedures called for in the *Act*. This view of the law was implicitly tested in *Hunter Farms Ltd. et at v Minister of Transportation and Highways* (1992), 48 L.C.R. 311. While the facts in that case are somewhat sketchy, the pleadings reveal that the claimants were the owners of properties at Salmon Arm. In 1990 the Minister, his servants or agents, advised the claimants that their property would be required for a highway project, and the residence located on the subject property would have to be demolished. During the following year, 1991, it was alleged that the authority entered on the subject property pursuant to s.8 of the Act to inspect, appraise and carry out studies. The claimants state that they relied on the Ministry's assertions that a specified portion of their property would be expropriated and the owners took steps to relocate. In particular, they purchased a trailer for storage purposes, relocated the trailer to Salmon Arm and incurred bulldozing and other costs in setting up the trailer. The claimant pleaded that they also had incurred legal

and survey fees, traveling expenses, long distance telephone charges, and loss of 100 hours of the owners' time. Only then were the claimants told that, so sorry, we have decided not to expropriate part of your land after all.

In December 1991 the claimants filed a Form A in the Land Compensation Board. The pleading states that the claim is made pursuant to ss.8 (3) of the Act (compensation for damages caused while making entry on the subject property for surveys, inspections etc.), ss.18 (4) of the Act (compensation for damages suffered by the initiation of an expropriation where the authority abandons the expropriation), s.25 of the Act (dealing with the Board's jurisdiction to determine compensation) and Part 2 of the *Highway Act* (which claim was subsequently abandoned).

A reply was filed by the Minister. While admitting the representations made to the claimants by Ministry officials, that the property would be expropriated, that the residence would be demolished, and that the Minister had exercised his powers of entry pursuant to s.8., it was pleaded that the property had not been expropriated by the respondent, no certificate of approval had been issued, and no advance payment had been made. The respondent pleaded further that the losses claimed by the claimants were not "damages" within the meaning of ss.8 (3) of the Act. The amended reply is a curious document and raises some interesting questions. While denying liability under ss.8 (3) it stated that over $15,000.00 had been paid to the claimants pursuant to ss.18 (4). Compensation under this subsection can only be awarded where an expropriation is abandoned.

Only four days before the scheduled compensation hearing the claimants further amended their claim for compensation. This further amendment acknowledged certain payments by the Minister but now sought additional compensation in the amount of $28,000.00. The respondent applied to the Board for an adjournment of the hearing in order that it might properly address the new claims in the most recently amended application for determination of compensation, and the respondent's application was granted. In allowing the adjournment the Board commented at page 315:

> There are a number of apparent inconsistencies in the material filed by the parties and in the actions taken by them. In para. 3(a) of the initial application for determination of compensation, the claimants pleaded that there has been no expropriation of the claimant's property. Amended para. 3 (a) alleges, *inter alia*, that a claim is made under s. 18 (4) for damages resulting from the *abandonment* of an expropriation.
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> The respondent, while confirming that no notice of expropriation has ever been served pursuant to s.6, pleads that certain payments have been made to the claimants under s.18 (4), being damages for abandonment of an expropriation.
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> The board therefore wishes to hear the evidence of the parties before it makes any determination as to the board's jurisdiction to consider the claims under s.18, where there has been no service of a notice of expropriation served as required by s.6 of the Act. The board is not satisfied by the pleadings, nor by the submissions of counsel that the board has such jurisdiction, but before coming to a final determination on that issue the board wishes, in this instance, to hear the evidence.

Following the hearing of the motion, the parties settled and no evidence was ever heard, and the questions raised by the Board have not been answered. While *Casamiro* was not referred to by either party, it seems implicit from the respondent's willingness to compensate the claimants that the respondent is now very much aware that the actions of its servants and agents can lead to a *de facto* expropriation even where the procedures under the Act have not been followed.

