

REVIEW

Expropriation in Canada: a practitioner's guide

By Kenneth J. Boyd
Aurora: Canada Law Book, 1988
178 pp.

Cameron Harvey*

IN THE FOREWORD, Eric Todd points out that as the full-time chair of the Alberta Land Compensation Board since 1974, Ken Boyd "has heard more...cases, determined more...claims, and drafted more reasoned...awards than any other individual in Canada." To give some perspective to Professor Todd's statement: the Land Compensation Reports have reported approximately 175 of Mr. Boyd's decisions. I have been his part-time counterpart in Manitoba since 1977; my total number of reported cases is 50. When the substance and articulateness of his decisions are also taken into account, it is fair to say that we are not in the same league. I dare say that Mr. Boyd has no peer in Canada among the expropriation compensation adjudicators. Given that Mr. Boyd has been in the thick of the action for so long and that he is such a thoughtful, articulate person, I eagerly looked forward to his book. I have to say that I am somewhat disappointed.

I was hoping for a book to replace Professor Todd's excellent, but now dated, 1976 book; I was hoping for a companion piece to *New Law of Expropriation* by Coates and Waque. Indeed, the title of Mr. Boyd's book suggests that it is such a book: a comprehensive, albeit not exhaustive, treatment for lawyers of the federal and provincial common and statute law relating to expropriation procedure and compensation. However, that is not the nature of the book at all. Rather, it is a collection of essays by the author on 11 topics with three kinds of practitioners in mind: namely, lawyers, expert witnesses, and compensation tribunal members. The topics of the essays are: the changes wrought by the so-called reform expropriation statutes; highest and best use; partial taking compensation; adjustments in the direct sales comparison method; sales to an expropriating authority; the cost method; continuing fixed agricultural costs compensation; interest on awards; expert witnesses; the role of the lawyer, and; decision writing. The most signi-

ficient essays are those dealing with compensation in the case of a partial taking, sales to an expropriating authority, the cost approach, and the role of the lawyer. The other essays, while worthwhile, deal with matters which are of limited interest, either because they are infrequently problematic in compensation cases or because of their potential readership. Based on my experience, the former category would include the essays on highest and best use and direct sales comparison adjustments. Of course, my experience reflects the compensation process at the provincial level in Manitoba, which may not be representative of what occurs in other provinces and at the federal level. In the latter category I put the essays concerning fixed agricultural costs compensation, expert witnesses, and decision writing.

Curiously, there is no reference to Manitoba legislation in the essay dealing with partial taking compensation. Our legislation is similar to that of Nova Scotia and New Brunswick in respect of the before and after method; it is unique in respect of our section 27(4), which legislatively proscribes, in certain circumstances, what Mr. Boyd calls the "small parcel" method and mandates what he calls the *Bonaventure* and *Kerr* rules. I certainly agree with Mr. Boyd's Reservations about the before and after method. It is seldom used in Manitoba. Appraisers usually deal separately with the market value and injurious affection compensation payable. When the before and after method is employed in cases where the determination of the due compensation payable precedes the construction of the public work involved, I am usually very skeptical of the after valuation. While before valuations can be presented on a fairly convincing evidential basis, after valuations strike me as being guesses, more or less.

I think that the essay on expert witnesses may be of limited interest, only because appraisers comprise the largest constituency within the expert population; most of the appraisers who would be inclined to read the essay probably read the slightly different version which was published in 1985 in *The Canadian Appraiser*. Similarly, the essay on decision writing and, to a lesser extent, the essay on adjustments in the direct sales comparison method are reprints of articles published in *The Canadian Appraiser*. In each case, Mr. Boyd acknowledges the earlier publication.

In the essay on expert witnesses, a reference might have been included in footnote 9 to an article by Mr. Klassen in (1978) 22 (Bk. 2) A.I.M. 9. Perhaps it would have been worthwhile to add a segment to the essay dealing with the duty of care owed by experts; useful articles respecting appraisers have been published: J.R. Johnson, "The Legal Ramifications of Stating an Opinion" (1980) 24 (Bk. 4) A.I.M. 25; W.F. Foster, "Accidental Misrepresentations: The Problem of Liability and Its

Avoidance" (1981) 25 (Bk. 4) A.I.M. 16; P.J. Mastaglio, "Real Estate Malpractice" (1982) 87 (No. 5) Case & Comment 12, and; a paper by me entitled "Liability of Appraisers for Negligence", due to be published in *The Canadian Appraiser*.

The essay on interest is largely a plea for law reform. As Mr. Boyd points out, in the reform legislation jurisdictions other than Alberta there is very little scope for judicial or tribunal determinations with respect to the interest to be paid on the due compensation payable. Without wishing to detract from the excellence of the essay, I wonder about its inclusion in a "Practitioner's Guide"; maybe I am quibbling.

I hope that lawyers, even those who think that they are familiar with expropriation tribunal hearings, read the essay on the role of lawyers. There are two observations I wish to add. In the essay on the expert witness, preparation is stressed; it cannot be over-stressed with lawyers in regard to tribunal hearings, as well. I gather from leading counsel that it is their frequent experience (in connection with all manner of tribunal hearings) that their average colleague tends to take tribunal hearings less seriously, in all respects, than court appearances. It certainly becomes apparent when that is the case and there is no excuse for such service to clients. My other observation is with respect to cross-examination and argument: most lawyers engage in too much pointless cross-examination and argument and their final arguments could be much better. Many of them who really do not know what they are doing with their cross-examination would serve their clients far better if they cross-examined less and took the time to prepare a well-thought out argument – something which any lawyer should be able to do.

Regarding continuing fixed agricultural costs compensation and the approach of the Manitoba Land Value Appraisal Commission (with which Mr. Boyd deals at pages 97 and 99): I agree that the approach taken by the Alberta Land Compensation Board is the soundest approach and, without a doubt, the exercise involved is justifiable when thousands of dollars of compensation are involved. However, it seems to us in Manitoba that, in the common-place case involving only tens of or a few hundred dollars of compensation, the Alberta method makes the exercise of determining the compensation payable more expensive than the compensation is worth.

Mr. Boyd included a bibliography at the end of the book. For administrative law in general, he refers the reader to Reid and David's book. I think that their book is seriously dated; a more current introductory text is Jones and de Villars' *Principles of Administrative Law*.

I do not want to end this review on a critical note. I was hoping for a different kind of book from Mr. Boyd; the title is misleading; and I am

less enthusiastic about some of the essays compared to others. However, that is not to say that this book of essays is worthless; as one expects of Ken Boyd, the essays are all thoughtful and well-written. They are valuable additions to the Canadian expropriation literature, which can certainly use strengthening.

Now if only he would do a revision of Eric Todd's book...