Expropriation Compensation Board

The Expropriation Compensation Board will be incorporating systematic case management and alternative dispute resolution processes into its mandate in the forthcoming year. The following paper provides some background to this initiative as well as an outline of recommended changes.

Anyone interested in commenting on the proposed changes is invited to do so in writing by no later than November 30, 2002, either by e-mail to: sherri.andrews@gems7.gov.bc.ca by fax to: (250) 387-0711 or by letter addressed to: ADR INITIATIVE, c/o Sherri Andrews, Expropriation Compensation Board, P.O. Box 9215, Stn. Prov. Govt., Victoria, British Columbia, V8W 9J1.

New Directions for the Board
In Case Management and Early Dispute Resolution

A Summary of Discussions and Proposals of the Liaison Committee of the Expropriation Compensation Board and the British Columbia Expropriation Association

1. BACKGROUND

The current initiative to implement a more systematic caseflow management system and early dispute resolution process for the Expropriation Compensation Board (the "Board") is reflective of a general trend which has developed within the court system and among administrative tribunals in British Columbia and elsewhere over the past several years.

1.1 Earlier Initiatives

As early as November, 1996, the then Attorney General of British Columbia announced a plan of major reform of B.C.'s justice system including "increasing use of alternate dispute resolution to assist people in resolving civil disputes before they end up in the courts."

That announced plan flowed, in part at least, from the recommendations made by the Systems of Civil Justice Task Force Report produced by the Canadian Bar Association. The problem identified to the Task Force was that a high percentage of settlements occurred very late in the litigation process and, therefore,

did not result in significant savings of time or money for the participants. Late resolution had adverse effects, not only on the participants, but also on the civil justice system as a whole. It was one recommendation of the Task Force that every jurisdiction "make available as part of the civil justice system opportunities for litigants to use non-binding dispute resolution processes as early as possible in the litigation process and, at a minimum, at or shortly after the closing of pleadings and again following completion of examinations for discovery."

Both the Board and the British Columbia Expropriation Association (the "Association") recognized at the time the possible advantages to be derived from implementing changes within expropriation compensation proceedings both to expedite the pre-hearing process and to encourage earlier dispute resolution.

A liaison committee of the Board and the Association in the nature of a "rules committee" was created around that time. The minutes of one committee meeting held in November, 1996 reflect agreement "that earlier and more 'interventionist' pre-hearing conferences would be of assistance in determining claims before the Board in a more cost-effective manner" and that amendments to the Board's *Practice and Procedure Regulation* should be explored. The committee also discussed in some detail the desirability of incorporating some type of mediation into the Board's process either on a voluntary or mandatory basis.

In March, 1997, the chair of the Board addressed a meeting of the Association on the subject of alternative dispute resolution. There were, he suggested, two aspects to the problem then facing the Board which it was believed alternative dispute resolution would help to address. First, many matters scheduled for hearing before the Board settled very late in the process, strongly suggesting that they could have been settled at an earlier date if the parties had been required to turn their minds and efforts to resolution of the issues earlier. Second, a significant number of matters which did proceed to hearing resulted in little or no additional compensation being awarded. This signalled to the Board that many such matters never should have reached the hearing stage and probably could have been resolved earlier by having the parties squarely examine the merits of their cases in advance.

Although members of the Board at the time were beginning to equip themselves through mediation training to take on that additional role, and members of the Association on the liaison committee volunteered to review possible revisions to the *Expropriation Act* and the *Practice and Procedure Regulation*, for a number of reasons this initiative did not go forward.

1.2 The Current Initiative

Since that time the impetus for change has come from two principal sources. First, approximately two years ago, the members of the Board met to discuss management issues and unanimously agreed that it would be desirable to move forward with a combined case management and early dispute resolution initiative. An *ad hoc* committee of the Board was struck to consider possible issues around the design and implementation of this initiative, including any legislative or regulatory amendments that might be

necessary or desirable. Members of the committee also held exploratory discussions with the Dispute Resolution Office and Secretariat and with the Policy, Planning and Legislation Division, both within the Ministry of Attorney General.

Second, the current initiative is an outgrowth of the Core Services Review process undertaken in conjunction with the Administrative Justice Project instituted by the present government during the summer and fall of 2001. The Board undertook an internal review both of its mandate and its service delivery for presentation to the Core Services Review Committee in November, 2001 and February, 2002, respectively.

