Province of
British Columbia

Ministry of
Environment and Parks

ENVIRONMENTAL APPEAL BOARD
Victoria
British Columbia
V8V 1X5

APPEAL NO. 86/15 WAT

JUDGEMENT:

In the Appeal Against the order of the Deputy Comptroller of Water Rights, dated March 13, 1986.

APPELLANT:

Bird Creek Improvement District, Nelson, B. C.

RESPONDENT: Mr. H.K. Boas, Kamloops, B. C.

The Comptroller of Water Rights was given full party status, pursuant to Sec. 11(10) of the Environment Management Act.

The Appeal was decided by Mr. H.D.C. Hunter, Barrister and Solicitor, sitting as a Panel of One of the Environmental Appeal Board.

This appeal is against the order of the Comptroller of Water Rights regarding payment of the costs of an arbitration. The arbitration arose from an expropriation under the Water Act by Bird Creek Improvement District of a statutory right of way over land owned by Mr. Boas.

The Comptroller has fixed the costs of the arbitration as the amount of the arbitrator's fees and expenses. The District has submitted an amount of its own costs but the Comptroller has not ruled on this. In any event the amount is not a matter for decision by this Board.

By agreement of the parties the appeal has been handled without a hearing and depends on the submission of documents and written argument. The Comptroller submitted his documents and comments to the Board and to the two parties. Each party submitted its documents and arguments to the Board, to the other party and to the Comptroller. Each party has commented on or has acknowledged the opportunity to comment on the submission of the other parties.

The Board must express its appreciation for the submissions made by all the parties and for the clarity and detail in which they have put their positions and opinions.

The sole point in dispute is which of the two parties, the District or Mr. Boas should pay the costs of the arbitration. The solution depends on an application of the Regulations to the facts as shown by the evidence. The whole procedure for expropriation under the Water Act is governed by the Regulations enacted pursuant to the Act and in particular to Division 4 of the Regulations. This part is a complete code.

Regulation 4.11 reads:-

> "If the amount of the compensation awarded is not greater than the amount offered by the licensee, the owner of the land shall be charged with all costs of the arbitration proceedings, and if the amount awarded is greater than the amount offered, the licensee shall be charged with the said costs."

Thus neither the Arbitrator nor the Comptroller has any discretion in deciding which party bears "all costs of the arbitration proceedings".

The arbitrator's award was the sum of $1,800.00. The dispute arises because the District made three offers or purported offers, the last of which clearly exceeded the amount of the award, and the second may have exceeded this amount.

The Regulations do not permit the Arbitrator to make any ruling as to costs either as to amount or as to who should pay. It is therefore clear that whether the Comptroller made an error or not the award of the Arbitrator is not affected and it must stand. There is no appeal to this Board, nor could there be such an appeal on the amount of the award.

Sec. 4.111 of the Regulations require the Comptroller to use his discretion to fix the costs of the arbitration. He has done so, and again there is no appeal as to his decision on this point.

The Regulations do not permit the Comptroller any discretion as to who should pay. If the amount of the award is greater than "the amount offered" the licensee must pay, if the amount of the award is less than "the amount offered" the landowner must pay.

Originally the Director looked at the last apparent offer and on this basis ordered the landowner to bear the costs. After further investigation and a submission by the landowner, he decided that he could only look at the offer made before the arbitration proceedings were instituted and on that basis ordered the licensee to bear the costs.

Sec. 36 of the Water Act permits the Comptroller, on notice, to amend or revoke his order. This is what he has done.

The matter in dispute is therefore the proper interpretation of Regulation 4.11 and what offer or offers as contemplated by this Regulation were made and what was the amount of any such offer.

The chronology of significant events was as follows.

May 7th, 1984. Offer by the District addressed to Mr. & Mrs. Boas personally. (Offer A).
May 16th, 1984. Letter from Mr. Boas' lawyer in Prince George to the District objecting. It implied rejection; but did not do so in precise terms. The offer was not accepted within 30 days which is the time referred to in Regulation 4.04 and 4.05.
February 4, 1985. Comptroller nominates Mr. N. Robertson as sole arbitrator at a fee of $1,000 for a one day hearing.

April 22, 1985. Letter from Arbitrator to parties suggesting dates for a hearing and stating that Mr. Boas will not have counsel and giving a new address for Mr. Boas.
May 11, 1985. Amended offer from the District to Mr. Boas' lawyer in Prince George (Offer B). Offer B may or may not have been rejected, but it was automatically withdrawn by the District when it submitted Offer C. Offer B was for $1,500 and the value of the timber removed.
May 22nd, 1985. Further amended offer from the District to Mr. Boas' lawyer in Prince George (Offer C).
Also contains suggested hearing dates for June 1 or June 8.
June 1, Hearing held.

Mr. Boas claims that he never received Offer C and did not know of it until the hearing started. This Offer C was clearly in a larger sum than the award of the arbitrator.

The District as a licensee elected to acquire its rights pursuant to Division 4 of the regulations. Accordingly it complied with Regulation 4.01 and offered compensation (Offer A).

Regulation 4.04 requires the land owner, within 30 days to notify the licensee whether he would or would not accept the offer. In this case the letter of May 11, 1984, coupled with an ensuing silence must be deemed to be a rejection of this offer. In any event it was not accepted within 30 days. The District took this position.

4.05 provides that if the landowner fails to accept the offer "the compensation .... shall be determined as provided in the following sections". These following sections call up arbitration, and include 4.11 quoted above. Offers B and C were made after the arbitrator had been appointed. Of course if either of these offers had been accepted prior to the hearing there would have been an agreement and the arbitrator would have made an award in the terms of the agreement or perhaps would have held no hearing. That did not happen.

4.11 refers to "the amount offered by the Licensee". The only reference in Division 4 to an offer is that referred to in 4.01 and 4.04 and 4.05. There is no reference to "latest offer" or "offers" in the plural.

It is my ruling that the only offer to be considered as applicable to 4.11 is Offer A, the only offer made prior to the appointment

of the arbitrator.

The next matter to consider is the relationship of the amount in this offer to the award. As already mentioned the award was $1,800.

Offer A was

> "(a) the sum of $700, payable forthwith upon registration of the right of way.
> (b) net proceeds, if any, from the disposable of the merchantable timber removed from the easement land (note - net proceeds is equal to sales proceeds less logging and removal costs). Payment will be made within 30 days of the receipt of the proceeds from the purchaser of the logs".

The Comptroller tried to obtain evidence as to the value of the timber and logging costs. The evidence before him suggests a figure of less than $700. The District has subsequently provided evidence for a larger amount.

In my opinion the offer really amounts to $700. The amount of money to be received for timber removed from a narrow right of way away from roads is always difficult to estimate. This is emphasised by the words "if any" in the offer. However in this case the timber belonged to Mr. Boas, the right of way agreement does not seek to transfer ownership to the District, it merely contains authority to "trim or fell all or any trees" and to "clear the rights of way and keep them clear". Item (b) in the offer is void for uncertainty and also because it is based on a right which the District did not have or seek to obtain.

It is my opinion that Offer A is the only offer to be considered in the application of Regulation 4.11 and as that is clearly less than the amount of the award the District must pay the costs of the arbitration.

The order of the Comptroller of Water Rights contained in his letter of March 13, 1986 to the District is confirmed and the appeal is dismissed.

H.D.C. Hunter

26th September, 1986