



Manitoba Law  
Reform Commission

# *THE EXPROPRIATION ACT OF MANITOBA*

Consultation Report

January 2018

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## CONSULTATION REPORT

Comments on this Report for Consultation should reach the Manitoba Law Reform Commission (“MLRC”) by **March 23, 2018**.

The Commission encourages you to provide your thoughts, comments and suggestions concerning this aspect of Manitoba’s law. Please refer to the provisional recommendations identified in this report, and any other matters you think should be addressed.

Please submit your comments in writing by email, fax or regular mail to:

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MLRC assumes that written comments are not confidential. You may submit anonymous written comments, or you may identify yourself but request that your comments be treated confidentially. If you do not comment anonymously, or request confidentiality, MLRC may quote from or refer to your comments in its Final Report.

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## CHAPTER 1: INTRODUCTION

In Canada, federal, provincial and municipal governments acquire privately owned land for public purposes in two ways: by mutually agreeable voluntary purchase and by compulsory purchase. The latter is more commonly known as expropriation. *The Expropriation Act*<sup>1</sup> (hereinafter referred to as “the Act” or “the Manitoba Act”), *inter alia*, provides for the “due compensation” payable to and the payment of consulting costs incurred by an owner from whom an estate or interest in land is expropriated. The Act lists in s. 26(1) four of the six bases of the due compensation payable:<sup>2</sup>

### **Due Compensation for Land**

26(1) Where land is expropriated, the due compensation payable to the owner therefor shall be the aggregate of

- (a) the market value of the land determined as hereinafter set forth;
- (b) the reasonable costs, expenses and losses arising out of or incidental to the owner's disturbance determined as hereinafter set forth;
- (c) damages for injurious affection as hereinafter set forth; and
- (d) the value to the owner of any special economic advantage to him arising out of or incidental to his actual occupation of the land, to the extent that no other provision is made therefor in due compensation.

Market value compensation is always payable and, likewise, disturbance compensation is almost always payable. Injurious affection compensation is occasionally payable while special value and special economic advantage compensation are rarely payable. The Act provides for the due compensation payable to be determined by the Land Value Appraisal Commission (LVAC) in s. 15(2):

### **Certification of Amount by Commission**

15(2) On receiving an application under subsection (1), the commission shall give the authority and owner of the land an opportunity to be heard and shall determine and certify the compensation payable by the authority to the owner.

Section 15(6) and (7) of the Act provide for the payment of consulting costs:

### **Authority to Pay Costs of Owner**

15(6) The authority shall pay reasonable appraisal, legal and other costs that are reasonably incurred by an owner for the purpose of determining the compensation payable under this Act for an expropriation.

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<sup>1</sup> RSM 1987, c. E190.

<sup>2</sup> Two other bases of compensation are provided in section 26(2) and (3), special value compensation in connection with residences and equivalent reinstatement compensation, neither of which is considered further in this Paper.

### **Commission May Determine Costs**

15(7) Where the amount of compensation payable under this Act for an expropriation is settled by the authority and an owner without a hearing or is determined by the commission, the commission may, on application by the authority or owner, determine the costs.

This Paper considers concerns brought to the attention of the Manitoba Law Reform Commission respecting the due compensation payable for injurious affection and disturbance, and the payment of consulting costs.

## **CHAPTER 2: INJURIOUS AFFECTION COMPENSATION**

Upon the expropriation of land, injurious affection can occur in several ways including: the severance of an owner's land into two parcels negatively affecting its efficient use, the reduction of a front yard negatively affecting its use and increasing the proximity of structures to traffic noise, dust, and litter, the loss of shelterbelt or privacy hedging, the loss of ability to subdivide and the reduction of ingress and egress.

Compensation for injurious affection is elaborated upon in ss. 30 and 31; the pertinent components of those sections to this Paper are ss. 30(1) and 31(1) and (2):

### **Injurious Affection in Partial Takings**

30(1) Compensation for injurious affection where an authority expropriates part of the land of an owner shall consist of the amount of

- (a) any reduction in market value of the remaining land of the owner caused by the expropriation of the part;
- (b) the damages sustained by the owner as a result of the existence<sup>3</sup> and the use but not the construction of the works upon the part of the land expropriated; and
- (c) such other damages sustained by the owner as a result of the existence, but not the construction or use, of the works as the authority would otherwise be responsible for in law if the existence of the works were not under the authority of a statute.

### **Injurious Affection where No Land Taken**

31(1) Due compensation for injurious affection where an authority does not acquire part of the land of an owner shall consist of the amount of such damages sustained by the owner, including any reduction in the market value of the land, as are the result of the existence, but not the construction or use, of the works and for which the authority would be responsible in law if the works were maintained otherwise than pursuant to the authority of a statute.

### **Time for Making Claim Limited**

31(2) Subject to subsection (3), a claim for due compensation under this section shall be made by the person suffering the damage or loss by application to the court within two years after the work is first used for the purpose for which it was constructed or acquired or after it has been substantially completed, and if not so made the right to compensation is forever barred.

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<sup>3</sup> An example of "existence", although there is no record of litigation resulting from the re-construction of the St. James Bridge in 1961-62, is the houses on the west side of Kenaston Blvd., between Wellington Crescent and Academy Road, facing the massive concrete southbound down ramp on the east side of Kenaston Road. The existence of this structure, almost in their front yards, no doubt negatively affected their market value.

On the issue of injurious affection compensation, three concerns have been expressed to the Commission.

### 1. Sections 30(1)(b)(c) and 31(1), “...but not the construction...”

In *Houle v. Manitoba*<sup>4</sup>, the Province of Manitoba expropriated land from the Houle family located on the south side of PR 201, bordered by the Red River to the east, in order to replace a bridge crossing the Red River. The Houles also own the land directly across PR 201 from the expropriated land where there was a residence. The Houles alleged that cracking occurred to this house from pile driving during the construction of the new bridge. The Houles’ compensation claim included, pursuant to s. 30(1), a claim for the inspection and repair costs incurred.<sup>5</sup> Quoting s. 30(1) and referring to a Supreme Court of Canada decision involving a similar claim decided pursuant to the *Expropriations Act* of Ontario, the LVAC dismissed the Houles’ claim stating:

510 The Authority [the respondent, Province of Manitoba] notes that the Ontario injurious affection provisions for either a partial taking or where no land is taken are distinct from that of Manitoba’s injurious affection legislation and therefore no award can be made.

511 The Manitoba legislation in Section 30(1) as noted above says in (b) the damages sustained by the owner as a result of the existence, *but not the construction of the works upon the part of the land expropriated*; and (c) such other damages sustained by the owner as a result of the existence, *but not the construction or use, of the works as the authority would otherwise be responsible for in law if the existence of the works were not under the authority of a statute*. Comparable provisions are not found in [the] Ontario legislation.

512 It strikes the Commission as unusual that the provisions in Manitoba legislation are so restrictive. However, given these provisions do exist in Manitoba legislation, the Commission concludes that no award can be made.

As noted by the LVAC in the *Houle* decision quoted above, the wording in ss. 30(1)(b) and 31(1), “but not the construction of the works”, is unique to the Manitoba Act. The comparable injurious affection damage sections in all of the other Canadian expropriation statutes do not proscribe a claim such as the one made by the Houles<sup>6</sup>. Presumably, their claim would be compensated elsewhere in Canada, assuming a causal connection is proved. It is trite to say that the purpose of the rules governing expropriation compensation is to make financially whole an expropriated landowner. As Justice Kerwin said in *Irving Oil Ltd. v. R.*: ... the displaced owner should be left as nearly as possible in the same position financially as ... [the owner] was prior to the taking, provided that the damage, loss, or expense for which compensation ... [is] claimed ... [is] directly

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<sup>4</sup> (2015), 115 LCR 77, reversed in part in (2016), 1 LCR (2d) 189 (Man CA).

<sup>5</sup> Although no land was actually expropriated from this parcel of land, pursuant to s. 30(2) it was treated as if it were a part of the parcel across PR 201.