In general terms the Board envisioned its mandate as being to ensure administrative fairness in determining compensation for owners whose lands had been expropriated or injuriously affected. Fairness in this context implied:

- ready accessibility to the Board for the purpose of bringing a claim;
- adequate procedural mechanisms for ensuring that the parties are able to obtain preliminary orders and directions from the Board in a timely way as they prepare their cases for hearing;
- necessary and reasonable financial resources being made available to the owner through the advance payment of costs regime to assist in what the Board has recognized as the legislative intent to "level the playing field" as between owners and expropriating authorities;
- the efficient scheduling of compensation hearings without significant delay once the parties have indicated their readiness to proceed;
- the conduct of compensation hearings, open to the public, by an impartial and expert panel of the Board in such a way as to afford the parties a full opportunity to present their cases in accordance with rules of evidence and civil procedure, flexibly applied; and
  the timely rendering of decisions by the Board after all the evidence and argument has been heard, with written reasons which are at once complete, intelligible, internally consistent, and consistent with established principles of law and valuation.

The Board also noted that one hiatus in its formal mandate to adjudicate expropriation compensation disputes was its lack of statutory or regulatory authorization to include a process for alternative dispute resolution, for example, through mediation or case settlement conferences. There was evidence from the experience of other tribunals which deal with land valuation issues, such as the Property Assessment Appeal Board in British Columbia, and the Ontario Municipal Board, of the benefit of such a process in reducing the number of cases which actually proceed to hearing.

The Core Services Review Committee, in its report on mandate review released on February 5, 2002, concluded that the Board continued to serve a compelling public purpose in resolving disputes over the value of expropriated land. However, the Board was to take steps to improve its efficiency, including the introduction of "mediation and other forms of early dispute resolution to reduce delays and provide more timely services to the public."

In addressing its organizational and service delivery model, the Board perceived that it had successfully made use of its specialized expertise to render thorough, well-reasoned and largely consistent decisions. It had also shown itself to be flexible in such a way as to eliminate delay and backlog in the scheduling of compensation hearings. By increasing the complement of part-time members to hear matters, severing off threshold issues for preliminary determination and resorting where possible to oral decisions, the Board in many instances had been able to foreshorten the overall time required to resolve issues before it.

However, the Board also acknowledged that a process which it calculated on average required four years from the filing of the claim to the final determination of compensation fell short of the ideal of efficiency. In the Board's view there were several factors which contributed to slowing the pace of the adjudicative or dispute resolution process. With reference to those issues which now form the basis of the current initiative, these included:

- Adherence to a litigation model in which the pace of pre-hearing preparation has been left largely to be determined by the parties themselves. Although case management conferences initiated by the Board have aimed at facilitating the pre-hearing process, they have tended not to be particularly directive in moving the parties toward an early hearing of their dispute.
- Adherence to a service delivery model which, despite the large proportion of cases that do settle late in the pre-hearing process, has been overly focused on the Board's adjudication of the dispute rather than on its facilitation of early dispute resolution through mediation or case settlement conferences, with the potential efficiencies in time and costs and the overall increased level of satisfaction for the parties that could result.

At the conclusion of its own service delivery review, the Board included the following recommendations relevant to the current initiative:

- The Board will endeavour to expedite the pre-hearing process through earlier, more rigorous and more directive case management.
- The Board will introduce early dispute resolution through mediation or case settlement conferences into its process in order to reduce the number and length of compensation hearings, save costs, and avoid inconvenience created by late adjournments and settlements.
- The Board will pursue statutory and regulatory revision authorizing formal case management and early dispute resolution processes.
- The Board will pursue statutory and regulatory revision enabling part-time members to participate in the case management and early dispute resolution processes, with the power to make binding orders or directions, and to participate more fully in interlocutory decision making.

1.3 The BCEA/ECB Liaison Committee

On April 19, 2002, the chair of the Board wrote to the president of the Association seeking the Association's participation in the design of case management and alternative dispute resolution processes before the Board.

As a result a Liaison Committee consisting of six members of the Board and six members of the Association was created. The president of the Association, who was not formally a member of the Committee, also volunteered his participation in some of the discussions.
The Liaison Committee as a whole met in Vancouver on three occasions: June 25, August 19, and October 10, 2002. Additionally, at the conclusion of the first meeting, three Subcommittees were formed to undertake more intensive review of particular aspects of the initiative and to report back to the Committee as a whole on their discussions and any recommendations. The three Subcommittees were: (1) Case Management; (2) Alternative Dispute Resolution; and (3) Tariff/Cost.

2. SUMMARY OF RECOMMENDATIONS

The following general recommendations proceed from discussion of design and implementation issues around case management, alternative dispute resolution, and their cost implications by the Liaison Committee as a whole following consideration of the three Subcommittee preliminary reports. The recommendations are set forth at this point for the purpose of encouraging further discussion and input from the membership at large of the Association.

