THE COSTS OF EXPROPRIATING IN ALBERTA AND MANITOBA

FRANCIS C. R. PRICE*

The last decade has seen sweeping changes in Canadian expropriation law. Beginning with Ontario, many of the Provinces and the Federal Government have enacted legislation that introduces completely new provisions relating to procedure and compensation in expropriation cases. Among the most significant changes is the change in approach to the matter of costs involved in the expropriation and this article examines the costs provisions in the Expropriation Acts of two Provinces that have enacted new expropriation legislation, Alberta and Manitoba. This article discusses to what extent an expropriated owner should have his costs paid by the authority that takes his land, and what limits should be set on the authority's liability to indemnify the owner from all the costs he may incur.

Probably one of the most striking changes of the recent expropriation legislation[1] is the approach taken towards the matter of the costs involved in expropriation proceedings. In this article it is proposed to examine the costs provisions in The Expropriation Act of Alberta[2] and Manitoba.[3] Attention will be paid mainly to the costs involved in determining compensation, but much of what is written in relation to those costs will apply equally to costs involved at other stages of the expropriation proceedings.[4]

In Alberta, s. 37(1) of The Expropriation Act provides as follows:

> The reasonable legal, appraisal and other costs actually incurred by the owner for the purpose of determining compensation payable shall be paid by the expropriating authority, unless the Board determines that special circumstances exist to justify the reduction or the denial of costs.

In Manitoba, s. 43 of The Expropriation Act refers to

> . . . such legal appraisal and other expenses incurred by the owner for the purpose of preparing and presenting his claim for due compensation as the Court deems just and reasonable . . .

The new legislation is based on the principle of total economic reimbursement, and the provisions regarding costs follow this principle in an attempt to ensure that the expropriated landowner does not suffer financially simply because he decides to challenge the amount of compensation that he has been offered for his land.

(i) Party-and-Party or Solicitor-and-Client Costs?

In Alberta, under the former Act, The Expropriation Procedure Act,[5] s. 28(4)(c) and s. 35(2)(f) gave the Public Utilities Board the power to determine "the costs of and incidental to the application and by whom payable". Section 60(1) of The Public Utilities Board Act[6] provides:

> 60(1) The costs of and incidental to any proceeding before the Board, except as otherwise

---

* LL.B. (Hons.) (Melb.), LL.M. (Alta.), presently articling with the firm of Reynolds, Agrios & Mirth, Edmonton, Alberta.

[1] *Canada*—R.S.C. 1970, c. 16 (1st Supp.); *Ontario*—s.O. 1968-9, c. 36; *Manitoba*—S.M. 1970, c. 78; *New Brunswick*—S.N.B. 1973, c. 6; *Quebec*—S.Q. 1973, c. 38; *Nova Scotia*—S.N.S. 1973, c. 7; *Alberta*—S.A. 1974, c. 27.

[2] S.A. 1974, c. 27.

[3] S.M. 1970, c. 78.

[4] See part (v), *infra*.

[5] R.S.A. 1970, c. 130.

[6] R.S.A. 1970, c. 302.

> provided in this Act, are in the discretion of the Board, and may be fixed in any case at a sum certain or may be taxed.

Under the old legislation the practice of the tribunal assessing compensation was to allow costs of the proceedings, taxed as between party-and-party, in all cases where the amount of compensation awarded exceeded the amount offered to the landowner by the expropriating authority. In addition the expropriated party would usually receive the costs of obtaining an appraiser's report, although the witness fee allowed would not always cover the cost of the appraiser's attendance at the hearing.

Under the new Expropriation Act in Alberta it is clear that costs are to be awarded on a solicitor-client basis. Section 33(1) of The Ontario Expropriations Act,[7] like s. 37(1) of the Alberta Act, contains the words "reasonable legal, appraisal and other costs actually incurred by the owner . . .". In *Salvadore* v. *The Minister of Highways*,[8] Taxing Officer McBride considered those words. He held that[9]

> . . . It is crystal clear from the words used in that section that the costs therein provided for are to be assessed with reference to the costs and expenses actually incurred by the claimant and not with reference to some Court scale.

He continued,[10]

> The reasonableness of the costs and whether or not they have been actually incurred "for the purposes of determining the compensation payable" are not only two of the factors to be considered when taxing the costs but they are the only two factors to be considered. And I have no hesitation in concluding that the reasonableness of the costs, at least in respect of quantum, can have no definable or measurable relation to the tariff of party-and-party costs of any Court.

Section 43(1) of the Manitoba Act, however, makes express mention of costs on a party-and-party basis:

> (1) Where the amount of due compensation to which an owner is entitled upon an expropriation is determined by the court and the amount offered by the authority is ninety per cent, or less, of the amount determined by the court, the due compensation shall be increased by the amount of such legal, appraisal and other expenses incurred by the owner for the purposes of preparing and presenting his claim for due compensation as the court deems just and reasonable and the authority shall pay costs on a party-and-party basis.