This brings us to another interesting question: how to recover costs incurred by an owner prior to expropriation. In *Hunter Farms* the claimants claimed both costs pursuant to s.44 and interest pursuant to s.45. It is not known how the settlement dealt with these two claims. Dealing now only with costs, it is some years since Chairman Heinrich was asked to decide whether "reasonable . . . costs" includes fees and disbursements incurred by the owner prior to service of the expropriation notice. See *Creative Stretch Fabrics Ltd. v. Pitt Meadows* (1991), 46 L.C.R. 111 at 115 and 117:

> Section 47 (1) requires that an owner may present his bill only after "an expropriation notice or an order under section 5 4 (a) has been served on him . . .". The bill will consist of "the reasonable legal, appraisal and other costs that have been incurred by him up to the time the bill is submitted". Do these "reasonable . . . costs" extend into the period prior to service of the expropriation notice?
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> Section 44(3) clearly states that costs are those "necessarily incurred" by an owner "for the purpose of asserting his claim for compensation or damages". The question is whether it was *necessary* or *reasonable* for the claimant in this case to secure professional advice once the respondent announced its intention to take part of the claimant's land.

Under both subsections, the answer given by the chairman was in the affirmative. Mr. Heinrich reached his decision at pages 118 and 119:

> In my opinion, it was both necessary and reasonable that the claimant obtain professional advice after being notified by the respondent in its letter of January, 1989, that part of its land was to be acquired for public purposes.
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> While a claim for compensation cannot be asserted pursuant to the *Expropriation Act* until the owner's land has been expropriated or the parties have entered into a s.3 agreement, it can be stated without exception that a portion of the cost of preparing and evaluating a claim in almost all instances precedes the formal expropriation process.
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> In my view, receipt by an owner of a letter from a public body with

> the power to expropriate land containing an overture that part or all of the owner's land is required for a public project is indicative of a *bona fide*, intention to acquire the owner's land to fulfil the authority's public mandate. I am of the opinion that at that moment in time, that is, from the time an owner receives a *bona fide* indication that the public authority intends to acquire his land, by letter or otherwise, he is entitled to seek professional advice, the reasonable costs of which are recoverable once an expropriation notice has been served in the event the parties have been unable to reach agreement that payment of such costs shall be for the account of the expropriating authority.
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> I find that the wording of the *Expropriation Act* and its underlying policy, the recommendations of the Law Reform Commission, and the elements of basic fairness all intersect on this issue. An owner cannot be asked to surrender his property without the option of obtaining professional advice. Basic fairness dictates that the costs incurred prior to serving an expropriation notice can and should be the subject of a s. 47 order for an advance payment of costs.

The Chairman's decision was not appealed and today expropriating authorities routinely pay expropriated owners their reasonable legal, appraisal and other costs incurred prior to the service of the expropriation notice.

We now go on to the next question: what events "triggers" an owner's right to receive payment for his pre-expropriation costs. The chairman looked to a "triggering process". See page 120:

> In order to ensure payment for those costs which are both reasonable and reasonably incurred an owner by necessity must insist that the expropriating authority invoke the formal expropriation process. It is only by triggering this process that an owner may become entitled to an advance payment of reasonable legal, appraisal and other costs.

This statement raises an interesting question: what happens where an owner negotiates in good faith, consults legal counsel, instructs the preparation of an appraisal report, and then is told that the authority no longer needs his land. Basically, this is what happened in *Hunter Farms.* It

has happened, or has been threatened, in a number of cases in which I have been involved.

If no expropriation notice has been served it would seem that the owner is without a remedy. It matters not that a property agent may have written the owner indicating a *bona fide* offer to acquire his land, or that negotiations may have proceeded for weeks or months. If the expropriating authority scales down the scope of its project or changes the route, or comes to the realization that the project as originally designed will cost too much, and scales back its plans it is just too bad. The Act does not provide for recovery of any of the owner's costs.

It must be obvious that as soon as an owner consults a solicitor, the solicitor should write the authority refusing to negotiate further until the authority undertakes to pay the owner's reasonable legal, appraisal and other costs as if expropriation had already occurred. This is the same procedure followed by many Ontario solicitors.

This situation arises far more frequently than might be expected, where the authority seeks to acquire the owner's land, substantial costs may be incurred, even though no expropriation notice has been served. It is this practitioner's experience that expropriating authorities, certainly the Highways Ministry, are particularly loathe to give such an undertaking. This seems to me to be counter-productive and inimical to the best interests of both parties.

In the absence of a statutory amendment, there seems little that the owner, or his counsel, can do to recover costs reasonably incurred, where the intention to expropriate is abandoned. If push comes to shove, and the authority's intention to expropriate has been clearly expressed, then an application similar to that brought by *Hunter Farms* may hold out some possibility. This is particularly true if the fact situation allows an owner to rely on *Casamiro* and show that he has in fact been expropriated even though the procedures in the Act were not followed.

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