2.1 Case Management

- All cases which appear to be proceeding toward hearing would benefit from a Board-directed and mandatory case management process. Case management conferences would be mandatory at the instance of the Board or upon request of one of the parties.
- The process would, however, be flexible, recognizing that larger and more complicated matters are likely to require more intensive attention than shorter, simpler matters and that some cases, such as those involving complex business loss claims, may require a longer period of pre-hearing maturation in order for proper loss estimates to be made.
- The Board would not intervene with case management too early in the process. Normally, case management would not commence before the parties have exchanged their pleadings (the Form A and the Form B). In most cases it would begin at the point at which the parties seek to have the matter set down for hearing.
- Earlier and binding deadlines would be established for key steps in the pre-hearing process, particularly as to discovery and the exchange of expert reports. An amendment would be required to the *Practice and Procedure Regulation* to expand the timeframe which currently governs exchange of expert reports under the *Evidence Act*.
- A mandatory pre-hearing conference would be held in every case approximately 60 days before the hearing is scheduled to ensure that the parties are or will be ready to proceed.
- The parties themselves, in addition to their legal counsel, would normally be in attendance at case management conferences.
- Other Board members, in addition to the chair and vice chair, would be authorized to conduct case management conferences and make binding orders and directions.

2.2 Alternative Dispute Resolution

- The model that would best serve the needs and interests of the parties is interest based mediation.
- Interest based mediation would be mandatory at the option of either party or at the direction of the Board. However, Board sponsored mediation would not be intended to supplant other efforts by the parties to settle the matter themselves through negotiation or outside mediation.
- Alternatives to interest based mediation, such as a case settlement conference or neutral evaluation conducted by the Board, would be made available by agreement of the parties.
- The case management process would be used by the Board to determine the desirability or timing of mediation or the timing of other early dispute resolution processes in a particular case.
- Full provision would be made to protect the confidentiality of mediation or other early dispute resolution processes.
- The person conducting the mediation or other early dispute resolution process would either be a member of the Board or an outside appointee. Where the person conducting the mediation is a member of the Board, the member would not subsequently act as an adjudicator in the case.
- To ensure adequate preparation and facilitate effective mediation, the parties would be required to deliver mediation briefs prior to meeting.
- The parties as well as their legal counsel or other professional advisors would participate in the mediation or other early dispute resolution process.

2.3 Costs

Preparation for and attendance at mandatory case management conferences and mediation or other case settlement conferences necessarily require that owners will incur legal and other professional costs. The *Tariff of Costs Regulation* would be amended to help indemnify the owner against such costs and facilitate effective participation.

There are a variety of possible options for dealing with the costs of case management and mediation under the *Tariff*, but having a range of units per day, for example, between 1 and 5 units for case management and between 1 and 10 units for mediation, with units also provided for preparation, would offer maximum flexibility. The *Tariff* currently provides for 15 units per day up to a maximum of 60 units for negotiations leading to settlement, but only if settlement is actually achieved.

To alleviate concern over the potential cost to both parties of mandatory mediation, the rules might provide that mediation conferences would be set for a period of only a half day or a full day, and that the parties would to have to agree to continue mediation efforts beyond the initial time that had been booked.

Costs would also be used as a mechanism of enforcement, to ensure attendance at mandatory case management, mediation or other case settlement conferences, and to encourage compliance with mandatory orders or directions of the Board.

Amendments would be made to the costs provisions of the *Expropriation Act* and the *Tariff of Costs Regulation* which adequately reflect the cost consequences of either party's failure to attend or comply.

3. STATUTORY AND REGULATORY CHANGES

In consultation with the Liaison Committee, the Board will be working with the Dispute Resolution Office and Secretariat and the Legislation Division of the Ministry of Attorney General to finalize the design of its case management and alternative dispute resolution processes, including necessary provisions as to costs.

The intention is to go forward with required changes to the *Expropriation Act* during the Spring 2003 Session of the Legislature. This, in turn, will likely require that legislative amendments be clearly identified during the month of November, 2002. Changes to the *Practice and Procedure Regulation* and the *Tariff of Costs Regulation* are perhaps less time sensitive, but the Board is hopeful that these amendments will also be finalized and proceed in time to bring the current initiative into effect during the first half of 2003.

For discussion purposes only, an outline or draft of proposed changes to the *Expropriation Act* follow:

1. To Broaden the Authority of Part Time Members

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

The policy objectives underlying the proposed amendment are:

- to facilitate the Board's current initiative to introduce early dispute resolution into its processes by allowing a member to conduct case management, mediation and case settlement conferences, with the power to make binding orders and directions.
- To improve the timeliness of decision making processes by allowing, at the chair's discretion, the wide range of interlocutory matters that often precede a compensation hearing, and which presently can only be heard and decided by the chair or the vice chair acting alone, also to be heard and decided by other members of the Board acting alone.

2. To Authorize Rules for Case Management and ADR Processes

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

3. To Broaden the Penalty Provisions under Section 47

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

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

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

5. To Incorporate Penalty Costs under Section 45

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

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

6. To Make the Foregoing Amendment Applicable to Advance Costs

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

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

An amendment would be sought to section 45(4) to avoid the circumstance where settlement of an issue might lead to a calculation which deprives the owner of automatic entitlement to costs.

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

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