<sup>6</sup> See Appendix A.

attributable to the taking of the lands.”<sup>7</sup> The anomalous, restrictive wording in ss. 30(1)(b) and (c) and 31(1) prevents landowners from making claims to make themselves financially whole and therefore should be deleted.

**Tentative Recommendation #1**

***The Commission recommends the deletion of the proscriptive wording in ss. 30(1)(b) and (c) and 31(1) to damages being awarded for damage as a result of the construction of the works for which an expropriation has been instituted.***

**2. Section 30(1)(b), “...upon the part of the land expropriated...”**

A related matter is the wording in s. 30(1)(b), which restricts the compensation payable to “damages sustained by the owner ... upon the part of the land expropriated”. It is not apparent from the reasons written in *Houle* whether the piles, which were alleged to have caused the damage, were driven on land expropriated from the Houles. If they were not, and even if s. 30(1)(b) provided for a claim to be made for damage caused by the construction of the works for which an expropriation has occurred, the Houles would be unable to make a claim for compensation.<sup>8</sup>

The restrictive, “iniquitous”<sup>9</sup> wording, “upon the part of the land expropriated”, codifies the common law Edwards Rule, derived from *Edwards v. Minister of Transport*<sup>10</sup>. The Minister of Transport expropriated land from Mr. Edwards and several other landowners to improve a highway. In addition to compensation for the market value of the land expropriated from him, Edwards claimed compensation for the injurious effect, such as noise and light, that the improved highway would have on the market value of his remaining land. The Court of Appeal reduced his claim, finding as a matter of fact that most of the injurious effect to Edwards’ remaining land resulted not from the improvement of the highway on the land expropriated from him, but rather on the land expropriated from other landowners.

On this issue, the wording of the other Canadian Acts falls into two groupings. Canada, Ontario, New Brunswick, and Nova Scotia, have wording similar to that of Manitoba. On the other hand,

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<sup>7</sup> [1946] SCR 551, 556.

<sup>8</sup> For ex. see *Hamilton & Crovo v. City of Winnipeg*. Unreported, July 19, 1995, 10-11 and 15, Manitoba Land Value Appraisal Commission, available from the Commission.

<sup>9</sup> E.C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2<sup>nd</sup> ed. 1992, 340.

<sup>10</sup> [1964] 2 QB 134, which was anticipated by *Sisters of Charity of Rockingham v. R.* [1922] AC 315 (JCPC) on appeal from the SCC, dismissing an appeal from the Exchequer Court, the trial judge having “reluctantly” concluded that the Sisters were not entitled to compensation for what occurred on other nearby taken land, but only for the construction and use of the works on the land taken from them, [1922] AC 315, 318 (JCPC).

the Acts of British Columbia, Alberta, Prince Edward Island, and Yukon, do not restrict claims to damage stemming from the land taken.<sup>11</sup>

In *The Law of Expropriation and Compensation in Canada*,<sup>12</sup> E.C.E Todd describes the Edwards Rule as:

“... inconsistent with the conceptual basis of compensation where a portion of land is expropriated. An owner is deemed to be a willing vendor of the portion and entitled to compensation for the market value of it and any economic loss (injurious affection) caused to the remaining land as a result of the construction or use of works on the expropriated portion. However, a prudent, informed and willing vendor would not sell a portion of land at a price that did not take into account the total decrease in value of the remaining land whether that decrease was caused by the construction or use of works wholly or only partially on the land which was originally his ...”<sup>13</sup>

The Edwards Rule was abolished in England.<sup>14</sup> In Canada, two reports have recommended its abolition.<sup>15</sup> The Commission agrees with Todd and the two reports,<sup>16</sup> which recommend the abolition of the Edwards Rule.

### **Tentative Recommendation #2**

***The Commission recommends the deletion from s. 30(1)(b) of the words “upon the part of the land expropriated” and the substitution of wording found in comparable sections in the British Columbia, Alberta, Prince Edward Island, and Yukon Acts.***

### **3. Sections 30(1)(c) and 31(1), “...and the use...”**

Regarding injurious affection resulting from the use of the works for which an expropriation occurs, such as noise, dust, litter, and vibration, compensation is payable pursuant to s. 30(1)(b), but proscribed in ss. 30(1)(c) and 31(1). The proscription in s. 31(1) also exists in the legislation

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<sup>11</sup> See Appendix A. For further commentary see Paul Scargall, Shane Rayman and Shara Wright, *Private Rights, Public Good: Balancing Competing Interests Under Expropriation Law*, online: Rayman Beitchman LLP <http://sokllp.com/resources/publications/publication/private-rights-public-good-balancing-competing-interests-under-expropriation-law>.

<sup>12</sup> *Supra* note 9.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Land Compensation Act*, 1973, c 26, s 44(1): “Where land is acquired or taken from any person for the purpose of works which are to be situated partly on that land and partly elsewhere, compensation for injurious affection of land retained by that person shall be assessed by reference to the whole of the works and not only the part situated on the land acquired or taken from him.”

<sup>15</sup> Law Reform Commission of Canada, *Report on Expropriation*, 1976, 23 and *Report of The Expropriations Act*, R.B. Robinson, Q.C., (1974), 32.

<sup>16</sup> *Ibid.*

of British Columbia, Ontario, New Brunswick, and Nova Scotia<sup>17</sup>, and in every other Canadian jurisdiction by common law. However the proscription in s. 30(1)(c) of the Manitoba Act is unique. It provides for compensation for injurious affection for damages sustained by the owner as a result of the existence of the works that the authority would have been responsible for in law if the existence of the works were not under the authority of a statute.

For the same reason, which is the basis of *Tentative Recommendation 1*, the proscriptive wording in s. 30(1)(c) should be deleted.

**Tentative Recommendation #3**

***The Commission recommends the deletion of the proscriptive wording in s. 30(1)(c) for damages being awarded as a result of the use of the works for which an expropriation has been instituted.***

**4. Section 31(2)**

The jurisdiction to hear an application for due compensation under s. 31(2) is vested in the Court of Queen’s Bench, not the LVAC,<sup>18</sup> which one lawyer advised the Commission “does not make sense.” To understand this comment requires a brief description of the legislative history of expropriation compensation jurisdiction.

Until 1970, *The Expropriation Act*<sup>19</sup> provided for a compensation dispute to be determined initially by the Minister responsible for the expropriation and ultimately, if necessary, by a judge of the County Court pursuant to *The Arbitration Act*.

In 1965, *The Land Acquisition Act* was enacted.<sup>20</sup> Part I of the Act deals with the acquisition of land by purchase by a government authority. Part II of the Act creates the LVAC and vests it with the jurisdiction to determine the due compensation payable for the acquisition of land pursuant to Part I, which is binding on the government authority, but not on the owner. If an owner is not satisfied with the LVAC decision and the government authority needs the land, it can expropriate land.

In 1970, *The Expropriation Act* was repealed and a new Act was enacted.<sup>21</sup> By s. 37(1), the Court of Queen’s Bench replaced the County Court and, by s. 15, the LVAC was granted a concurrent jurisdiction. The decision of the LVAC was final regarding expropriating authorities but not

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<sup>17</sup> See Appendix A.

<sup>18</sup> By *The Expropriation Act*, *supra* note 1, s. 1(1) “court” is defined to mean the Court of Queen’s Bench.

<sup>19</sup> RSM 1970, c E190, ss 15-18.

<sup>20</sup> SM 1965, c.43.

<sup>21</sup> SM 1970, c.78, RSM 1987, c E190.

owners who could reject an LVAC decision and proceed afresh to the Court of Queen's Bench. The interpretation given to s.15 by both owners and government lawyers that LVAC decisions were binding on expropriating authorities was crushed by the Court of Appeal in *Manitoba v. Leather Ranch Ltd.*<sup>22</sup>, where the Court decided that LVAC decisions were not binding on expropriating authorities. Rather "the Commission is to function as a moderator appointed to assist the parties reach agreement".<sup>23</sup>

In 1993, *The Expropriation Amendment Act*,<sup>24</sup> *inter alia*, ended the jurisdiction of the Court of Queen's Bench respecting compensation claims by owners from whom an estate or interest in their land was expropriated. The legislature did so by repealing s. 37(1) of *The Expropriation Act*, repealing and re-enacting s. 15 to supersede *Manitoba v. Leather Ranch Ltd.* and giving the LVAC sole original compensation jurisdiction with a full right of appeal to the Court of Appeal by owners and expropriating authorities pursuant to a re-enacted s. 44.

