

# **OMBUDSMAN OF BRITISH COLUMBIA**

*Special Report No. 3*

*to*

*The Legislative Assembly  
of British Columbia*

## **THE CUTHBERT CASE**



Province of  
British Columbia

Office of the  
Ombudsman

Legislative Assembly  
8 Bastion Square  
Victoria  
British Columbia  
V8W 1H9  
Telephone: (604) 387-5855  
Zenith 2221

---

July 6, 1981

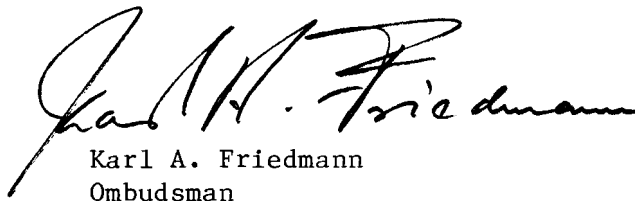
The Honourable Harvey W. Schroeder  
Speaker of the Legislative Assembly  
Province of British Columbia  
Parliament Buildings  
Victoria, B. C.

Mr. Speaker:

I have the honour to submit herewith a report to the Legislative Assembly, pursuant to section 30(2) of the Ombudsman Act, R.S.B.C. 1979, chapter 306.

The report concerns a complaint I received from Roy and Maureen Cuthbert of Delta, British Columbia, the investigation of this complaint by my office, and the recommendation I made to the British Columbia Harbours Board following this investigation. I have attached in the appendices to this report my correspondence with the British Columbia Harbours Board and the Ministry of Transportation and Highways.

All of which is respectfully submitted.

  
Karl A. Friedmann  
Ombudsman

OMBUDSMAN OF BRITISH COLUMBIA

SPECIAL REPORT #3

TO

THE LEGISLATIVE ASSEMBLY OF BRITISH COLUMBIA

AN INVESTIGATION BY THE OMBUDSMAN

INTO A COMPLAINT

RECEIVED FROM ROY AND MAUREEN CUTHBERT

OF DELTA, BRITISH COLUMBIA

July 6, 1981

TABLE OF CONTENTS

I. INTRODUCTION .....	1
II. THE FACTS .....	3
III. MY PRELIMINARY FINDINGS .....	11
IV. MY CONCLUSION AND RECOMMENDATION .....	14
TABLE OF APPENDICES .....	26

INTRODUCTION

The rights of the individual to his or her life, liberty, and property are highly cherished in this country and in this province and they are given the protection of law. However, the law also allows, in certain circumstances, that these rights may be overridden by the state where the public interest so requires. A statute empowering the government to expropriate land is an example of such a law.

The heavy hand of expropriation fell into the lives of Roy and Maureen Cuthbert on March 15, 1968, and their property was taken by force of law and immediately transferred into the name of the Crown. However, the land was never used for the purpose for which it was expropriated. Consistently refusing to accept all offers of compensation for the property taken, the Cuthberts struggled for years against successive governments in the attempt to have their land returned to them. But to no avail. On October 10, 1979, ten days after the Ombudsman Act was proclaimed, the Cuthberts contacted my office and made their complaint.

Roy and Maureen Cuthbert are the actual names of the complainants; they have consented to the use of their names in this report as an intelligent discussion of this case requires that I provide information which would make it easy to identify the complainants in any case. However, it not just a utilitarian consideration that led to the decision to use actual names. The Cuthberts felt strongly about their right to own and enjoy this property, as it has been in Mrs. Cuthbert's family since 1886, and they are prepared to state their case publicly.

This report sets out the relevant facts of the matter as I found them during my investigation, my findings and conclusions, and the recommendation which I made following the completion of my investigation.

THE FACTS

In an article entitled "Roberts Bank Development Project: Full Steam Ahead, Bennett Orders", the Vancouver Sun reported on March 7, 1968 as follows:

The B. C. government has built up a full head of steam to start developing a big deepsea provincial port at Roberts Bank and is confident its jurisdiction over the site cannot be upset by the federal government.

Premier W. A. C. Bennett demonstrated Wednesday his government's intention to act quickly by proclaiming a bill setting up the B. C. Harbours Board, and passage of an order-in-council appointing three of the seven members that board will eventually have.