Section 43(2), which applies where the authority's offer is more than ninety per cent of the amount determined by the court, makes similar mention of party-and-party costs. In both subsections (1) and (2) a distinction is made between "costs" on the one hand and "expenses" on the other. The various "expenses incurred by the owner for the purpose of preparing and presenting his claim for due compensation" are to be included (in full if they are reasonable) in the compensation which the expropriating authority must pay. The "costs", *i.e.* those costs incidental to the proceedings, are payable on a party-and-party basis—presumably those laid down in the tariffs in The Queen's Bench Rules.[11] The distinction between "costs" and "expenses" was considered by the Court of Appeal (though in a different context) in *Weston Bakeries Ltd.* v. *Bakes Perkins Inc.*[12] Miller J.A., for the majority, disallowed over $22,000.00 in costs on the basis that they were not

---

[7] S.O. 1968-9, c. 36, R.S.O. 1970, c. 154.

[8] [1970] 1 O.R. 116, (1969) 1 L.C.R. 172.

[9] (1969) 1 L.C.R. 172, 173.

[10] *Id.*, at 174.

[11] Man. Regs. 26/45, as emended.

[12] (1960) 31 W.W.R. 200. The case involved interpretation of s. 100(1) of The Queen's Bench Act, R.S.M. 1954, c. 52, relating to the awarding of costs.

"costs" at all, but "expenses".[13] These "expenses" included consultations between solicitor-and-client, and consultation with and advice from experts, research, investigation and experiments by experts to get the facts on which to give their evidence. From the definition of "costs" and "expenses" in this case, it follows that in Manitoba, an expropriating authority is liable (if s. 43(1) applies) to pay for all expenses such as appraisal reports, reports on future potential, consultations and so on. The major difference from costs awarded in Alberta is that the attendance at the hearing to determine compensation comes within the meaning of "costs" and accordingly must be remunerated in accordance with the tariff established in The Queen's Bench Rules.[14]

(ii) Reasonable Costs Actually Incurred

The relevant provision in Alberta refers to reasonable costs (in Manitoba, reasonable expenses) that have been incurred in determining the compensation payable, and as noted above these are the only two factors to be considered when taxing costs.[15] However, other general principles are difficult to draw from the decisions of the assessing tribunals as to what are "costs actually incurred for the purposes of determining compensation" as costs have been determined on a case-to-case basis depending on the particular facts of the case.[16] Nevertheless, it is clear that costs incurred in pursuit of a contention that was not accepted by the tribunal will still be allowed if they are reasonable.[17] The time when such costs were incurred is immaterial, although, where the costs were incurred before the expropriation proceedings commenced, it may be difficult to show that they were actually incurred for the purpose of determining the compensation payable.[18] Finally, it should be noted that the words "actually incurred" do not mean that the bills must have been paid by the expropriated party. However, he must already have been billed for the costs—he must have received the bill or statement of account.[19]

The remaining question is how to determine what costs are reasonable. While it may be "reasonable" to retain senior and junior counsel, a highly qualified appraiser and sundry expert witnesses when a large area is being expropriated, is it reasonable to retain the same people for an expropriation of a pipe line right-of-way across a quarter section? In *Salvadore* v. *Minister of Highways,* Taxing Officer McBride stated:[20]

> The *quantum* of costs, and particularly of fees, must be reasonable, having regard to the amount of the award, the number and complexity of the issues involved, the time expended by the claimants' solicitors and expert advisers, the degree of skill and competence demonstrated by them and the degree of success realized in the proceedings.

In *Oriole Pharmacy* v. *Metro. Toronto* (No. 2),[21] the arbitrator, Moore Co.Ct.J. citing *Salvadore* held that, even though very little more money was awarded than had been offered, the costs were still reasonable (for the most

[13] *Id.*, at 214.

[14] The landowner is left to pay the difference between the amount agreed upon with the expert witnesses and the amount received under The Queen's Bench Rules.

[15] *Supra*, n. 10, *per* McBride, Taxing Officer, in *Salvadore* v. *Minister of Highways* (1969) 1 L.C.R. 172, 174.

[16] The following cases should be noted however: *Peloquin* v. *Junction Creek Conservation Authority* [1973] 1 O.R. 258; *Kalinin* v. *Metro. Toronto* (1970) 1 L.C.R. 177; *Shiner* v. *Metro. Toronto* [1972] 3 O.R. 557.

[17] *Smegal* v. *City of Oshawa* (1972) 3 L.C.R. 18, 21-2; *Genman Holdings Ltd.* v. *New Mount Sinai Hospital (no. 2)* (1974) 6 L.C.R. 186. If the costs are not reasonable, they will not be allowed: *Lake Louise Ski Lodge* v. *The Queen* [1968] 2 Ex. C.R. 401, 423-4, n. 27, *infra*.

[18] *Salvadore* v. *Minister of Highways* [1970] 1 O.R. 116, (1969) 1 L.C.R. 172.