Finally, pertinent to this Paper, *The Expropriation Amendment Act* amended s. 31(2) regarding injurious affection claims by owners who are adversely affected by an expropriation or nearby expropriation but have no land expropriated. Prior to the 1993 amendments, section 31(2) of the re-enacted *Expropriation Act*, 1970, read:

#### **Time for Making Claim Limited**

31(2) Subject to subsection (3), a claim for due compensation under this section shall be made by the person suffering the damage or loss **in writing, giving particulars of the claim, before the expiration of two years** after the work is first used for the purpose for which it was constructed or acquired or after it has been substantially completed, and if not so made the right to compensation is forever barred. (Emphasis added)

*The Expropriation Amendment Act* amended s. 31(2) by striking out "in writing, giving particulars of the claim, before the expiration of two years" and substituting "by application to the court within two years", thus leaving the Court of Queen's Bench with this one original jurisdiction. There is no indication in legislative record of debate respecting *The Expropriation Amendment Act* why the LVAC was not also given the jurisdiction respecting s. 31.<sup>25</sup> Was it intentional or inadvertent? In any event, this is the legislative history explaining the earlier quoted comment. To quote the lawyer completely:

"It does not make any sense to have the Court [of Queen's Bench] deal with injurious affection where no land is taken. It is out of the loop on expropriation matters."

We are inclined to agree.

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<sup>22</sup> (1987) 38 LCR 44(CA).

<sup>23</sup> *Ibid*, 48.

<sup>24</sup> SM 1993, c 25.

<sup>25</sup> Legislative Assembly of Manitoba, Debates and Proceedings, April 21, 28, July 6, 16, 19, 26, and 27, 1993, and Legislative Assembly of Manitoba, Standing Committee, July 21, 1993.

**Tentative Recommendation #4**

***The Commission recommends the deletion of the word “court” in s. 31(2), and the substitution of the word “commission”.***

## CHAPTER 3: DISTURBANCE COMPENSATION

Disturbance compensation is payable pursuant to ss. 26(1)(b) and 28 of *The Expropriation Act*. Two issues have been brought to the attention of the Commission.

First, during the construction of a public work for which an expropriation has transpired, there may occur trespass on or the blocking of access to the remaining land of the owner and, similarly, on or to the land of an owner from whom no land has been expropriated. This construction issue is different from the construction issue considered in *Tentative Recommendation 1*, regarding the damaging effect of an expropriation to the market value of the claimant's (remaining) land. The construction issue now being addressed is disturbance damage, which does not have to do with the market value of the claimant's (remaining) land.

Perhaps, there should there be added to s. 28(1) a sub-section (e):

### **Compensation for Disturbance of Owner**

28(1) Subject to subsection (3), the authority shall pay to an owner in respect of disturbance, such reasonable costs, expenses and losses as arise out of or are incidental to the expropriation, including...

(e) costs, expenses, and losses, which arise out of or are incidental to the authority or contactors constructing the public works trespassing on an owner's land and impeding access to an owner's land, including an owner from whom no land has been expropriated.

**The Commission seeks your comments on possible amendments to s. 28.**

Second, *The Expropriation Act* provides in s. 16(1)(c):

### **Offer of Compensation**

16(1) Within 120 days after the registration of the declaration and before serving a notice for possession of the land the authority shall serve upon every registered owner of the land an offer in writing stating ...

(c) unless the market value has been estimated for the purposes of clause (b) upon the basis of a use of the land other than the existing use, that the authority offers to pay

(i) the moving costs, as they are incurred, that are reasonably incurred by an owner in possession of the land at the time the declaration or expropriation was filed, and

(ii) the costs, as they are incurred, that are reasonably incurred by any owner in possession of the land at the time the declaration or expropriation was filed of removing and relocating any fixture or structure owned by that owner and situated on the land at the time the declaration or expropriation was filed;

It has been pointed out that there is no method provided in the Act for the enforcement of this obligation. It has been suggested that a clause be added to s. 16(1)(c) empowering the LVAC to award such costs as they are incurred.

**The Commission seeks your comments on the above issue.**

## CHAPTER 4: CONSULTING COSTS

As indicated in Chapter 1, the “due compensation” payable to an owner from whom an estate or interest in land is expropriated is outlined in s. 26. Quite separately, not as a component of the “due compensation” payable, provision is made in s. 15(6)-(7) for the payment of consulting costs incurred by an owner in connection with the determination of the due compensation payable.

### **Authority to Pay Costs of Owner**

15(6) The authority shall pay reasonable appraisal, legal and other costs that are reasonably incurred by an owner for the purpose of determining the compensation payable under this Act for an expropriation.

### **Commission May Determine Costs**

15(7) Where the amount of compensation payable under this Act for an expropriation is settled by the authority and an owner without a hearing or is determined by the commission, the commission may, on application by the authority or owner, determine the costs.

The “other costs” referenced in s. 15(6) above include expert reports and testimony relating to accounting, business valuation, planning and development, appraisal, engineering, architectural, and construction issues. Occasionally, realtor services are also required. Lawyers comprising the expropriation bar have voiced three concerns to the Commission, namely:

1. the lack of any incentive in the Act for owners to settle compensation claims rather than proceeding to the LVAC, which results in increased legal costs,
2. the inability to obtain interim payment of consulting costs incurred by an owner for expert assistance in preparing the compensation claim, and
3. the appeal of a consulting costs award made by the LVAC.

### **1. Lack of Incentive to Settle**

Since the re-enactment of *The Expropriation Act* in 1970, in line with the basic principle of “due compensation” stated earlier in this Report with reference to *Irving Oil Ltd. v. R.*, the regime of awarding consulting costs incurred in connection with LVAC hearings has been full indemnification, subject to the qualifications contained in s. 15(6) that the costs are “reasonably incurred” and “reasonable” in quantum. In *Gulak v. City of Winnipeg*<sup>26</sup>, the LVAC made the

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<sup>26</sup> (1983) 29 LCR 261, 271. In the quotes of Master McBride in the *Kolbrich* and *Stanton* cases McBride uses the terms tax, taxing, and taxation respecting expropriation consultation costs, not in the same sense that a lawyer’s bill can be taxed, i.e. actually reduced, but rather in the context of a determination by the LVAC of the amount an expropriated owner shall receive from the expropriating authority as reimbursement for consulting costs incurred.

following comments on the words in s. 15(7) - “The authority shall pay reasonable appraisal, legal, and other costs...”:

“ . . . The final point which [the City of Winnipeg’s counsel] raised concerning the claim for compensation for the account of David Palubeskie & Assocs., he raised in conjunction with the claim in respect of the account of Monk Goodwin and Co., namely, that their fees were unreasonable in that they were excessive. On occasion the commission has not compensated landowners for the full amount of their legal and appraisal fees because the commission felt that the fees were excessive. However, there is a major problem with not compensating landowners for the full amount of their experts’ fees, especially respecting experts other than lawyers, for lawyers’ bills can be taken for taxation by unhappy clients. The problem has been lucidly articulated by Mr. McBride in *Kolbrich et al. v. Ministry of Housing* (1981), 23 L.C.R. 1, 24 C.P.C. 20, and *Stanton v. Scarborough (No. 3)*, *supra*. At pp. 4-6 in the *Kolbrich* case, Mr. McBride said:

The matter of the costs 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....

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 a 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? I do not know, but I do know that it is long past time that the expropriating authorities and the provincial Government worked out with the appraisers and town planners, and perhaps other groups of experts, some system of limiting the cost of their services in expropriation proceedings... In my opinion, it is up to the state and not the expropriated landowners to control these costs. I have no doubt that a reasonable but restricting tariff would be accepted, probably with much grumbling, by the appraisers generally....