Indeed the Government did act quickly; six days later, on March 12, 1968, a notice was published in the British Columbia Gazette establishing a large tract of land at Roberts Bank as "an industrial area for harbour purposes." Three days later, one of many similar documents signed by the Deputy Minister of Highways stated that:

Lot 1 of Lot 187, Group 2, New Westminster District, Plan 16007. Municipality of Delta. Certificate of Title No. 356841E has been entered upon, set out, ascertained and taken possession of by me, my agents, servants or workmen and that by such action and by virtue of section 9 of the Highway Act every title and claim to the lands so entered upon and taken possession of is completely extinguished.

The land above described is acquired on behalf of the British Columbia Harbours Board for the purposes of the British Columbia Harbours Act.

The property described in this notice had been owned, immediately prior to this notice, by Roy and Maureen Cuthbert, and had been in Mrs. Cuthbert's family from the time it was originally settled by her grandfather, Paul Swenson, in 1886. Mr. and Mrs. Cuthbert were not informed that their property had been expropriated until six days later and they received formal notice by registered mail on March 25, 1968.

As might be expected, the Roberts Bank community was stunned. All told, some four thousand acres of rich farmland were either expropriated or purchased by the Harbours Board. Following the expropriations, the government offered compensation for the properties taken and most people settled, either through negotiation or arbitration, in the following few years. Upon acquisition by the Board, most of the properties were leased back to the former owners and remained in agricultural use.

The Cuthbert property is a small residential lot among a sea of larger agricultural properties. Their lot is just under one-half acre in size and the house was built many years ago. About two weeks after the expropriation of their property, the Department of Highways (as agents for the Harbours Board) offered them the sum of \$23,500 as compensation. The Cuthberts refused to accept this



offer. On June 15, 1970, the Department offered the Cuthberts \$27,500 as compensation. Again they refused. By letter, dated January 11, 1971, the Department offered the sum of \$32,860 (an amount which included interest since 1968), and again the Cuthberts declined to accept compensation. At that time the Cuthberts requested a sum of \$48,000 in compensation. At no time, however, since 1968, have the Cuthberts accepted any compensation for their property.

The Roberts Bank Superport was never built in the form in which it had been originally designed. Most of the four thousand acres acquired by the Harbours Board in 1968 have been leased by the Board back to the original owners. In 1973, the Chairman of the Harbours Board, at that time the Honourable James Lorimer, announced that all four thousand acres would continue to be used as farmland and that future industrial development would take place only on land specifically reclaimed from the sea (the foreshore) and developed for that purpose. In that same year, the land was placed within the Agricultural Land Reserve.

In a letter dated February 25, 1974, the Minister of Agriculture at that time, the Honourable David Stupich, wrote that

the decision was also made that the 4,000 acres under control of the B. C. Harbours Board will be developed for agricultural use rather than reserved for further industrial development.

This policy was not altered by the present government. In response to a letter from a Member of the Legislative Assembly concerning the problems encountered by one of his constituents, the Honourable James J. Hewitt, Minister of Agriculture and Food, stated on November 14, 1980:

. . . it would be desirable to make a public commitment regarding the future use of these lands. As you know, we made some earlier moves toward transferring jurisdiction to the Provincial Agricultural Land Commission.

. . . . .

It is our hope and objective to see a transfer of title and leasing administration to the Land Commission so that the long-term agricultural leases can be instituted. I agree that the short-term leases currently used are detrimental in the long-term to the land asset.

Notwithstanding the abandonment by the government of the development of these lands for the purposes of the Roberts Bank Superport, the Cuthberts' numerous attempts to have the land returned to them have been consistently unsuccessful. A brief history of these attempts follows.

On October 10, 1974, the Cuthberts submitted a petition to the Lieutenant Governor in Council asking for the return of their property. The petition was first heard by the Environment and Land Use Committee (a committee which is composed of a number of Cabinet ministers), and the Committee recommended that title to the property be reconveyed to the Cuthberts. In a memorandum dated August 15, 1975, to the Honourable Ernest Hall, then Provincial Secretary, the

Honourable R. A. Williams, at that time Chairman of the Environment and Land Use Committee, wrote:

The opinion of the Committee was that the Cuthbert land was no longer required for industrial purposes and would not conflict with the future agricultural use of the property. The Committee therefore decided that the petition of the Cuthberts for release from expropriation should be granted and that the expropriation proceedings for this property should be halted.