[19] *Peloquin* v. *Junction Creek Conservation Authority* [1973] 1 O.R. 258, 266.

[20] (1969) 1 L.C.R. 172, 174.

[21] (1970) 1 L.C.R. 253.

part) because the issues that had been raised were complex ones. In *Seres* v. *Minister of Transportation* (No. 2),[22] it was held that, since the case was relatively simple, legal and appraisal expenses in excess of the amount in dispute were not reasonable and should be reduced.[23] In *Arsco Investments Ltd.* v. *Metro. Toronto*,[24] it was held that the case was not of such a complex nature that both senior and junior counsel were required at the arbitration. This case also provides a good example of an instance where overpreparation was not reasonable. Taxing Officer McBride felt that the appraiser's report represented a substantial degree of overkill. He continued:[25]

> I doubt if it would require a more elaborate written brochure and a greater expenditure of time and effort to sell the Brooklyn bridge.

The appraisal costs were reduced from $4,500 to $2,000. Costs for attendance by the experts at the hearing are costs which the expropriating authority must pay (at least in Alberta, although not in Manitoba), and it is reasonable that these experts remain at the hearing after they have given their evidence in case they have to rebut the testimony of the other side's expert witnesses.[26]

The case of *Lake Louise Ski Lodge* v. *The Queen*[27] is another example of an instance where costs were denied as being unreasonable. In that case Gibson J. denied the costs relating to two models which were of no use in determining compensation, and also denied the costs of preparing various grandiose possible schemes of development by an engineering company. His Lordship held that these schemes were of no assistance in assessing compensation and there was no reason for having gone to all the trouble and expense of producing the same.

It must be remembered that the costs under discussion are those which the expropriating authority has to pay to the landowner. The landowner will still have to pay an expert witness more than the amount awarded against the expropriating authority by way of costs in cases where that expert's account is found to be unreasonable. Taxing Officer McBride referred to this problem in *Smegal* v. *City of Oshawa*:[28]

> I add only that nothing I have said or decided in these reasons is intended to act as bar to the various experts collecting from the claimants payment in full of their respective accounts. These charges are a matter of contract between the individual expert and the claimants and I have no jurisdiction to interfere with that.

The sole exception to this rule relates to the lawyer. Where the costs awarded are solicitor-client costs, the lawyer is apparently bound by the award of the Taxing Officer with respect to those services for which costs are allowed as against the authority. He may not charge the client more for these services.[29]

---

[22] (1974) 6 L.C.R. 316.

[23] On the other hand, *see Re Johnson and Minister of Transport and Communications (No. 2)* (1974) 7 L.C.R. 296, where the Ontario High Court held that costs amounting to $84,000 were reasonable for the purposes of determining compensation of $60,000.

[24] (1972) 2 L.C.R. 312.

[25] *Id.*, at 315.

[26] *Smegal* v. *City of Oshawa* (1972) 3 L.C.R. 18. But where the claimants had expressed a lack of confidence in the work of their appraiser, it was unreasonable for them to expect the respondents to be required to pay for this appraiser's remaining at the hearing in an advisory capacity: *Seres* v. *Minister of Transportation (No. 2)* (1974) 6 L.C.R. 316.

[27] [1968] 2 Ex. C.R. 401, 423-4.

[28] (1972) 3 L.C.R. 18, 26.

[29] *Peloquin* v. *Junction Creek Conservation Authority* [1973] 1 O.R. 258, 266, (1972) 2 L.C.R. 101, 109. Although if the client asks the lawyer to spend extra time preparing his case, the lawyer can presumably bill the client separately for this overpreparation.

(iii) When are Costs to be Paid by the Authority?

Although the landowner may claim reimbursement for his reasonable costs, there are some circumstances in which he may not be entitled to any costs or in which he may even have to pay the expropriating authority's costs.

In Alberta, s. 37(1) provides that the landowner is to receive his costs, "unless the Board determines that special circimstances exist to justify the reduction or denial of costs". In Manitoba, the party who bears the costs of the expropriation is determined in part by the difference between the amount offered by the company to the landowner and the amount finally awarded by the assessing tribunal. Alberta's Act contains no similar provision, but if the proposed payment offered by the company is greater than the final award, the tribunal assessing compensation may decide that this constitutes the "special circumstances" under which it may reduce or deny costs.

One example of "the special circumstances" referred to in s. 37(1) of the Alberta Act may be provided by the case of *Junek* v. *Rural Municipality of Fertile Belt*.[30] In that case Geatros D.C.J. of the Saskatchewan District Court considered the amount claimed by four of the five claimants to be extravagant and unreasonable when compared with the award of the Court and further held that the offer by the municipality, although inadequate in the sense that the Court's award was greater than the municipality's offer, was not unreasonable when compared with the Court's award. The claimant must be making a *bona fide* attempt to obtain the amount of compensation to which he is entitled. By making an extravagant and unreasonable demand he effectively prevents any negotiated settlement and forces the matter before the relevant tribunal. Following the approach in *Junek* it may be that, in cases where a claim is made that is extravagant, the tribunal assessing compensation will decide that the claimant was not making a *bona fide* attempt to obtain compensation, so that special circumstances exist to justify the reducation or denial of costs.