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 has already 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...

Mr. McBride was overruled on appeal in *Kolbrich v. Minister of Housing, supra*. In the *Stanton* case, at pp. 294-6, Mr. McBride had an opportunity to comment on the reasoning of the appellate court:

...the learned judge held that not only must such costs have been reasonably incurred in order that the expropriating authority might be held liable to reimburse the claimant for them but they must have been reasonable in amount for the work done and services rendered....It follows that his lordship has ruled that even if a claimant has acted reasonably in engaging the services of an expert, if the fee charged by such expert is excessive for what he has done, or to put it another way, if the value of his work is, in the result, less

than the fee he has charged, it is the claimant who is to be victimized, not the expropriating authority which created the need for the claimant to hire an expert in the first place. If I may make the observation with great respect, I suggest that the learned judge may have overlooked the fact that what I was taxing were the costs payable by the expropriating authority to the claimant, not those payable by the claimant to his experts. A taxing officer [such as the LVAC] simply does not have jurisdiction to reduce the amount of an expert's account in the sense that the expert is required to make do with the reduced amount. What the taxing officer does have jurisdiction to do and is required to do, according to the reasoning of [the learned judge] is to assess what amount the expropriating authority must pay to the claimant on account of the costs of a particular expert without regard to what amount the claimant may be obliged by contract to pay to that expert. If the assessed amount is less than the contract amount, the expropriated landowner is liable for the difference....

Before leaving [the reasoning of the appellate court in the *Kolbrich* case], I record the following from the [judgment]: "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."

With great respect I say that if the decision [of the appellate court] is correct. There is equally nothing to stop an appraiser from using his retainer as a *carte blanche* for any fee his conscience will allow. I repeat that no taxing officer has any authority under the *Expropriations Act* ... to restrict or assess what an appraiser or other expert may charge a claimant for his services. All he can do is regulate what amount the expropriating authority is required to pay to the claimant on account of the expense of retaining such experts. As I have said on more than one occasion in the past, this is an unsatisfactory, unreasonable and unnecessary state of affairs but I do not have the impression that anyone with authority to correct it is concerned about it.

The commission agrees completely with Mr. McBride. Even if the fees of David Palubeskie & Assocs. and Monk, Goodwin & Co. are excessive, which the commission has not found as a fact, the commission is not prepared in this case to place that burden on the shoulders of Michael Gulak *et al.* It is to be noted that, unlike Mr. McBride, the commission is not bound by the decision in *Kolbrich v. Minister of Housing...*"

A law firm, which acts for municipalities, in an email to the Manitoba Law Reform Commission wrote:

“Manitoba is an outlier when it comes to awarding the landowner’s costs in expropriation proceedings. There is little or no discipline in the system, which has the affect of encouraging lawyers, who are acting for landowners, to trigger inquiries [pursuant to s.9 and Schedule A of *The Expropriation Act*] and LVAC hearings rather than negotiate. No analysis of risks and benefits is needed in the lawyer’s advice to the [landowner] client. An expropriation of a small parcel of agricultural land for a drain can result in the owner receiving compensation for [the] land at \$800 with \$25,000 in legal and appraisal costs. For small municipalities this is an unreasonable burden to bear. At the same time the benefit to the landowner is negligible.”

The firm suggests that the Commission consider recommending either a tariff of costs, as exists in British Columbia<sup>27</sup>, or an assessment of costs based upon the degree of success as exists in the British Columbia, Ontario, Nova Scotia, and Federal Acts, and as existed in *The Expropriation Act* of Manitoba prior to its re-enactment in 1970.<sup>28</sup> Also the firm suggests that the Commission consider for recommendation a legislative statement of the criteria to be applied in awarding costs, such as s. 45(10) and 52(8) of the Expropriation Acts of British Columbia and Nova Scotia.<sup>29</sup>

Finally, the firm suggests that the Commission consider recommending the enactment of a cap on legal fees incurred in connection with inquiries conducted pursuant to s. 9 and Schedule A of *The Expropriation Act* as to whether an “expropriation is fair and reasonably necessary”, as exists in Ontario.<sup>30</sup>

At this juncture the Commission has not reached even tentative conclusions on the merit of these suggestions.

**The Commission seeks your comments.**

## **2. Interim Payment of Consulting Costs**

Consulting costs may be incurred months or even years before the due compensation payable on an expropriation is settled or decided by the LVAC. In *Atkins v. Manitoba; Reimer v. Manitoba*<sup>31</sup>

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<sup>27</sup> See Appendix B.

<sup>28</sup> See Appendix C.

<sup>29</sup> See Appendix D. It is to be noted that in a series of cases the LVAC has articulated similar criteria it applies for the determination of the quantum of reasonably incurred consulting costs; see, inter alia, *Gulak v. City of Winnipeg* (1983) 29 LCR 261, *Zukawich v. Dept. of Urban Affairs* (1990) 43 LCR 300 and other cases to be found in the indices of its cases at the LVAC website <http://www.gov.mb.ca/mit/lvac/index.html>

<sup>30</sup> See Appendix E.

<sup>31</sup> (2002), 78 LCR 155.

the issue before the LVAC was the date from which interest payable pursuant to s. 35 on the due compensation payable should run. In an *obiter dictum* the LVAC said:

The Commission agrees with [counsel] that an expropriating entity should make interim advances to cover consulting costs when provided with accounts (invoices) in usual form.

...

The Commission considered ... [Manitoba counsel's] point that an expropriating authority has an obligation to assess the reasonableness of such accounts and such an assessment may not be able to be made until after the due compensation payable has been determined. In the opinion of the Commission this reality does not impact upon an expropriating authority making interim advances to cover consulting costs incurred. An expropriating authority can challenge the reasonableness of such costs, as is done now, after the Commission has rendered its decision on the due compensation otherwise payable, and, if the Commission agrees, take its decision into account in the payment of the remaining due compensation payable.<sup>32</sup>

Following the rendering of this *obiter dictum* and a letter in February 2008 from the LVAC to its Minister complaining that the Province was not paying interim consulting accounts, the Province developed the practice of paying interim accounts, although not necessarily in full, but only those it deems reasonable.

In *Manitoba v. Russell Inns Ltd.*<sup>33</sup>, the Province of Manitoba expropriated land for the widening of PTH 6. Russell Inns Ltd. retained the services of a land appraiser who periodically submitted interim accounts for his services which were forwarded to the Province. Following the practice of paying interim accounts incurred by owners if it deemed the accounts reasonable, portions of the appraiser's accounts were not paid by the Province who deemed them unreasonable. After negotiation between counsel for Russell Inns Ltd. and the Province failed, counsel requested a meeting with the LVAC prior to the scheduled hearing respecting the due compensation payable for the expropriated land. Following that meeting, the LVAC ordered the Province to "pay, on a without prejudice basis, the full fees as submitted". The LVAC indicated that it would entertain arguments from the parties in due course as to the reasonableness of the appraisal fees and order Russell Inns Ltd. to reimburse the Province for any amount in excess of what it determined to be reasonable.<sup>34</sup> The Province applied to the Court of Queen's Bench for an order quashing the LVAC order requiring it to pay Russell Inns Ltd.'s full interim appraisal fees.<sup>35</sup>

Reading ss. 15(6) and (7) together, the Court quashed the LVAC order. In doing so, the Court decided that, as provided in s. 15(7), the LVAC does not have jurisdiction to order the payment of any s. 15(6) costs, including interim accounts, prior to the settlement or determination by the

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<sup>32</sup> Ibid, 157 & 158.

<sup>33</sup> (2013) 109 LCR 18 (Man CA).

<sup>34</sup> Unreported, Apr 13, 2010.

<sup>35</sup> (2011) 104 LCR 188 (Man. QB).