However, the recommendation by the Environment and Land Use Committee was turned down by the Cabinet on October 5, 1975.

Following the change in government later in 1975, the Cuthberts resubmitted their petition. This time the Environment and Land Use Committee denied the petition, and the Cabinet also decided that the property should not be returned to the Cuthberts.

While I have not been able to discover the reasons why the latter Committee, and the Cabinet on both occasions, denied the petition, some of the advice given by various civil servants may reveal some of the possible reasons. The Executive Secretary of the Harbours Board wrote to the Chairman of the Harbours Board, at that time the Honourable J. G. Lorimer, on October 25, 1974, as follows:

The policy of the British Columbia Harbours Board has always been since its inception to develop the land outside the present dyke for industrial purposes. The land inside the dyke [which includes the Cuthbert property] was acquired to prevent sprawl-type development taking place

immediately adjacent to the development proposed by the Board and to provide for a transportation and utility access corridor.

. . . . .

When a proposed return of the lands expropriated from [another] family was considered by the Board some time ago it was the Board's opinion that it would be unfair to treat one individual in a different manner from that accorded to all others in the area and that it would create many more problems than it would resolve. The Cuthbert property would be one very small, isolated island of privately held property in a very large holding of publicly held lands should it be returned to the Cuthberts.

A month later, the Executive Secretary of the Board wrote again in respect of the Cuthberts' petition. In a memorandum to a solicitor with the Department of the Attorney General, dated November 22, 1974, he stated:

The British Columbia Harbours Board is a Crown Corporation and as such retains its own legal advisors. When similar requests for return of expropriated land have been requested in earlier years, we have been advised that acquiescing to the request would be inadvisable and would create more problems than it would resolve.

. . . . .

You have asked me specifically to deal with the matter of whether or not the lands acquired in the first expropriation were taken for Harbours Board purposes only. A copy of O.I.C. 768, dated March 12, 1968, dealing with this matter is attached. You will note that no limitation on the use of the lands is indicated. The subsequent notice which appeared in the B. C. Gazette over the signature of the Minister of Highways on March 14, 1968 refers to 'establishing an industrial area for harbour purposes'. While I was not associated with the British Columbia Harbours Board at that time, it has always been my understanding that the lands acquired by expropriation were to provide access to and from the port area, to accommodate transportation and utility facilities, and when in Board

ownership would not be subject to the urban sprawl which normally accompanies the development of major transportation facilities. Since its inception, it has been Board policy to keep all lands suited for that purpose in agricultural production where they were not required for development in association with the Port development.

In a memo dated September 8, 1975, to the Deputy Provincial Secretary, following the first Committee's recommendation that the land be returned to the Cuthberts, a solicitor for the Attorney General wrote:

There may well be problems along the way for the Department of Highways such as obtaining releases, making certain that the return of the property does not set a dangerous precedent for them in Roberts Bank Superport acquisitions or in other acquisitions, and that there be no admission of liability whatever for the taking and for the subsequent occupation by the Crown.

The only advice received, to my knowledge, supporting the Cuthberts' petition was from the Assistant Deputy Minister of Environment, Lands Service, in a memorandum to his Minister, the Honourable James A. Nielson, dated March 16, 1976:

My own personal view is that B. C. Harbours Board should drop expropriation proceedings against Cuthbert because:

- (a) This land is no longer required for industrial development.
- (b) It is doubtful if the Land Commission or the Environment and Land Use Committee would approve development of 4,000 acres of high value agricultural land for industrial use even if the B. C. Harbours Board was anxious to develop same.

- (c) The Cuthbert property is a small surveyed parcel fronting on an established road that has been occupied as a homesite for many years and continues to be used for this purpose.
- (d) I believe B. C. Harbours Board could simply exclude this parcel from expropriation on the grounds it was no longer required for industrial use.

Following these decisions to refuse to return the property to the Cuthberts, the British Columbia Harbours Board requested the Department of Highways (as its agent) to commence arbitration proceedings against the Cuthberts in order to determine the amount of compensation which ought to be paid. For a variety of reasons, these proceedings did not really get off the ground until the latter part of 1979. Shortly thereafter, the Cuthberts brought their complaint to me, and at my request, the Chairman of the Harbours Board, the Honourable D. M. Phillips, kindly consented to the adjournment of the arbitration proceedings in order to allow the Government to review my report and recommendations.