Section 31(2) of the Alberta Act provides that an owner who withholds relevant information concerning his property may be penalized in costs, but from a reading of this section and s. 37(1) it appears that, unless the owner withholds information, the tribunal cannot award costs *against* him. Section 37(1) does not give the Board complete discretion as to costs. It only allows the Board to reduce or deny costs. Accordingly it appears that, in Alberta, no matter how unreasonable the landowner's action in refusing a generous proposed payment for instance, he will not have costs awarded *against* him.

The relevant section in Manitoba, s. 43, provides greater incentive for the owner to accept the statutory offer made by the company. Under s. 43(1), the statutory offer must be ninety per cent, or less, of the award before the authority automatically pays costs. If the offer is greater than ninety per cent of the award, s. 43(2) leaves the matter of costs to the discretion of the Court.

Three problems have arisen under the Ontario legislation which may also arise under the Manitoba Act. First of all, what if there is no offer? Secondly, what if there is more than one offer? Finally, what if there is no award? In *Four Thousand Yonge Street* v. *Metro Toronto*,[31] the ex-

[30] (1973) 4 L.C.R. 270.

[31] (1972) 2 L.C.R. 191, 199.

propriating authority made no statutory offer of compensation and The Land Compensation Board held that since there was no provision in The Expropriations Act dealing with this situation, the only section relating to costs, s. 33, was to be applied. Because "the offer" was effectively $0.00, the award was "eighty-five per cent or more" of "the offer". Accordingly the expropriating authority had to pay costs. However, the expropriating authority must be given an opportunity to make an offer. Thus, in *Pugliese* v. *City of Hamilton*,[32] where a (successful) claim for disturbance damages was first made at the hearing itself, the expropriating authority had no prior notice of the claim and hence had made no offer. The Board refused to allow the costs connected with this part of the claim.

If the expropriating authority makes a second offer, claiming it to be a statutory offer, which party is to pay the costs in the event that the award is more than the first offer but less than the second offer? In *Harvey* v. *Minister of Highways*,[33] the British Columbia Court of Appeal held that account should be taken of a second offer made by the Minister shortly before the arbitration hearing, and that the words "the sum offered" did not necessarily refer only to an offer made under one particular section of the relevant Act. Since this second offer exceeded the award, under the provisions of the Act the claimant had to pay the Minister's costs. However the statute involved in that case was The Department of Highways Act of British Columbia,[34] and it is clear that the reasoning in the *Harvey* case will not be applied to The Expropriations Acts of Ontario, in light of the decision in *Jakubowski* v. *Minister of Transportation*.[35] In that case The Land Compensation Board of Ontario held:[36]

> Section 33 would appear to contemplate only one offer and if that is a proper interpretation of the section then the offer must necessarily be that referred to in s. 25(1) as there is no other section within The Expropriations Act which makes provision for an offer.

Manitoba, however, has a provision, s. 16(2), which permits the expropriating authority to amend its offer at any time up to the hearing to determine compensation.[37] It is presumably the last of these offers that qualifies as "the amount offered" within the meaning of s. 43 of the Manitoba Act.

Finally, if the parties settle before the hearing, can the landowner still have his costs paid by the authority in appropriate circumstances? Section 37(3) of the Alberta Act provides that upon settlement, where the parties are unable to determine costs, the tribunal assessing compensation may determine costs in accordance with s. 37(1). Manitoba does not have such a provision in its legislation. The Manitoba Act refers to the amount of compensation *awarded* when determining by whom costs are payable. In the absence of any "award", the costs provisions seem to be inapplicable. In two Ontario cases before Taxing Officer McBride,[38] although this point does not appear to have been argued, an award of costs was made in favour of the expropriated claimant following a negotiated settlement, as if an award of compensation has been made to him in accordance with s. 33(1) of the Ontario Act. In both cases the terms of the settlement were embodied in an

---

[32] (1972) 3 L.C.R. 55, 74.

[33] (1974) 6 L.C.R. 113.

[34] R.S.B.C. 1960, c. 103.

[35] (1973) 6 L.C.R. 29.

[36] *Id.*, at 44.

[37] Unless an amount has been certified by the Land Value Appraisal Commission (*q.v.*, *infra*) in accordance with s. 15, when the expropriating authority cannot offer a different amount without the Commission's approval.