LVAC of the due compensation payable. In so deciding, the Court referred to a Nova Scotia Court of Appeal decision, *Nova Scotia (Attorney General) v. Williams*<sup>36</sup>, which construed s. 35(1) of the *Expropriation Act of Nova Scotia*, to require consulting fees to “be paid without undue delay, that is, upon submission or reasonably soon thereafter.” The Court quoted from the *Williams* reasons for judgment:

[57] At. p. 103 of the decision in *Williams*, the court indicated that “[t]he obvious aim of s. 35 (1) is to ensure that an owner whose lands are expropriated can be informed, at the negotiating stage prior to the formal compensation hearing, as to the value of the property and the degree to which it will be injuriously affected, and to be advised as to his or her legal rights. Such a provision facilitates early settlements without compensation hearings. It is also an attempt by the legislature to redress the inequality between the positions of the expropriating authority, with its relatively unlimited resources, and individuals otherwise unable to afford expensive professional services.

....

[64] While it may be that the policy considerations outlined by the Nova Scotia courts make good sense and contribute to the fairness of the expropriation process, these policy considerations cannot be addressed in the narrow confines of this motion. My focus has to be on the wording of the *Manitoba Act*. In this case, the scheme contemplates the amount of costs payable being determined where the amount of compensation is settled by the authority and the owner without a hearing or is determined by the LVAC.

Russell Inns Ltd. appealed unsuccessfully,<sup>37</sup> the Court of Appeal agreeing with the trial judge’s analysis of s. 15(6) and (7). In its reasons the Court said:

115 Even though Manitoba has stated that it will pay interest on any unpaid amount later found to be reasonable, the owner or professional who has to wait for payment may be ill-equipped to carry that cost for a lengthy period of time, not knowing whether or not payment will eventually be made.

116 To meet the objects of the *Act*, being to avoid victimizing the owner and to provide full indemnification, it would be more consistent with those objects to interpret ss. 15(6) and (7) so as to provide for payment of the owner’s costs as early and as completely as possible.

....

126 [But t]he intention of the government is also clear from the 2008 complaint by the LVAC to the Minister and his response. It was clearly put to the Minister that the problem was the hardship to an owner who was required to wait until after the determination of the compensation for the property before receiving compensation for the costs incurred in the process and that the LVAC was of the view that the expropriating authority should pay the full interim costs on a without prejudice basis and have the reasonableness determined at a later date. The Minister rejected this

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<sup>36</sup> (1995), 56 LCR 99 (NSCA).

<sup>37</sup> *Supra*, note 33.

position in favour of requiring the authority to pay only reasonable costs reasonably incurred on an interim basis.

127 On the question of the LVAC having the power to make interim orders for costs, interpreting the legislation to permit such applications would result in additional proceedings, contrary to the government's intention of reducing the number of proceedings. Adding such a further step would both delay a final resolution of the matter and increase the costs.

128 If the LVAC were permitted to consider the reasonableness of the costs at that interim hearing, that would complicate the procedure, further increasing both the time and cost of resolving claims. In making an assessment of reasonableness, the LVAC would have to look at many facts and factors. As regards an appraisal report, the LVAC should look at the qualifications and experience of the appraiser, the time spent, the work done and steps taken, the hourly rate charged, the complexity of the appraisal, the amount of the compensation awarded/agreed upon and the quality of the report. Similar factors would be relevant to legal fees, and, in addition, the LVAC would have to determine whether either the owner or the authority delayed proceedings or undertook steps that were unnecessary. (See Todd at pp. 518-25.) This would not be a simple process, and many of the assessments could only finally be made after a final determination as to the amount of compensation to which the owner was entitled.

129 Interim decisions would be open to being reargued after the determination of the final costs, in light of the findings of the LVAC regarding the acceptance and utility of expert reports and the final amount of compensation. This further cost would be inconsistent with the government's goals, as stated in 1993, of reducing both the length of time to complete the expropriation process and the costs to the authority.

130 If the legislation were read to require the authority to pay full costs and seek a determination by the LVAC of the reasonableness of those costs after compensation was determined, that interpretation would be inconsistent with the Minister's direction in April 2008.

131 On the other hand, interpreting the legislation to require the interim payment of costs, either with or without an interim determination of the reasonableness of those costs, would go the farthest to meeting the object of the *Act* of reducing the victimization of the owner by providing the highest reasonable indemnification at the earliest date.

132 I will now look at the scheme of the *Act*. The cost provisions that are at issue, being appraisal, legal and other costs related to determining the compensation payable, are found in ss. 15(6) and (7) of the *Act*. There is no other provision in the *Act* that gives the LVAC the ability to order or determine these costs and no provision to order the interim payment of any costs. Further, unlike s. 47(1) of the Nova Scotia legislation, there is no provision in the *Act* that grants any residual authority to the LVAC to determine "other matters that may arise," such as an application for interim costs or the determination of the reasonableness of costs on an interim basis.

The Commission agrees with the sentiment of the LVAC *obiter dictum* in *Atkins v. Manitoba*; *Reimer v. Manitoba*, quoted earlier, that consulting costs should be reimbursed in full on a rolling basis upon their submission. It also agrees with the Nova Scotia Court of Appeal's words in *Williams*, quoted by the Court of Queens Bench in *Russell Inns Ltd.*, para. 57 and the first sentence

of para. 64, and by the Court of Appeal in *Russell Inns Ltd.*, paras. 115-116. There is a simple solution, the addition of a sub-section to s. 15 providing for the interim payment of costs compensable pursuant to s. 15(6). *The Expropriation Act of British Columbia* uniquely contains such a section at s. 48:<sup>38</sup>

48(1) An owner may, from time to time after an expropriation notice or an order ... 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.

48(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.

...

48(7) If the amount of costs paid under this section exceeds the amount of costs awarded under section 45, the expropriating authority may

- (a) deduct the amount of the difference from any amounts of compensation then outstanding, and
- (b) if all compensation has been paid, recover the excess by action against the owner.

Regarding the determination of the reasonableness of such costs and the concern expressed by the Court of Appeal in paras. 127-29 of its reasons, quoted earlier, the Commission agrees with the LVAC in *Russell Inn Ltd.*, quoted earlier, that the reasonableness of such accounts need not be determined upon their submission; determining the reasonableness of such accounts is premature and would cause undue delay. They should be paid in full, conditional on their reasonableness being determined with other such costs claimed at the conclusion of the hearing and subject to a set-off against the due compensation payable pursuant to s. 26 and other costs payable pursuant to s. 15(6) and, if necessary, re-imbursement of the expropriating authority by the expropriated landowner.

#### **Tentative Recommendation #5**

**The Commission is inclined to recommend the addition of two sub-sections to s. 15:**

- **one similar to s. 48(1) of the *Expropriation Act of British Columbia*; and,**
- **one providing for an expropriating authority to pay bills submitted to the LVAC hearing promptly and in full, conditional on their reasonableness being determined, with other such costs claimed at the conclusion of an LVAC hearing. Such claims would be subject to a set-off of an over-payment against the due compensation payable pursuant to s. 26, other costs payable pursuant to s. 15(6) and, if necessary, reimbursement of the expropriating entity by the expropriated landowner.**

<sup>38</sup> RSBC 1996, c 125. Sections 48(3)-(6) are not pertinent.

### 3. Appeal of a Consulting Costs Award

As indicated at the beginning of this chapter, “due compensation” payable pursuant to s. 26 of *The Expropriation Act* and reimbursement of consulting costs pursuant to s. 15(6) are separate entitlements. Reimbursement of consulting costs is not a component of “due compensation.” Also, as indicated earlier in this chapter, pursuant to s. 15(7) of the Act, upon application by either an expropriating authority or an owner, the LVAC has the original jurisdiction to determine the consulting costs payable by an authority to an owner. Section 44 provides for an appeal from an LVAC compensation decision:

#### **Appeal of Certified Amount to Court of Appeal**

44(1) A party to a proceeding before the commission may appeal the amount certified as compensation payable to The Court of Appeal within 40 days after the day the commission certifies the amount under subsection 15(2), or within seven days from the day the commission issues a decision or certifies an amount under subsection 15(5), whichever is the later.<sup>39</sup>

In *Russell Inn Ltd. v. Manitoba*<sup>40</sup> the Court of Appeal dismissed an appeal by Manitoba, pursuant to s. 44, respecting a s. 15(7) costs award of the LVAC, for the reason that a s. 15(7) costs award does not come within the word “compensation” in s. 44(1), leaving an expropriating authority with only a Court of Queen’s Bench judicial review of a s. 15(7) costs award.<sup>41</sup>

#### **Tentative Recommendation #6**

**The Commission recommends that s. 44(1) be amended to include an amount determined payable by the LVAC pursuant to s. 15(7).**

<sup>39</sup> Section 15(5) empowers the LVAC to vary a s. 15(2) certification upon “new evidence” coming to light.