MY PRELIMINARY FINDINGS

By letters dated February 7, 1980 (Appendix A), and August 27, 1980 (Appendix B), I wrote to the the Honourable D. M. Phillips, Chairman of the British Columbia Harbours Board, and to the Deputy Minister of Transportation and Highways and set out my preliminary findings. Mr. Phillips replied to my first letter on March 7, 1980 (Appendix C), and the Deputy Minister of Transportation and Highways replied on February 25, 1980 (Appendix D). In reply to my second letter, Mr. Phillips wrote on October 6, 1980 (Appendix E), and the Assistant Deputy Minister of Transporatation and Highways, Administration, responded by letter dated September 12, 1980 (Appendix F).

My letters set out a number of reasons why I believed that the refusal of the Harbours Board to return title to the property to the Cuthberts was unjust. Most of the grounds stated therein were based on legal arguments: that the Board was without the statutory authority to expropriate in the first instance; that the procedures employed in this expropriation violated the doctrine of fairness; and, that the Board had constructively abandoned the property by not using it for the purposes for which it was expropriated.

The Ministry of Transportation and Highways took the position, and rightly so in my view, that it had acted only on behalf of the Harbours Board in conducting this expropriation and hence, the decision to reverse the expropriation was solely within the discretion of the Harbours Board. The Deputy Minister pointed out:

In other words, we were only the carriers of the expropriation flag, we were not the ones who raised it, and we should not be the ones to say it should be hauled down, that rests with the B. C. Harbours Board.

However, in reply to my second letter, the Assistant Deputy Minister of Transportation and Highways, Administration, made some additional comments. He wrote:

It is not within our authority to determine whether or not the Cuthbert land is required, however, to abandon our claim to this parcel at this time could initiate similar demands from other former owners. While we may not be legally bound to consider such further demands, we would have difficulty in retaining the land if we accede to your proposal.

The Honourable D. M. Phillips, as Chairman of the British Columbia Harbours Board, responded on October 6, 1980, to my preliminary findings. He noted that while he had no substantial disagreement with the facts as I had found them, he emphasized that

the fact that the Cuthberts . . . have not been compensated to-date for the property acquired, cannot be laid at the foot of the British Columbia Harbours Board. Over the intervening period, the Board has made repeated efforts to conclude the matter of compensation, either by way of negotiation or by arbitration with the Cuthberts, but to no avail.



I accept this point without dispute. Mr. Phillips went on to point out that it was the opinion of his legal advisors that because the Board honestly believed that the land would be used for harbour purposes at the time of the expropriation, the expropriation was valid in law and the fact that the land had never been used for these purposes did not affect the legal validity of the expropriation. On this basis, Mr. Phillips concluded that

In the circumstances, it is the considered opinion of the British Columbia Harbours Board that the matter should now proceed by way of compensation, through the re-opening of arbitration hearings.

MY CONCLUSIONS AND RECOMMENDATION

After receiving and considering the various responses to my preliminary findings, I concluded that the Cuthberts' complaint was substantiated because of my belief that the Board's refusal to reconvey the property to the Cuthberts was unjust. I wrote to Mr. Phillips on December 24, 1980 (Appendix G), informed him of my conclusion, and made a recommendation as to how the injustice might be rectified. At that time, I did not pursue the legal arguments which I had stated to support, in part, my preliminary findings, and I do not pursue them now. My reason for concluding that the Cuthberts' complaint is substantiated is quite simple, and I have outlined this reasoning below.

The purposes for which the British Columbia Harbours Board was created are set out in section 5 of the Harbour Board Act, R.S.B.C. 1979, chapter 160, and these purposes have not changed since the Act was proclaimed in 1968. Section 5 states as follows:

The board is established for the purposes of developing and encouraging the development of harbour facilities in the Province, to provide access to and from the harbour facilities, and to assist and promote the industrial development of the Province in conjunction with harbour development and, . . . to construct, own and operate a railway, and to act as a carrier of passengers and freight.

Section 33 (1) of the Harbour Board Act allows the Board to acquire land for these purposes. This subsection states:

On the request of the board and subject to the approval of the Lieutenant Governor in Council, the Minister of Transportation and Highways shall acquire on behalf of the board land . . . in accordance with the Highway Act as may be necessary for the purposes of this Act.