[38] *Shiner* v. *Metro. Toronto* (1972) 2 L.C.R. 330; *Nazaret Construction Co.* v. *Scarborough* (1973) 4 L.C.R. 156.

order of The Land Compensation Board, which order also directed that costs be taxed pursuant to s. 33 of the Ontario Act. It remains to be seen whether the same award of costs would be made where settlement was reached without any reference to the Board (or the Court in the case of Manitoba). If an expropriating authority offers an amount by way of compensation which comes close to the compensation actually payable under the Act, but refuses to pay costs, the landowner may be put in the unenviable position of having to choose between accepting the settlement and paying his own costs, or refusing the settlement offer, going before the assessing tribunal, and perhaps finding that the amount offered exceeds the award so that he may have to pay his own costs and possibly those of the expropriating authority as well. The problem is accentuated under the Manitoba provision which allows for an amended offer at any time up to the hearing. Because the final offer governs by whom the costs of the action may be payable, the landowner may be faced with the risk of losing his costs because of an eleventh-hour offer by the expropriating authority which brings the case under s. 43(2) of the Manitoba Act.[39]

(iv) Costs of Further Hearings

Both of the statutes under discussion make express provision for the matter of costs on an appeal from the decision of the tribunal determining compensation. Section 37(4) of the Alberta Expropriation Act provides that the expropriating authority is to pay the costs of the appeal (on the same basis as payable under s. 37(1)) in all cases except where the owner appeals and is unsuccessful. In the latter case, costs are in the discretion of the Appellate Division. Subsection (4) and (5) of s. 44 of the Manitoba Expropriation Act provide that where the expropriating authority appeals, it must pay costs on a solicitor-client basis. Where the owner appeals, costs are in the discretion of the Court of Appeal.

What consideration should the Appellate Courts take into account when determining costs? In *Re Souter & Co. and City of Hamilton,*[40] the Ontario Court of Appeal stated that it was the intention of the Expropriations Act that a claimant should receive his legal and other costs, and this intention should be kept in mind by the appeal tribunal when awarding costs. Accordingly the Court awarded costs against the City on a solicitor-client basis.

If the result of the appeal is that the award, although reduced from the amount initially awarded, is still greater than the statutory offer of compensation, must the expropriating authority pay the owner's costs of the appeal? An affirmative answer was given to this question by the Appeal Division of the Nova Scotia Supreme Court in *Martell* v. *City of Halifax*[41] where the City, which had been successful in its appeal, nonetheless had to pay the owner's costs since the award, although reduced, was still greater than the amount offered by the City. On appeal to the Supreme Court of Canada,[42] the award to the owner was increased again, although not by as much as the amount claimed. Although Laskin C.J.C., for the court, did not refer to the award of costs in the Appeal Division, he ordered that "success being divided, the appellant should have one half of his costs in this Court".[43]

[39] Although costs do still remain in the discretion of the Court under s. 43(2). See the comments of the B.C. Court of Appeal in *Harvey* v. *Minister of Highways* (1974) 6 L.C.R. 113, 118-9.

[40] (1974) 1 O.R. (2d) 760, 5 L.C.R. 153.

[41] (1971) 2 N.S.R. (2d) 1.

[42] (1974) 9 N.S.R. (2d) 87.

[43] *Id.*, at 88.

It remains to be seen how the Appeal Courts in Alberta and Manitoba will exercise their discretion in cases where the owner appeals (and where he is unsuccessful in Alberta), and how far the Courts will allow the owner to take his case without any expense to himself.

As well as appeals from the judgment of the assessing tribunals, there may be further hearings before taxation officers to determining what costs are reasonable and are payable by the expropriating authority. These often time-consuming hearings in turn generate further legal costs and none of the provincial expropriation statutes provide any indication as to which party of parties is or are responsible for these costs. The determining factor is whether these costs are "incurred for determining the amount of compensation payable", and unfortunately the reported cases on point reach different conclusions. In *Nazaret Construction Co.* v. *Scarborough*,[44] Taxing Officer McBride was not prepared to award costs of the taxation reference as he felt that there was simply no provision for the award of these costs in the Act. Six months earlier, however, in *Shiner* v. *Metro. Toronto*,[45] the same Taxing Officer had said[46]

> . . . I think the cost of the legal services rendered in connection with the normal procedure for the taxation of the costs of the arbitration are payable by the authority.

Finally, in *Four Thousand Yonge Street* v. *Metro. Toronto*,[47] Taxing Officer Saunders cited the decision in *Madsen* v. *Metro. Toronto*[48] where Aylesworth J.A. said:[49]

> Accordingly, we remit the matter before us to the arbitrator for the sole purpose of the fixing by him of the reasonable legal, appraisal and other costs mentioned in the award.
>
> The question of any costs arising out of this additional hearing will, *of course*, be disposed of and fixed by him under [s. 33] of the Act. [Emphasis added by Saunders T.O.]

The Taxing Officer accordingly ordered the reasonable costs of the taxation to be paid by the expropriating authority. It appears that the balance of authority supports the view that the costs of the taxation reference are part of the reasonable legal costs awarded to the owner.

(v) Costs at Other Stages of the Proceedings

(a) Costs of the Inquiry

The provisions in the provincial Acts relating to the costs of the inquiry differ widely. In Ontario, for example, s. 7(10) of The Expropriations Act permits the inquiry officer to recommend to the approving authority that the expropriating authority pay a party to the inquiry a fixed amount (maximum $200) by way of costs.