<sup>40</sup> *Supra* note 33.

<sup>41</sup> *Ibid*, paras. 31-41.

## CHAPTER 5: SECTION 50(1) - ABANDONMENT OF EXPROPRIATION

Section 50(1) of The Expropriation Act provides:

### **Abandonment of Expropriation**

50(1) Where, at any time before the due compensation payable upon an expropriation is paid in full, the land or any part thereof is found to be unnecessary for the purposes of the authority, or it is found that a more limited estate or interest therein only is required, the authority shall so notify each owner of the land, or estate or interest, who has been served or is entitled to be served with the notice of expropriation, and each of them may by writing elect

(a) to take back the land, estate or interest, in which case he has the right to compensation for consequential damages; or

(b) to require the authority to retain the land, estate or interest, in which case he has the right to due compensation therefor.

It has been pointed out to the Commission that when a residence is expropriated and the expropriated owner wishes to buy and move the house, “there is [often] a refusal [by the expropriating authority]... the house is put on a tender list without notice to the owner and sold to a third party. Section 50(1) is interpreted [by some expropriating authorities] as only applying to land in the narrow sense”, not including buildings and fixtures. This surprises the Commission, given the definition of “land” in s. 1(1) of the Act:

**"land"** means land, messuages, tenements, hereditaments, corporeal and incorporeal, of every kind and description, whatever the estate or interest therein, and whether legal or equitable, together with all paths, passages, ways, watercourses, liberties, privileges and easements appertaining thereto, and all trees and timber thereon, and all mines and minerals and quarries, unless specially excepted, and includes an interest in land;

The statutory definition of “land” includes “messuages”<sup>42</sup> and “corporeal hereditaments.”<sup>43</sup> Although this matter can be left to an owner to seek judicial clarification of “land” in s. 50(1), it can also be clarified by adding to the wording of s. 50(1) after the word “land”, each time it occurs in the section, the words “residence of the owner, buildings, structures, and fixtures.”

**The Commission seeks your comments.**

<sup>42</sup> Black’s Law Dictionary, 10<sup>th</sup> ed. 2014, Thomson Reuters, defines “messuage” to be “A dwelling house together with the curtilage [defined to be the land surrounding a dwelling house], including any outbuildings.

<sup>43</sup> Ibid, defines “corporeal hereditament” to be “A tangible item of property, such as land, a building, or a fixture”.

## **CHAPTER 6: LIST OF TENTATIVE RECOMMENDATIONS**

### **Tentative Recommendation #1**

The Commission recommends the deletion of the proscriptive wording in ss. 30(1)(b) and (c) and 31(1) to damages being awarded for damage as a result of the construction of the works for which an expropriation has been instituted. (p. 5)

### **Tentative Recommendation #2**

The Commission recommends the deletion from s. 30(1)(b) of the words “upon the part of the land expropriated” and the substitution of wording found in comparable sections in the British Columbia, Alberta, Prince Edward Island, and Yukon Acts. (p. 6)

### **Tentative Recommendation #3**

The Commission recommends the deletion of the proscriptive wording in s. 30(1)(c) to damages being awarded for damage as a result of the use of the works for which an expropriation has been instituted. (p. 7)

### **Tentative Recommendation #4**

The Commission recommends the deletion of the word “court” in s. 31(2) and the substitution of the word “commission”. (p. 9)

### **Tentative Recommendation #5**

The Commission is inclined to recommend the addition of two sub-sections to s. 15:

- one similar to s. 48(1) of the Expropriation Act of British Columbia; and
- one providing for an expropriating authority to pay bills submitted to the LVAC hearing promptly and in full, conditional on their reasonableness being determined, with other such costs claimed at the conclusion of an LVAC hearing. Such claims would be subject to a set-off of an over-payment against the due compensation payable pursuant to s. 26, other costs payable pursuant to s. 15(6) and, if necessary, reimbursement of the expropriating entity by the expropriated landowner. (p. 20)

### **Tentative Recommendation #6**

The Commission recommends that s. 44(1) be amended to include an amount determined payable by the LVAC pursuant to s. 15(7). (p.21)

## Appendix A

### **British Columbia, Expropriation Act, R.S.B.C. 1996, c. 125:**

#### **Partial takings**

- 40** (1) Subject to section 44, if part of the land of an owner is expropriated, he or she is entitled to compensation for
- (a) the market value of the owner's estate or interest in the expropriated land, and
  - (b) the following if and to the extent they are directly attributable to the taking or result from the construction or use of the works for which the land is acquired:
    - (i) the reduction in the market value of the remaining land;
    - (ii) reasonable personal and business losses.

Section 44 provides for betterment to be taken into account, like s. 32 of The Expropriation Act of Manitoba.

Injurious affection compensation is payable where no land is expropriated, pursuant to s.41, which incorporates the common law, recently treated in *Spur Valley Improvement District v. Checkman Holdings (Calgary) Ltd.* (2004), 83 L.C.R. 54, paras. 36-45 (B.C. Exp. Comp. Bd.); the common law provides for a claim resulting from the construction but not the use of a work, as provided in the legislation of Ontario, New Brunswick, and Nova Scotia, *infra*.

### **Alberta, Expropriation Act, R.S.A. 2000, c. E-13:**

#### **Injurious affection and incidental damage**

- 56** When only part of an owner's land is taken, compensation shall be given for
- (a) injurious affectation, including
    - (i) severance damage, and
    - (ii) any reduction in market value to the remaining land,
- and
- (b) incidental damages,

if the injurious affection and incidental damages result from or are likely to result from the taking or from the construction or use of the works for which the land is acquired.

**Ontario, Expropriation Act, R.S.O. 1990, c. E. 26:**

1. “Injurious affection” means,

- (a) where a statutory authority acquires part of the land of an owner,
  - (i) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them,
  - and
  - (ii) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute,

(b) where the statutory authority does not acquire part of the land of an owner,

- (i) such reduction in the market value of the land of the owner, and
- (ii) such personal and business damages,

resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute,

and for the purposes of this clause, part of the lands of an owner shall be deemed to have been acquired where the owner from whom lands are acquired retains lands contiguous to those acquired or retains lands of which the use is enhanced by unified ownership with those acquired; (“effet préjudiciable”)

**New Brunswick, Expropriation Act R.S.N.B. 1973, c. E-14:**

1. “Injurious affection” means,

- (a) where a statutory authority takes part of the land of an owner,
  - (i) the reduction in market value thereby caused to the remaining land of the owner by the taking or by the construction of the works thereon or by the use of the works thereon or any combination of them, and
  - (ii) such personal and business damages resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute,

or

(b) where the statutory authority does not take part of the land of an owner,

- (i) such reduction in the market value of the land of the owner, and
- (ii) such personal and business damages,

resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute,

and for the purpose of this definition, part of the land of an owner shall be deemed to have been taken where the owner retains land contiguous to the taken or retains land of which the use was enhanced by unified ownership with that taken/ (préjudice)

**Nova Scotia, Expropriation Act, R.S.N.S. 1989, c. 156:**

**3(1)(h)** “injurious affection” means

- (i) where a statutory authority acquires part of the land of an owner,
    - (A) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them,
    - and
    - (B) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute,
  - (ii) where the statutory authority does not acquire part of the land of an owner,
    - (A) such reduction in the market value of the land of the owner, and
    - (B) such personal and business damages, resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute,
- and for the purposes of subclause (i), part of the land of an owner shall be deemed to have been acquired where the owner from whom land is acquired retains land contiguous to that acquired or retains land of which the use is enhanced by unified ownership with that acquired.

