

# Characteristics of an **Expropriation Appraiser** for Litigation Support

*Litigation support is defined by Barron's Business Dictionary as "any professional assistance non-lawyers provide to lawyers in the litigation process. Those involved in litigation support ... perform investigative accounting, auditing, and tax determinations, provide expert testimony, or produce financial valuations in dispute situations."*

In appraisal circles, litigation support relates to many different situations requiring valuation services: expropriation, appraisal review, divorce, fractional interests, encroachments, foreclosure and bankruptcy, losses due to delay in closing contracts, and lease-rate disputes. This article will discuss the desired characteristics of a litigation appraiser specific to expropriation.

BC's *Expropriation Act* defines market value: the market value "...of an estate or interest in land is the amount that would have been paid for it if it had been sold at the date of expropriation in the open market by a willing seller to a willing buyer." Market value under the *Expropriation Act* is not the same as that under traditional appraisal definitions, due to limitations under Section 33 of the *Expropriation Act*.

Expropriation reports that determine market value can be very complicated, especially as the date from which the value is being determined may be well in the past. This is why under BC's *Expropriation Act* (Part 6) only professionals holding the SR/WA (Senior Member, International Right of Way Association) designation, or the AACI (Accredited Appraiser Canadian Institute) designation, can prepare expropriation reports—and they must do it themselves without assistance.

## **CHOOSING A LITIGATION SUPPORT APPRAISER (EXPERT WITNESS)**

Litigation support in expropriation cases is growing in BC as infrastructure is built and replaced. Make sure you are well represented and your property is valued correctly by people who know the rules, the relevant Acts, and the accepted expropriation valuation techniques.

When choosing a litigation appraiser, you should interview the appraiser on the following four items:

### **1. Understanding of Part 11 (Experts) of the BC Supreme Court Civic Rules**

New BC Supreme Court Civic Rules took effect in 2010. Rule 11-6 clarifies when reports must be served to the parties involved so there are no surprises. It also has the court permitting the experts to come to statements of common facts, in the hope that this will speed up the process. The court can call

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Jeremy is a Director of the Canadian Property Tax Association (BC Chapter) and has previously served as Education Chair for the Appraisal Institute of Canada (Vancouver Chapter). He is a member of these and many other organizations: BC Expropriation Association, Mortgage Investment Association of BC, Real Estate Institute of BC, Real Estate Institute of Canada, and Urban Development Institute - Pacific Region.



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up an appraiser to help clarify issues between both parties' experts under Rule 11-3 (Appointment of Joint Experts), Rule 11-4 (Appointment of Own Experts), or under Rule 11-5 (Appointment of Court's Own Expert). These rules each have requirements for timing and the production of experts.

## 2. Comfortable on the stand

Tell the appraiser that he or she should expect to be called up to the witness box and ask what experience the appraiser has with providing courtroom testimony. The witness box can be a place of fear or a place of redemption, but most appraisers will refuse the assignment if they know they will be called up to testify. Find an appraiser who is willing and able to testify—the appraiser must be able to stand under pressure to explain his or her professional opinion.

## 3. Background in your area of dispute

Generally, it is best to find someone who has recently done an appraisal for your class of property and who makes you comfortable about his or her level of understanding on the subject. You want an appraiser who has confidence and credibility.

Look for appraisers with an expropriation background. A good place to start is the BC Expropriation Association, the largest speciality group in the province. Also look for appraisers who have a balanced view—those who have done expropriation work for both government clients and private landlords, rather than generating a high proportion of their revenue from government contracts. Ethical land agents working for the agency taking the site should not refer or comment on a specific firm or appraiser/consultant as this is a potential conflict of interest. Check out firms' websites for the clients they service.

Education is also important. The International Right of Way Association (IRWA) has several courses on the subject of expropriation, though UBC has the only course with Canadian subject matter.

## 4. Understanding of the relationship between clients, lawyers, expert witnesses (appraisers) and judges

The client wants the appraiser to value the property in their favour. Lawyers want to achieve the client's goal, but their strategy may be different from their client's. Lawyers also want to control the message (how the value is presented), while experts want to deliver their carefully thought-out report with its supportable conclusions and lead others to the same results. Some experts may wish to educate the lawyer or judge along the way.

Judges are ex-lawyers who may have been very good at one area of law, but it may not have been in real estate appraisal. They may not always appreciate how lawyers want to control the message, and judges are even less appreciative if the testimony appears biased. Judges tend to be skeptical about experts becoming part of the legal team as opposed to remaining an unbiased third party (witness).

Litigation appraisers must have an understanding of this complicated web, and must only provide objective reports and testimony. Credibility can be earned, but once lost is gone forever.

## EXPROPRIATION APPRAISAL SERVICES ARE WORTH THE COST

Expropriation appraisal fees are always higher than for typical financing appraisal. Litigation reports require more work to achieve due diligence, including things not done in a typical financing appraisal: a review of the current Title and all charges; a historical Title review (usually); and more in-depth analysis of all comparables, including speaking to at least one party in each sale or lease transaction. Reviews of comparables may lead to in-depth reviews of the comparables the appraiser has isolated, as well as those that the land agent's appraiser has provided. Partial or temporary takings require reviews of statutory plans. More time is spent on review and analysis. In addition, many appraisers in the field have some understanding

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of possible legal damages available and this information can also be included in the report.

Most lawyers require an early draft and want to meet with the appraiser to review the report. There may be issues relating to strategy or to the comparables the appraiser has mentioned. More investigation may be required. All of the time and supplies required to complete the report are factored into the cost.

From the day of notification that property is being appraised by an expropriating authority to the date that property is actually taken can be a long period—in some cases years—and markets change. Asking for quarterly or semi-annual reviews is not out

of line depending on the market. A lawyer can coordinate these updates with an appraiser.

Despite the potentially high cost for expropriation appraisal services, Part 6 of the *Expropriation Act* requires that all parties being expropriated are entitled to reimbursement of appraisal fees, including fees for updates. In some cases, fees can be reimbursed before the actual taking of the land. In other words, the fees are immaterial since the expropriating authority (utility or government) will repay the client for purchasing appraisal services. There's no reason not to invest in these valuable professional services.



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