Lawyer And Appraiser Prepare For A Hearing

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Legal background of value: Thorson P. in Supertest Petroleum—the concept of "value" cannot be static; Market value—the willing seller and willing buyer; "Value to the owner" Pastoral Finance The Expropriation Act RSM Cap.E.190.

The most usual point at which lawyers and appraisers meet, either as allies or opponents, is on *expropriations. But* this is NOT always so and they may also meet in estate valuations, valuations for tax purposes (e.g. income tax or estate tax,) corporate purchases, sales, amalgamations, winding up and bankruptcies (e.g. valuing securities).

Different types of appraisal may call for some different factors to be considered.

A lawyer and an appraiser acting for the same client should get together at the very earliest moment when the client, either on the advice of the appraiser or the lawyer, envisages a dispute or possible future controversy about the value of property so that mistakes can be avoided. Both should always remember that the client's interest is important but that truth and integrity are paramount!

So, we sit down together to consider the factors of value to be taken into account. We remember that each is going to learn and profit from the other's expertise, and especially that the lawyer can never dictate to the appraiser the weight to be attached to any factor of value nor limit the investigation necessary to reach a true value for use within the statutory requirements. That is depreciation rates may vary with the purpose of the valuation—one rate for *business purposes*—one rate for *income tax purposes* within the limits of the act.

Let us, however, look at an "expropriation" proceeding as probably the most common reason for an appraisal.

We sit down together and look at the "Notice of Expropriation" and its date—because that governs the economic atmosphere (condition) in which the property value is to be ascertained.

We agree to see if, in the appraiser's opinion, the property is being used for its Highest and Best Use, which means its economic Highest and Best Use though not necessarily its aesthetic or social Highest and Best Use. These latter uses, if they are ever relevant to an expropriation are very, very rarely so where privately owned property is the subject of the expropriation.

If there is a question of whether the property is being used for its Highest and Best Use, then what that Highest and Best Use would be, when it would arise (because it might be some time in the future) and what the cost of fitting the property for such a use might be considered.

All of which may give rise to discussions about zoning, demolition costs, building costs, loss of revenue during alterations, carrying costs, projected commercial and industrial development and growth in the area, future rents and expenses and perhaps other matters. Some of these things may require the *expertise of architects, engineers, builders and economic advisers* to support an appraiser's analysis and judgment in arriving at a reasonable value to the owner on the date of the expropriation. This, I should think, is particularly so today when inflation and rising interest rates are making the time honoured rules of thumb for ascertaining present value, for example, obsolete or inapplicable.

The lawyer at this conference will expect to be guided by the appraiser in settling the factors which will have to be considered in the case before them and the appraiser must not allow himself to be led into giving an opinion on too little evidence or into omitting from his report any relevant evidence especially on a plea of economy or on the basis that the tribunal itself would be familiar with the environment and the inclusion of details of the locality would be superfluous. In the first place the tribunal may properly refuse to take "judicial notice" of unproved facts no matter how familiar with them it may be, and secondly, even if the tribunal of first instance does so, an appellate court 300 or 400, or 1000 or 2000 miles away may, because of complete ignorance of the locality, be unable to do so.

Such omissions are false economy and if a lawyer or his client are too obtuse to recognize this then the appraiser should make it clear and refuse to give an opinion at all unless supported on a proper base.

There are, of course, cases where the amount involved in dollars and cents does not warrant an extensive investigation or full dress report. In these circumstances an "off the cuff" estimate may be justified if the client is made fully aware—*in writing* by the appraiser and, preferably by his lawyer as well, of the fact that such a value is in reality an unsupported guess. Usually in such small matters the difference between an owner's appraiser's estimate and the amount offered by the expropriating authority is hardly worth litigating and would be eaten up in expense. This both lawyer and appraiser should be able to see at a very early date and so advise their client.

Both lawyer and appraiser should recognize the limitations of their expertise—a very humiliating exercise, but very necessary. The appraiser has many facilities for investigating sales, availability of alternative sites, zoning, prevailing rents, leasing conditions and so on, from available listings and statistics; all of which, though technically hearsay evidence, the courts in Canada will admit. The lawyer should know how best to put the appraiser's evidence, including the appraisal document itself, before the tribunal, and how it can be best embellished by the appraiser's oral testimony. He should also be able to pick out the 'soft spots' and have the appraiser prepared to deal with them in evidence-in-chief rather than have to do so in cross-examination. Many such "soft spots" can be eliminated or hardened by intelligent discussion and cooperation of lawyer and appraiser *before* the appraisal report is completed and before opposing counsel can get his finger on it. Often the "soft spot" itself is not too essential to the final opinion of value, but once attacked it can affect the credibility of a whole appraisal.

An essential aspect of expropriation is the interest in property which is being interfered with, e.g. is it the "fee simple,"

i.e. the freehold; is it a leasehold—if so, what is the term and its advantages to the tenant. Is it "fee simple" subject to a lease, or life-tenancy, and how much does this detract from the "fee simple?" or enhance it! Is it a "life tenancy," then what is its present value?—life expectancy; is it an easement? What effect will its taking have on (a) the dominant tenement; (b) the servient tenement (e.g. on surface rights where there are Hydro lines, etc.). Is it "mineral rights" (included in the freehold?), their extent or exhaustibility; is there "injurious affection."

There must be at the very outset a full appreciation by the appraiser of the legal meaning and effect of each of the above "estates" and the effect on them of expropriation, so there must be a close liaison to make certain that lawyer and appraiser are not at odds in definition or meaning at a hearing.

In "partial takings" the question of *access* to the remaining land is of great importance if it is interfered with or altered adversely. On the other hand it may be improved to the point where the value of the remaining land is enhanced to a greater extent than the value of the land taken.

Where an owner's farm land is divided by a highway or a right-of-way, besides the value of the land actually taken there is frequently a loss of crop for an undetermined period of years to be considered, extra cost of time and fuel used to reach the severed land, cost of extra fencing, interference with drainage and probably other things which do not spring to mind at this moment. Proof of any of these adverse effects is often not difficult to demonstrate, but putting a "value" on them for a "disturbance" claim is extremely hard because they involve both assembly of facts from the past and a projection of inferred facts into an uncertain future. Who today, even on the evidence of past performance can forecast what crops would have grown on the land next year or for undetermined years hence; or what prices might be obtained for them, or what production costs may be in years to come? In a period of increasing inflation an owner whose future loss is based on past gains may well come out on the short end of the stick, but a *value* must be reached for the land by the tribunal. When considering the factors I have just mentioned one must also keep in mind that "compensation" takes the place of the land, and "disturbance," and that if the owner wishes he may invest the compensation and replace the net income with interest. Assuming that the cost of money keeps pace with prices perhaps he may not suffer so much as he anticipates.

Two other things I should mention: First, the appraiser's inspection of the property and neighbourhood and the great care and detail in which it should be done; second, the choice of "comparable" property where a use different from the existing use is not contemplated as the Highest and Best Use.

As for the first—if the appraiser needs other expert advice to assess structural soundness, depreciation, adaptability, life expectancy, obsolescence, etc., let others be called to advise. On "cosmetic" conditions such as paint, stucco, general appearance and appropriateness to the neighbourhood—the appraiser's opinion is probably as good as anyone else's. Environment e.g. market suitability of location, type of business, development, may require some other consultant but generally is within an experienced appraiser's field.

As for the second—keep your "comparables" close at hand both in *time* and *space*. If you can find no recent sales of *comparable* property it is probably better to abandon that approach entirely because so called "comparables" present a field day for the skillful cross-examiner and a morass for the unwary appraiser.