Although one might question whether it is among the purposes of the Board to prevent "the urban sprawl which normally accompanies the development of major transportation facilities" (see letter from the Executive Secretary of the Board, quoted at page 8 above), I do not question that the Board believed, in 1968, that the property was necessary for the purposes of the Act. However, what has been complained about, and what is at issue in this current dispute, is the refusal of the Harbours Board to return the property to the Cuthberts. More precisely stated, is it fair and just that the Harbours Board continue to hold on to the property which was expropriated from the Cuthberts?

Section 32 of the Harbour Board Act reads as follows:

Subject to the Purchasing Commission Act, the board may acquire property it requires for its purposes, and may hold the property in the name of the board AND MAY DISPOSE OF PROPERTY NO LONGER REQUIRED FOR ITS PURPOSES. (emphasis added)

Thus the first question to be addressed is this: does the Board still require the Cuthbert property for the purposes set out in section 5 of the Harbour Board Act (quoted above at page 14)? By letter dated November 24, 1974, the Executive Secretary to the Board wrote:

Since its inception, it has been Board policy to keep all lands suited for that purpose in agricultural production WHERE THEY WERE NOT REQUIRED FOR DEVELOPMENT IN ASSOCIATION WITH THE PORT DEVELOPMENT.

The Gazette notice and associated news stories gave rise to some confusion in the public mind. To make clear the Board policy on the use of its land holdings the Chairman of the Board issued a press release and held a news conference on November 27, 1973. A copy of this press release is attached. You will note that the chairman states that the 4,000 acres of farmland owned by the Board will continue to be preserved for varied agricultural uses. You will note that the last sentence of the release states, 'BCHB OWNERSHIP OF THE FARMLANDS IMMEDIATELY ADJACENT TO THE SUPERPORT ENCOURAGES THE ORDERLY DEVELOPMENT OF THIS PART OF THE GREATER VANCOUVER REGION.' No change in policy was indicated. (capitals added)

This statement suggests that the Board is continuing to hold these lands, not for harbours purposes (given that "they were not required for development in association with the port development"), but because the Board's ownership "encourages the orderly development of this part of the Greater Vancouver Region." It appears to me that this is not one of the purposes for which the Board was authorized to hold lands (see section 5 of the Harbours Board Act, quoted on page 14 above).

Mr. B. R. Carpenter, Manager, Special Projects, of the British Columbia Harbours Board was contacted by my staff last summer and asked whether the Board had any intentions of developing the Cuthbert property. He indicated that, to the best of his knowledge, he knew of no development planned for the property, certainly not within the next few years.

Based on this information, it is my opinion that the refusal by the Board to return the property to the Cuthberts cannot be justified on the basis that the property is still required for the purposes for which the British Columbia Harbours Board was established. What other reasons therefore have been expressed, or may be implied, which might support the Board's decision not to return the property to the Cuthberts?

In his response to my letter of December 24, 1980, in which I recommended that the property be reconveyed to the Cuthberts, the Honourable D. M. Phillips wrote on January 22, 1981 (Appendix H) and provided two reasons for declining to implement this recommendation. First, he reiterated his position that the original expropriation was based on the Board's bona fide belief that the property was necessary for the purposes for which the Board was established and "it would therefore appear that a court of law would not order the return of the property from the British Columbia

Harbours Board to Mr. and Mrs. Cuthbert." This may indeed be the case; however decisions are often reached which, though not illegal, are not necessarily fair and just. The question which I as Ombudsman must ask is not whether the Board's decision to refuse to reconvey the property is lawful, but rather whether the decision is fair and just.

The other reason given by Mr. Phillips for the Board's decision was stated as follows:

Secondly, as Mr. and Mrs. Cuthbert, alone among the many former owners of property involved with the initial expropriation carried out on behalf of the British Columbia Harbours Board, have refused all offers of compensation, it would be, as a matter of policy, unfair to treat them, as individual holders, in a manner different from all the others. To transfer title to the Cuthberts at this stage would confer a substantial benefit on them to which they are no more entitled, in principle, than any of the former owners.