Manitoba's provision, s. 4(3) of Schedule A to the Act, only provides for the remuneration of the inquiry officer, to be paid by the expropriating authority, but makes no mention of the costs of the parties.

In Alberta, however, s. 14(10) of The Expropriations Act states:

> The reasonable costs of the owner in connection with the inquiry shall be paid by the expropriating authority unless the inquiry officer determines that special circumstances exist to justify the reduction or denial of costs.

The wording of s. 14(10) is similar to that used in s. 37(1) dealing with costs

[44] (1973) 4 L.C.R. 156, 160.
[45] (1972) 3 L.C.R. 101.
[46] *Id.*, at 104.
[47] (1973) 5 L.C.R. 23, 28.
[48] (1970) 1 L.C.R. 27 (Ont. C.A.).
[49] *Id.*, at 39.

incurred in determining compensation and the principles discussed above will apply to these costs.

One important effect of s. 14(10) of the Alberta Act is that an owner can receive *all* of his costs of the inquiry (so long as they are reasonable).[50] On the other hand, in Manitoba an owner cannot obtain his costs of the inquiry, while in Ontario he is limited to $200. In neither of these two latter Provinces can an owner recover the inquiry costs under the compensation provisions of the Act, since any costs recovered under these provisions must have been paid *for the purposes of establishing the amount of compensation due.* An earlier inquiry to determine the necessity of the expropriation is not held for the purpose of establishing the compensation to be paid. Accordingly the expropriating authority is not liable for the costs thereof.[52] In Alberta, however, s. 14(10) preserves for the landowner the right to his reasonable costs of this initial inquiry.

(b) Costs of the Proposed Payment and Negotiations

Section 33(2) of the Alberta Expropriation Act states:

> The owner may obtain advice from any solicitor of his choice as to whether to accept the proposed payment in full settlement of compensation, and the expropriating authority shall pay the owner's reasonable legal costs therein.

In addition, s. 33(1) allows the owner at the authority's expense to obtain an independent appraisal of the expropriated interest (as well as the appraisal already carried out on behalf of the authority of which the owner will have a copy since it accompanies the Notice of Proposed Payment (s. 30)).

In Manitoba, unlike Alberta, there is a formal system of negotiation under the Expropriation Act quite distinct from informal settlement talks between expropriating bodies and landowners and since January 1st, 1971 the functions of the Land Value Appraisal Commission, originally established in 1965 under The Land Acquisition Act,[53] were extended to cover expropriations under The Expropriation Act. Once the Notice of Expropriation has been served, application can be made to the Commission by either the landowner or the expropriating authority, and the Commission will hold a hearing to determine the amount which the Commission estimates to represent the due compensation in the particular case.

The costs of the proceedings before the Commission are paid for by the expropriating authority (Expropriation Act, s. 15(5)).[54] Section 55(c), inserted in 1971,[55] gives the Cabinet power to prescribe the fees and charges before the Commission. These have been set at $100 per hour or part thereof,[56] and are to be paid to the Minister of Finance within 28 days of the hearing. The Land Acquisition Act[57] provides that at least two members of the Land Value Appraisal Commission are required for a quorum, but it would seem that the object of the negotiation procedure, to bring the parties together in the presence of an independent third party, can adequately be fulfilled by a single arbitrator, as in the Federal Expropria-

[50] In contrast to the Recommendations of the Institute of Law Research and Reform who recommended (at p. 31 of their *Report on Expropriation* (1973)) that the expropriating authority should *not* be liable for the owner's costs of the inquiry.

[51] S.M. 1970, c. 78, s. 43; R.S.O. 1970, c. 154, s. 33.

[52] *Peloquin* v. *Junction Creek Conservation Authority* [1973] 1 O.R. 258.

[53] S.M. 1965, c. 43, s. 11; R.S.M. 1970, c. L40, s. 11.

[54] This provision was inserted by s. 9 of The Expropriation Act Amendment Act, S.M. 1971, c. 79.

[55] Also by S.M. 1971, c. 79.

[56] Man. Regs. 11/72.

[57] R.S.M. 1970, c. L40, s. 11(9).

tion Act.[58] This would permit a fee of less than $100 per hour to be charged, and thus reduce the expense to the expropriating authority, and free at least one member of the Commission for other hearings.

However, just as the expropriating authority may have cause for complaint about the costs incurred, so the landowners may have similar cause. There is no section in the Act which specifically deals with costs (legal, appraisal or other) incurred at the negotiation stage. Section 15(5) refers merely to payment to the Government of the fees of the Commission, and the landowner is left to rely on the general costs provision, s. 43. Section 43, however, only allows the just and reasonable "legal, appraisal and other expenses incurred by the owner for the purposes of preparing and presenting his claim for due compensation". Does this section cover costs incurred at the negotiation stage of the proceedings?

