

The Acting Chairman: Honourable senators, I think it might be well to hear from the minister on the point.

Hon. Mr. Turner: Mr. Chairman, basically, as I understand Senator Flynn's proposal, the claimant should be entitled to his costs if he contests before the Exchequer Court, in any event, provided that the amount of his claim, or the type of his claim, is not unreasonable.

Senator Flynn: His contestation.

Hon. Mr. Turner: I want to get to that point. We were concerned when we first looked at this proposal that it would make negotiations very difficult. In other words, if the owner of the expropriated interest were to know that his costs would be covered in any event then the negotiating procedure would not have such a binding influence on the parties.

Senator Hayden: You mean, by its intimidating effect.

Hon. Mr. Turner: You can put it in any way you wish. It might mean that the negotiations would be considered to be just a formal preliminary to proceedings.

We think that in terms such as this we could live with the amendment, first of all, because the court ordinarily awards costs to the claimant any way—and even within the terms of this bill there is a discretion given to the court. Secondly, we felt that it was likely that the court would tend to construe the word “unreasonable” that we have here against claimants if it became apparent that the negotiating procedure was not being used properly, and claimants were coming to the court as a matter of course. Obviously, the court would tend to interpret the awarding of costs in such a way as to not encourage a flood of litigation that did not have any reasonable basis.

First of all, I can accept Senator Flynn's amendment, so now we are just talking about how it should be drafted. What I am trying to achieve here is an objective test. I get a little nervous when we start talking about *bona fide* intention. A *bona fide* intention is a subjective test that has to be measured in objective terms by evidence. There must be some sort of evidence adduced. Therefore, I am looking for an objective test which the court can assess.

Secondly, I do not think there is much difference, if there is any at all, between contestation and compensation, because the only

type of contestation is over the amount of compensation. The only type of contestation that brings a matter before the court is the amount of compensation, and nothing else. The objective test that we felt was reasonable is the amount of the compensation he is seeking, reasonable under the circumstances. If the amount is reasonable then the contestation is reasonable, and if the amount is unreasonable then the contestation cannot be reasonable. I know there is a shading of difference, but I do not want to put the court in a position where it has to assess intention.

Senator Flynn: It can be based on the evidence adduced by the expropriated party. I suggest to you, for instance, that if the Government offers \$50,000 and if the expropriated party says he wants \$55,000 then the test would not be whether the amount claimed was unreasonable because it cannot be unreasonable to ask \$55,000 when you are offered \$50,000. But if on the *bona fide* advice of experts he claimed twice the amount offered it might be unreasonable if the court did not accept the viewpoint of the experts.

The Acting Chairman: Could we not marry the two ideas to the theme of “unreasonable” and “reflecting bad faith”.

Senator Flynn: If it reads “unless it finds the contestation made by such party in the proceedings to have been unreasonable”, it will be based on the evidence that is adduced.

Senator Croll: Mr. Chairman, if you start reflecting bad faith you are getting down to a basis that should not be there in a civil action. It is something which is completely foreign to it.

Senator Flynn: It is the contestation that has to be unreasonable; not the amount claimed.

Hon. Mr. Turner: Suppose the Government's valuation is in the neighbourhood of \$50,000, and suppose there is a special interest, history, or family tradition attached to the property. I am not talking about special use, because that is covered. Suppose the attachment that the expropriated owner has to the property really prevents him from having a reasonable attitude toward how it should be valued. He might be in good faith when he says that he wants \$150,000, and that he believes the property is worth \$150,000. Even though this man is in good faith in asking three times the value of the property, the court is put in a difficult position.