I cannot agree that returning the property would confer a "substantial benefit" on the Cuthberts. Compensation has never been paid for the property, and since 1968 the Cuthberts have paid rent to the Harbours Board for their use of the property. Reconveying the property in these circumstances would not, in my opinion, confer a substantial benefit on the Cuthberts.

With respect to the first part of Mr. Phillips' argument as set out in the paragraph quoted above, I agree. Mr. Phillips pointed out that it is unfair to treat the Cuthberts any differently than any of the other former owners. I do not quarrel with this, but I cannot agree that this should stand as a reason for not reconveying the Cuthberts' former property to the Cuthberts. Clearly, there may be others who wish to have their former properties returned to them. And fairness may require that the Board should return their properties. However, the fact that fairness may require that all of the properties be returned to all of the former owners, does not mean that it is fair not to return any of the properties. In this case, the issue to be decided is whether it is fair and just that the Cuthberts' former property be returned to the Cuthberts. The fact that other former owners of property may also want their properties back does not mean it is just to refuse to return the Cuthbert property.

But why should the Cuthberts be permitted to get their property back? The answer to this question lies in our values about the right to own and enjoy property and in the nature of expropriation.

The right to own and enjoy property is one of the fundamental rights in our society and has a sacred place in our legal tradition.

Section 1 of the Canadian Bill of Rights puts it this way:

It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination . . . the following human rights and fundamental freedoms, namely

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law; . . . .

We value our land not only because it provides us with a place to live but also because it is the place where we are at home, and around which we make friends and establish other relationships which are necessary for our emotional well-being. Because of its primary importance to the individual, the Courts have held that property may be expropriated only by the express authorization of the House of Commons or of the Provincial Legislative Assemblies by way of statutory enactment. Moreover, property may not to be expropriated except by due process of law, and most provinces have now enacted legislation which provides for these procedural protections. British Columbia has not, although such legislation was recommended by both the Clyne Commission in 1964 and the Law Reform Commission of British Columbia in its 1971 "Report on Expropriation".



Expropriation deprives the individual, in many cases, of his home and uproots him from the community in which he has established himself. The adverse emotional and financial effects of such an action on the individual can be severe and ought not to be dealt with lightly. The Roberts Bank Superport expropriations are a case in point. Many of the people in the area were born there, and the community had roots going back generations. Mrs. Cuthbert's father was born in Roberts Bank in 1895 and owned and farmed some 400 acres in the area since 1928. In 1968 he was chosen by the Delta Chamber of Commerce as Citizen of the Year for his many contributions to the community. About one hundred and sixty acres of this property was expropriated by the Harbours Board in the same year. Although the Cuthberts and other members of the family continue to live in the area, their relationship with the land is tenuous; the Cuthberts, for example, have only a month-to-month lease which may be terminated by the Board upon short notice.

These negative consequences of expropriation are not uncommon, and in many cases, the effects are much worse as whole communities are uprooted and the communal ties are consequently destroyed. Thus, in my view, expropriation of any property should be resorted to only when absolutely necessary and where the public good clearly requires that the interest of the individual be subordinated.

It follows therefore that when expropriated lands are no longer required in the public interest, action ought to be taken to reverse the process where this is yet possible. Clearly, there will be many cases in which it is impossible to return the expropriated parties to their original position as they will have moved and put down roots in other communities. Further, I do not suggest that such persons be permitted to reap a windfall from the reversal of the expropriation process. If compensation has been paid to them according to the value of the property at the time of the expropriation, they ought to be required to pay compensation to the expropriating authority should they wish to repurchase the property. Such compensation would be based on the current value of the property, given that the person had the use and benefit of the compensation paid by the authority during the intervening years.

There are precedents in British Columbia for this procedure. I understand that it is the policy of the British Columbia Hydro and Power Authority to sell lands which were previously expropriated but which are no longer required for Hydro purposes. B. C. Hydro will first offer such lands to the person from whom the lands were expropriated, prior to tendering them to the general public.

As mentioned earlier, the Cuthbert property is a one-half acre residential lot and was settled (as part of a larger parcel) by Mrs. Cuthbert's ancestors in the late 1800's and has been in the family ever since. It is my view that because the British Columbia Harbours Board no longer requires the property for harbours purposes, title to the property should be returned to the Cuthberts. Given that no compensation was ever paid to the Cuthberts, they should not be required to pay any compensation to the Board. The fact that the Cuthberts have lived on and used the property in the intervening years is offset by the fact that the Cuthberts have paid rent to the Board for the use of the property during this period. For the reasons expressed above, I made the following recommendation to the British Columbia Harbours Board:

RECOMMENDATION

That the property which was expropriated from Robert and Maureen Cuthbert, of 2830 River Road West, Delta, B. C., on March 15, 1968 be reconveyed to the Cuthberts.