The only cases on this point have arisen under the Ontario Act, which provides for a Board of Negotiation along similar lines to the Manitoba Land Value Appraisal Commission. None of the cases are of great authority and so the point must still be considered open to doubt, especially since the cases are in conflict. In two cases before Moore Co.Ct.J., in his capacity as arbitrator,[59] the claim for costs incurred at the hearing before the Board of Negotiation was rejected on the grounds that they were not incurred "for the purposes of determining the compensation payable". However, Taxing Officer McBride, in the cases of *Smegal* v. *City of Oshawa*[60] and *Christian & Missionary Alliance* v. *Metro. Toronto*,[61] refused to follow the approach of Moore Co.Ct.J., and held that costs incurred before the Board of Negotiation were costs incurred "for the purposes of determining the compensation payable". The *Christian & Missionary Alliance* case[62] provides the only reasoning supporting a particular interpretation. There the Taxing Officer contrasted the proceedings at the initial hearing before the inquiry officer with the proceedings before the Board of Negotiation. The former proceedings clearly have nothing to do with the amount of compensation payable and are not covered by s. 33 of the Expropriations Act. Instead the costs of the inquiry are separately provided for in s. 7(10) of the Act. However, there is no specific provision as to costs incurred before the Board of Negotiation. The Taxation Officer continued,[63]

> I do not find this strange because I think it is perfectly clear that these proceedings are part and parcel of the entire process set up by the Act for the determination of the compensation payable. The compensation payable is just as capable of being determined by negotiation as it is by arbitration.

This problem of the lack of clear authority is aggravated in Manitoba, since the words of the relevant section (s. 43) are not the same as those found in s. 33 of the Ontario Act. Is there a significant difference between the words "incurred . . . for the purposes of preparing and presenting his claim for due compensation" and the words "incurred for the purpose of determining the compensation payable". Can it be said that the landowner is "presenting a claim for due compensation" when he appears before the Land Value Appraisal Commission? The answer is probably in the affirmative, since the landowner is in a fashion presenting a claim to the

---

[58] R.S.C. 1970, c. 16 (1st Supp.), s. 28.

[59] *Kalinin* v. *Metro. Toronto* (1970) 1 L.C.R. 177, 179 and *Madsen* v. *Metro. Toronto* (1970) 1 L.C.R. 204, 207.

[60] (1972) 3 L.C.R. 18, 27.

[61] (1973) 6 L.C.R. 393.

[62] *Id.*, at 395.

[63] *Id.*

expropriating authority, which will provide a starting point for negotiations before the Commission, negotiations which may result in the settlement of the claim. However the reasoning in *Christian & Missionary Alliance* v. *Metro. Toronto* is not available in its entirety in support of the affirmative answer given above. While the Ontario Act, by s. 7(10), makes some provision for the owner's costs at the inquiry procedure, the Manitoba Act makes no provision except as to the costs of the inquiry officer himself (Schedule A, s. 4(3)), so that the same contrast made by Taxing Officer McBride cannot be made when interpreting the provisions of the Manitoba Act. However one sentence still remains valid: "The compensation payable is just as capable of being determined by negotiation as it is by arbitration". For this reason it is submitted that the legal, appraisal and other costs incurred at a hearing before the Land Value Appraisal Commission should be treated in the same was as costs in proceedings before a judge and should be determined according to s. 43.

(vi) Conclusion

The approach taken by the new expropriation statutes to the matter of costs is certainly one of the more significant changes of the recent legislation. The general principle behind this new approach was enunciated in the Working Paper on The Principles of Compensation produced by the Alberta Institute of Law Research and Reform in 1971:

> . . . the owner should not be out-of-pocket in any reasonable step he takes to determine the amount he should receive. He has not chosen to be expropriated.

Total reimbursement ot the expropriated party's reasonable costs has resulted in a much higher amount of costs being awarded in proportion to the amount of compensation being awarded.[64] This proportion of costs to compensation may be still higher in the case of expropriations for easements or rights-of-way where the final sum awarded by way of compensation is relatively small, and, when one remembers that the expropriating authority has its own legal, appraisal and other costs to pay, the proportion is raised yet further.

This very generous approach to costs has had a marked effect on expropriation proceedings under the new legislation. In Alberta, since the introduction of the Act on July 9th, 1974, not one single case has, to date, come before the Land Compensation Board or the Surface Rights Board for a determination of compensation.[64a] The reaction of the various expropriating authorities has been to settle at almost any cost. They can afford to make very generous offers and yet still pay less than they would if they proceeded to expropriation. In addition, settlement usually saves the authority all the time which would otherwise have been spent in drawn-out expropriation proceedings, and this saving of time is in itself a valuable asset.

One problem with s. 37(1) of the Alberta Act is that there is no link between the proposed payment and the final award, as there is in Manitoba to encourage the acceptance of reasonable proposed payments. In its Working Paper on The Principles of Compensation, the Alberta Institute of Law Research and Reform stated,

---

[64] For some of the more extreme examples of the proportion of costs to compensation, see R. B. Robinson, Q.C., *Report on The Expropriations Act (Ontario)*, October, 1974, pp. 16-17.