**Prince Edward Island, Expropriation Act, R.S.P.E.I. 1988, c. E-13:**

**11** The Minister shall make to the owner of land entered upon, taken or used by him, or injuriously affected by the exercise of any of the powers conferred by this Act, due compensation for any damages necessarily resulting from the exercise of such powers, beyond any advantage which the owner may derive from the contemplated work, and any claim for the compensation not mutually agreed upon shall be determined as hereinafter provided. R.S.P.E.I. 1974, Cap. E-11, s. 11.

**Yukon, Expropriation Act, R.S.Y. 2002, c. 81:**

**7(1)** If land is expropriated or is injuriously affected by an expropriating authority in the exercise of its statutory powers, the expropriating authority shall make due compensation to the owner of the land for the land expropriated or for any damage necessarily resulting from the exercise of

those powers, as the case may be, beyond any advantage that the owner may derive from any work for which the land was expropriated or injuriously affected.

**Canada, Expropriation Act, R.S.C. 1985, c. E-21: 27:**

**27(1)** The amount of the decrease in value, if any, of the remaining property of an owner is the value of all his interests in land immediately before the time of the taking of the expropriated interest, determined as provided in section 26, minus the aggregate of

- (a) the value of the expropriated interest; and
- (b) the value of all his remaining interests in land immediately after the time of the taking of the expropriated interest.

**(2)** For the purpose of paragraph (1)(b), the value of the remaining interests in land of an owner immediately after the time of the taking of the expropriated interest shall be determined as provided in section 26, except that in determining that value account shall be taken of any increase or decrease in the value of any remaining interest in land of the owner, that immediately before the registration of the notice of confirmation was held by him together with the expropriated interest, resulting from the construction or use or anticipated construction or use of any public work on the land to which the notice relates or from the use of anticipated use of that land for any public purpose. R.S., c. 16(1<sup>st</sup> Supp.), s. 25.

Section 26 prescribes the “rules” for determining due compensation payable very similar to ss. 25-29 and 32-33 of The Expropriation Act of Manitoba.

The Expropriation Acts of Saskatchewan, Newfoundland and Labrador, and the Northwest Territories, which applies also to Nunavut, do not deal specifically with injurious affection.

## Appendix B

### *Expropriation Act, RSBC, 1996, c. 125*

#### Expropriation Proceeding Costs Regulation

#### **Definitions**

**1** In this regulation:

**"Act"** means the *Expropriation Act*;

**"board"** means the Expropriation Compensation Board;

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

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

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

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

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

**"court"** means the Supreme Court;

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

- (a) the board held a compensation hearing in the board proceeding after August 1, 2004 and before March 18, 2005 and the board has not yet rendered its compensation decision in that proceeding;
- (b) there has been an appeal to the Court of Appeal in relation to the board proceeding and the appeal has been heard, in whole or in part, before March 18, 2005;
- (c) before March 18, 2005, a hearing in the board proceeding was scheduled to commence after March 17, 2005 and before January 1, 2006;

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

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

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

## **Application**

- 2** This regulation applies to costs payable under section 45 or 48 of the Act but only,
- (a) in the case of legal costs, if those costs
    - (i) were incurred on or after June 28, 1999, and
    - (ii) are payable in relation to an unset board proceeding, and
  - (b) in the case of real estate appraisal costs, if those costs
    - (i) were incurred on or after June 28, 1999, and
    - (ii) are payable in relation to an unset board proceeding or in relation to a compensation action, within the meaning of the Compensation Action Procedure Rule, brought under subrule (7) or (10) of that rule.

## **Tariff of costs**

- 3** (1) If legal costs and real estate appraisal costs are payable under the Act, they must be assessed as follows:
- (a) legal costs must be assessed under Schedule 1;
  - (b) real estate appraisal costs must be assessed under Schedule 2.
- (2) When making an assessment of legal costs under section 45 or 48 of the Act, the reviewer must allow those costs under the tariff in Schedule 1 that were proper or reasonably necessary to conduct the board proceeding.
- (3) If costs are payable under section 45 of the Act, the court may fix the scale, from Scale 1 to 3 in section 4 (1), under which the costs will be assessed.
- (4) The court may order that legal costs be assessed on a different scale from real estate appraisal costs, and may order that one or more steps in the board proceeding be assessed under a different scale from that fixed for other steps.

## Scale of costs

- 4 (1) When fixing the scale of costs, the court must have regard to the following principles:
  - (a) Scale 1 is for matters of less than ordinary difficulty or importance;
  - (b) Scale 2 is for matters of ordinary difficulty or importance;
  - (c) Scale 3 is for matters of more than ordinary difficulty or importance.
- (2) When fixing the appropriate scale under which costs will be assessed, the court may take into account any of the following:
  - (a) whether a difficult issue of law, fact or construction is involved;
  - (b) whether a difficult appraisal issue is involved;
  - (c) whether an issue is of importance to a class or body of persons, or is of general interest;
  - (d) whether the result of the board proceeding effectively determines the rights and obligations as between the parties beyond the relief that was actually granted or denied.
- (3) Subject to section 3 (3), if
  - (a) costs are payable under section 45 or 48 of the Act, or
  - (b) payment of assessed costs has been agreed to on a settlement but no scale has been fixed or agreed to,the costs must be assessed under Scale 2 unless a party, on application, obtains an order of the court that the costs be assessed under another scale.
- (4) For the purpose of determining legal costs under Schedule 1, the value allowed on an assessment is as follows:
  - (a) Scale 1 - \$100 for each unit;
  - (b) Scale 2 - \$140 for each unit;
  - (c) Scale 3 - \$180 for each unit.
- (5) For the purpose of determining real estate appraisal costs under Schedule 2, the value allowed on an assessment is as follows:
  - (a) Scale 1 - \$80 for each unit;
  - (b) Scale 2 - \$100 for each unit;
  - (c) Scale 3 - \$120 for each unit.
- (6) If an item in a tariff provides for maximum and minimum numbers of units, the reviewer has the discretion to allow a number within that range of units, and must have regard to the following principles when assessing costs:

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

(7) If an item in a tariff provides for

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

## **Expenses and disbursements**

- 5 (1) In addition to the costs allowed on a review under a tariff, the reviewer may allow a reasonable amount for expenses and disbursements that were necessarily and properly incurred in the conduct of the board proceeding.
- (2) Subject to subsection (4), if tax is payable by a party in respect of legal costs or real estate appraisal costs, the reviewer must allow an additional amount calculated on the monetary value of the units assessed equal to the percentage rate of tax payable.
- (3) Subject to subsection (4), if tax is payable by a party in respect of expenses or disbursements, the reviewer must allow an additional amount to compensate for that tax, which additional amount must be determined by multiplying the percentage rate of the tax by the monetary value of the expenses or disbursements as assessed.
- (4) If a person claims an additional amount under subsection (2) or (3) for tax imposed under Part IX of the *Excise Tax Act* (Canada) payable on legal costs or real estate appraisal costs or on expenses or disbursements, that person must provide proof that
- (a) the person is not a registrant under the *Excise Tax Act* (Canada), and
  - (b) the person is not entitled to and cannot claim reimbursement of any tax imposed under Part IX of the *Excise Tax Act* (Canada) paid

in respect of the costs, expenses or disbursements to which the additional amount claimed relates.

- (5) In the absence of the proof required by subsection (4), no additional amounts for tax imposed under Part IX of the *Excise Tax Act* (Canada) payable on costs, expenses or disbursements is allowed under subsection (2) or (3).
- (6) An allowance must not be made for interest on legal costs or real estate appraisal costs or expense or disbursement claims.