As mentioned earlier, the Honourable D. M. Phillips replied on January 22, 1981 to the effect that the British Columbia Harbours Board was unwilling to implement my recommendation. I have set out above the reasons which Mr. Phillips provided in support of this decision.

On February 16, 1981, I submitted a report on this matter to the Lieutenant Governor in Council in accordance with section 24 of the Ombudsman Act. By letter dated June 29, 1981 (Appendix I), the Honourable D. M. Phillips, Minister of Industry and Small Business Development, wrote to me and informed me of the decision of the Lieutenant Governor in Council. Mr. Phillips advised as follows:

The review of your report by the Lieutenant Governor in Council consisted of a full examination of the report, its findings, and full consideration was given to your conclusions and recommendations.

It has been determined by the Lieutenant Governor in Council that the property in question should not be re-conveyed to Mr. and Mrs. Cuthbert, and that the arbitration hearings to determine compensation, which were adjourned in order that you could conduct an investigation in this matter, be reinstated as soon as possible.

However, the Lieutenant Governor in Council has decided that provision should be made for the use of the property by the Cuthberts for a term more satisfactory than the current month to month lease.

I replied to Mr. Phillips on June 30, 1981 (Appendix J), expressing my appreciation for the consideration given to my report by the Lieutenant Governor in Council and for the small concession the Government had offered, namely to provide for a longer than month-to-month lease for the Cuthberts. However I must point out that I had neither recommended such action nor can I consider it adequate in light of my findings and recommendations.

Common sense and common justice suggests that title to the land be returned to the previous owners. They continue to live in their former home on this small residential lot as tenants of the British Columbia Harbours Board. They had difficulty accepting that the public interest required them to be deprived of this property in the first place because it constituted their main link to their past. Their difficulty in accepting the original expropriation was aggravated by the continuing proof that the land was not required for the purposes for which it was expropriated.

Thirteen years have now passed since this expropriation. The original plans for the public use of their property have been abandoned. The area surrounding this small residential lot has been made part of the Agricultural Land Reserve thus making it highly unlikely that the land will be used in the foreseeable future for the purposes for which it was expropriated.

I must now state my opinion that there is no justification for public authorities to hold on to this property and it is time for public authorities to respect the moral right of the Cuthberts to their former property. As in Britain's Crichel Down case, there is no dispute over the need to expropriate land in the public interest.

But once that public interest has been served -- as in the Crichel Down case -- or the justification for the expropriation has lapsed -- as in the Cuthbert case -- public authorities must be reminded of the moral claim that the expropriated owners can make that the return of their property be given very serious consideration.

Return of expropriated property is not an easy transaction. Earlier attempts to have the property returned to its expropriated owners have mainly foundered on the bureaucratic alarm about creating a "dangerous precedent". What is that danger?

It remains my belief that it is unjust for the Harbours Board to refuse to reconvey the property to the Cuthberts. I note that Mr. Phillips did not indicate in his letter that the property was further required for the public interest, and in my view, that would have been the only reason which should stand against the property being returned to the Cuthberts. I therefore respectfully submit this special report to the Legislative Assembly in the hope that justice will prevail.