[64a] No longer true. On March 10th and 11th, 1976, the Surface Rights Board held the first hearing under the Act to determine compensation. This hearing was held after this article was submitted to the Editors, but before the final printing of the Law Review. However, as at 1st April, 1976, no decision in the case, *Northwestern Utilities Limited* v. *Casavant et al.*, has been rendered.

> To aid the negotiating procedure, there must be something consequent upon the negotiation offer and its acceptance or rejection.

Section 27(1) of the Alberta Act in fact makes no mention of the offer by the expropriating authority, but merely refers to "special circumstances". It is submitted that there should be expressed in the Act a direct connection between the offer and the final award which would furnish some objective guidelines along which to assess the costs, and would at the same time emphasize the dangers of refusing a generous offer.

The linking of the negotiation offer with the final award of compensation has, however, brought its own problems. In Ontario, which has a provision (s. 33) that automatically gives costs to the expropriated landowner if the award is 85 per cent, or more, of the offer, the basis on which costs are awarded has received severe criticism.[65] In his *Report on The Expropriations Act,* R. B. Robinson, Q.C. advocated the deletion of any reference to 85 per cent of the offer.[66] The offer itself should govern costs. This raises the further problem, already discussed, of which offer it should be that will govern costs. The prevailing judicial opinion in Ontario as evidenced in *Jakubowski* v. *Minister of Transportation*[67] would appear to permit only one offer to govern costs in that Province. Very often this is made with little information concerning the land to be expropriated especially in relation to such items as future potential and severance damages. It is hardly surprising that the expropriating authority underestimates the value of these items in making its initial offer. Manitoba, in s. 16(2) of its Expropriation Act, allows for an amendment of the statutory offer, and it is submitted that a provision permitting an amendment of the statutory offer up to and including the day before the hearing to determine compensation should be added to the Alberta Expropriation Act. However, Taggart J.A., for the British Columbia Court of Appeal in *Harvey* v. *Minister of Highways*,[68] pointed out the dangers of improper drafting of such a provision:

> I have reached this conclusion [that the landowner should pay the Minister's costs] reluctantly because it seems to me patently unfair that a property owner should be faced with the risk of losing the considerable costs of an expropriation such as this one because the Minister makes an offer a few days before the proceedings are to open.

His Lordship agreed with the trial judge that the relevant statute should be amended so that the landowner should still be entitled to his reasonable costs incurred up to the time when the last offer was made. The same solution was advocated by Mr. Robinson, Q.C.,[69] and it is submitted that the same approach should be adopted in the Alberta and Manitoba Acts.

One final provision which offers an interesting alternative approach to the awarding of costs is s. 50(1) of The Highways Act of Saskatchewan:[70]

> If 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 [under s. 45], the claimant shall pay all costs and expenses of the arbitration; and if 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 department shall pay all costs and expenses of the arbitration.

---

[65] Robinson, *Report on The Expropriations Act*, 1974, Ch. III.

[66] *Id.*, at 18.

[67] (1973) 6 L.C.R. 29.

[68] (1974) 6 L.C.R. 113, 119.

[69] *Report of The Expropriations Act*, 1974, at 18.

[70] R.S.S. 1965, c. 27.

This section serves the useful function of discouraging both extravagant claims by the landowner and unreasonable offers by the expropriating authority. With both parties attempting to "second-guess" the tribunal's actual award the chances of settlement before the hearing increase greatly. Such a provision merits consideration if a revision of the sections relating to costs is undertaken.

Mr. Robinson, Q.C, in his Report, stated that "the present provision for costs seems to presuppose a claimant's right to carry his case through to a full hearing without cost to himself". It is submitted that this is a fair presupposition in an expropriation case where the owner has been forced to incur these costs. The present provisions are, however, too generous if they are going to be interpreted in such a way that they permit overpreparation of the case by lawyers, appraisers or others representing the landowner. Mr. Robinson, Q.C., sums up the problem thus:

> As a general principle, an expropriating authority should have to pay solicitor and client costs reflecting economical and straightforward preparation. Service beyond that should be paid for by the client, if he wishes it.

In Alberta in particular, the Land Compensation Board and the Surface Rights Board have the opportunity to follow this principle in interpreting the new Act without the restrictions of precedent that affect their Ontario counterpart. It is to be hoped that these Boards will have the courage to depart from the Ontario approach when they feel that such a departure is warranted. A stricter approach to what costs are reasonable is advocated in the hopes that this will reduce the costly overpreparation permitted in many instances by the Ontario Land Compensation Board. Overpreparation of his case is the prerogative of any litigant, but it is unreasonable to expect an expropriating authority to pay for such a luxury.[71]

[71] As to the overpreparation of cases and the establishing of tariffs (in particular for appraisers' fees) see Robinson, *Report on The Expropriations Act*, 1974, pp. 19-22.