## Tariff of Costs

### Schedule 1

#### Legal Costs

Item	Description	Units	
<b>Instructions and investigations</b>			
1	Correspondence, conferences, instructions, investigations or negotiations by a claimant relating to a board proceeding, whether before or after commencement, for which provision is not made elsewhere in this tariff	Minimum	1
		Maximum	20
2	Reviewing and advising in relation to an agreement under section 3 of the Act if		
	(a) no agreement entered into		1
	(b) agreement entered into		3
3	Reviewing and advising in relation to a payment made under section 20 of the Act, for each payment		2
4	Instructing expert witness if witness prepares a report, for each expert (maximum of 3 witnesses, without leave)	Minimum	1
		Maximum	5
5	Every process for commencing and prosecuting a board proceeding before the board or the court	Minimum	1
		Maximum	10
<b>Discovery</b>			
6	Process for obtaining discovery and inspection of documents	Minimum	1
		Maximum	10
7	Process for giving discovery and inspection of documents	Minimum	1
		Maximum	10
8	Process for delivering interrogatories	Minimum	1
		Maximum	10
9	Process for answering interrogatories	Minimum	1
		Maximum	10

### **Examinations**

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

### **Applications**

12	Preparation for an application referred to in Item 13, for each day of hearing, if the hearing has commenced	
	(a) unopposed	2
	(b) opposed	3
13	Interlocutory application or other application for which provision is not made elsewhere in this tariff, for each day	
	(a) if unopposed	4
	(b) if opposed	5
14	Preparation for attendance referred to in Item 15, for each day of attendance	2
15	Attendance before the board, the court or a reviewer to settle an order or to assess costs, for each day	4
16	Preparation for attendance referred to in Item 17, for each day of attendance	2
17	Attendance at a pre-trial conference, for each day	3

### **Hearing**

18	Preparation for trial, if board proceeding set down, for each day of trial, to a maximum of 30 units	5
19	Attendance at trial or of an issue in a board proceeding, for each day	10
20	Written argument, if requested or ordered by the board or the court	Minimum 1 Maximum 10

### **Miscellaneous**

21	Process for setting board proceeding down for trial	1
22	Negotiations, mediation and process for settlement, discontinuance, or dismissal by consent of any board proceeding if settled, discontinued, or dismissed by consent as a result of the negotiations, for each day, to a maximum of 60 units	15
23	Travel by a solicitor to attend any trial, hearing, application, examination or other analogous proceeding if held more than 40 km from the place where the solicitor carries on business, for each day of travel by the solicitor	2

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

## **Schedule 2**

### **Real Estate Appraisal Costs**

Item	Description	Units	
<b>Instructions</b>			
1	Correspondence, conferences, instructions or meetings with a claimant and counsel relating to a board proceeding, whether before or after commencement, for which provision is not made elsewhere in this tariff	Minimum	1
		Maximum	20
<b>Inspection and research</b>			
2	Inspect and research subject property	Minimum	1
		Maximum	30
3	Market research, including all necessary attendances	Minimum	1
		Maximum	20
4	Inspection of comparable properties	Minimum	1
		Maximum	20
<b>Analysis and report preparation</b>			
5	Analysis of data and preparation of a report or reports	Minimum	1
		Maximum	60

### **Hearing**

- |   |   |    |
|---|---|----|
| 6 | Preparation for trial, if board proceeding set down, for each day of necessary attendance of appraiser, to a maximum of 30 units  | 5  |
| 7 | Attendance at trial of board proceeding or of an issue in an board proceeding, for each day of necessary attendance of appraiser  | 10 |
| 8 | Travel by an appraiser for necessary attendance at any trial, hearing, application, examination or other analogous proceeding if held more than 40 km from the place where the appraiser carries on business, for each day of travel by the appraiser | 2  |

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

## Appendix C

### **Expropriations Act, RSO 1990, c E.26**

#### **Costs**

**32.** (1) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Board and the amount awarded by the Board is 85 per cent, or more, of the amount offered by the statutory authority, the Board shall make an order directing the statutory authority to pay the reasonable legal, appraisal and other costs actually incurred by the owner for the purposes of determining the compensation payable, and may fix the costs in a lump sum or may order that the determination of the amount of such costs be referred to an assessment officer who shall assess and allow the costs in accordance with this subsection and the tariffs and rules prescribed under clause 44 (d). R.S.O. 1990, c. E.26, s. 32 (1).

#### **Idem**

(2) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Board and the amount awarded by the Board is less than 85 per cent of the amount offered by the statutory authority, the Board may make such order, if any, for the payment of costs as it considers appropriate, and may fix the costs in a lump sum or may order that the determination of the amount of such costs be referred to an assessment officer who shall assess and allow the costs in accordance with the order and the tariffs and rules prescribed under clause 44 (d) in like manner to the assessment of costs awarded on a party and party basis. R.S.O. 1990, c. E.26, s. 32 (2).

### **Expropriations Act, RSC 1985, C E-21**

#### **Costs**

**39 (1)** Subject to subsection (2), the costs of and incident to any proceedings in the Court under this Part are in the discretion of the Court or, in the case of proceedings before a judge of the Court or a judge of the superior court of a province, in the discretion of the judge, and the Court or the judge may direct that the whole or any part of those costs be paid by the Crown or by any party to the proceedings.

#### **Marginal note: Costs payable by the Crown**

(2) If the amount of the compensation adjudged under this Part to be payable to a party to any proceedings in the Court under sections 31 and 32 in respect of an expropriated interest or right does not exceed the total amount of any offer made under section 16 and any subsequent offer made to the party in respect of that interest or right before the commencement of the trial of the proceedings, the Court shall, unless it finds the amount of the compensation claimed by the party in the proceedings to have been unreasonable, direct that the whole of the party's costs of and incident to the proceedings be paid by the Crown, and if the amount of the compensation so adjudged to be payable to the party exceeds that total amount, the Court shall direct that the

whole of the party's costs of and incident to the proceedings, determined by the Court on a solicitor and client basis, be paid by the Crown.

R.S., 1985, c. E-21, s. 39; 2011, c. 21, s. 151.

## **Expropriations Act, RSBC 1996, c 125**

### **Legal and appraisal costs**

**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, the authority must pay the owner his or her costs.

(5) If the compensation awarded to an owner is 115% or less of the amount paid by the expropriating authority under section 20 (1) and (12) or otherwise, the court may award the owner all or part of his or her costs.

(6) On a claim under section 41 (3), the court may award, in its discretion, costs to the claimant or the expropriation authority.

(7) The costs payable under subsection (3), (4), (5) or (6) 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 Expropriation Act, RSM 1970, C E190**

### **Payment of costs by claimant.**

**20** (1) Where the difference between the sum awarded to the claimant and the amount offered by the minister is less than the difference between the sum awarded to the claimant and the amount claimed, the claimant shall pay all costs and expenses of the arbitration.

### **Payment of costs by minister.**

**20** (2) Where the difference between the sum awarded to the claimant and the amount offered by the minister is greater than the difference between the sum awarded to the claimant and the amount claimed, the minister shall pay all costs and expenses of the arbitration.

## Appendix D

### **Expropriation Act, RSBC 1996, c 125**

#### **Legal and appraisal costs**

- 45** (10) In a determination of costs under subsection (8) or (9), the following considerations must be taken into account:
- (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.

### **Expropriation Act, RSNS, c 156**

#### **Costs**

- 52(8)** In a determination of costs pursuant to subsection (2), (3), (4) or (5), the following shall be taken into account:
- (a) the number and complexity of the issues;
  - (b) the conduct of any party that tended to shorten or unnecessarily lengthen the duration of the proceeding;
  - (c) any step in the proceeding that was improper, vexatious, prolix or unnecessary;
  - (d) the reasonableness and relevance of appraisal and other expert reports, including the cost of the reports;
  - (e) the skill, labour and responsibility involved;
  - (f) the amount of the award or settlement;
  - (g) any other matter relevant to the question of costs.

## **Appendix E**

### **Expropriations Act RSO 1990, c. E.26**

#### Costs

s. 7(10) The inquiry officer may recommend to the approving authority that a party to the inquiry be paid a fixed amount for the party's costs of the inquiry not to exceed \$200 and the approving authority may in its discretion order the expropriating authority to pay such costs forthwith. R.S.O. 1990, c. E.26, s. 7(10).