TABLE OF APPENDICES\*

A.	Letter from the Ombudsman to the Chairman of the British Columbia Harbours Board and the Deputy Minister of Transportation and Highways, pursuant to section 16 of the <u>Ombudsman Act</u> , dated February 7, 1980.	28
B.	Letter from the Ombudsman to the Chairman of the British Columbia Harbours Board and the Deputy Minister of Transportation and Highways, pursuant to section 16 of the <u>Ombudsman Act</u> , dated August 27, 1980.	31
C.	Reply of the Chairman of the British Columbia Harbours Board to the Ombudsman, dated March 7, 1980.	40
D.	Reply of the Deputy Minister of Transportation and Highways to the Ombudsman, dated February 25, 1980.	41
E.	Reply of the Chairman of the British Columbia Harbours Board to the Ombudsman, dated October 6, 1980.	43
F.	Reply of the Assistant Deputy Minister of Transportation and Highways, Administration, to the Ombudsman, dated September 12, 1980.	45
G.	Letter from the Ombudsman to the Chairman of the British Columbia Harbours Board, pursuant to section 22 of the <u>Ombudsman Act</u> , dated December 24, 1980.	46
H.	Reply of the Chairman of the British Columbia Harbours Board to the Ombudsman, dated January 22, 1981.	47
I.	Letter from the Chairman of the British Columbia Harbours Board to the Ombudsman, dated June 29, 1981.	49
J.	Reply of the Ombudsman to the Chairman of the British Columbia Harbours Board, dated June 30, 1981.	50

\* For ease of reference, the remaining pages are consecutively numbered in the upper right-hand corner of each page.



February 7, 1980

BY HAND

The Honourable D.M. Phillips, Chairman  
British Columbia Harbours Board  
1400 - 1177 West Hastings Street  
Vancouver, British Columbia V6E 2K3

Mr. R. G. Harvey, Deputy Minister  
Ministry of Transportation and Highways  
Parliament Buildings  
Victoria, British Columbia

Dear Sirs:

Re: Robert Major Cuthbert &  
Maureen Gwen Cuthbert  
2830 River Road West  
Delta, British Columbia

On November 15, 1979, you were notified of my intentions to investigate the expropriation of the home of Mr. and Mrs. R.M. Cuthbert of 2830 River Road West. Mr. Parfitt of my office did the actual investigation, and after extensive review of the files and interviews with the parties involved provided me with his initial report.

This letter is to advise you of my initial findings pursuant to Section 13 of the Ombudsman Act.

Before I deal with the findings I would like to address the matter of the arbitration currently ongoing respecting the subject property. I am advised that it is not the usual practice of the Ministry of Transportation and Highways to initiate arbitration in matters where a settlement cannot be reached between the property owner and expropriating authority. I am also of the opinion that the owner of the property has a far better chance of having his property returned if compensation has not been paid and accepted for his expropriated property in the event of an abandonment.

The hearing to fix the place, date, and time of arbitration proceedings has been adjourned twice now, by the sole Arbitrator, Mr. McNeill, due to the intervention of my office and I know this



has placed him in a very uncomfortable position.

In December of 1977 the Honourable Alex V. Fraser when writing to the Premier indicated that he was not in favour of initiating the arbitration procedure unless it was absolutely necessary. Furthermore, in correspondence from the Honourable Grace McCarthy dated April 14, 1977, to the Cuthberts' solicitor, Mrs. McCarthy stated that the Government, in responding to their petition, decided "to allow continued occupancy by the Cuthberts of their present property for as long as it remains in agricultural use, and is not required for other public use. It was further agreed that a question of compensation for the property should it be required for other public use would be handled by the B.C. Harbours Board ...." (my underlining). This last letter indicated that if and when the property is required for public use, then the matter of compensation would be dealt with. With this in mind, I am requesting that you consider adjourning the arbitration sine die or at least until you have had the opportunity to review my findings and recommendations. I cannot see how an adjournment would prejudice your position and, as this matter is complex and the material on file enormous, I feel that a great deal of time will be necessary for your office and mine to consider and make representations with respect to the issues. Please advise me as to your decision.

As to the findings, I find the following to be sufficient grounds to make a report or recommendation:

- A. The ability for the B.C. Harbours Board to expropriate land through the Ministry of Transportation and Highways has to be questioned in the first instance. Under the B.C. Harbours Board Act, the Ministry of Transportation and Highways shall "acquire" on behalf of the Board such lands as may be necessary for the purposes of the Act. Under the provisions of the Interpretation Act the term "acquire" does not include expropriate. Neither does the Highways Act speak in terms of expropriation. If legislation is to authorize such powers it should be specific.

The legislation uses the clause necessary for the purposes of the Act. The Gazette notice of March 12, 1968, from the Minister of Highways stated that the land in question is "established and declared to be an industrial area for harbours purposes". In fact the lands have not been used for the purposes mentioned in the Gazette and there has been no indication as to when and if they ever will be so used. Ministries of Government have queried the use of such lands for this purpose in view of its historic agricultural value. The term "necessary" means essential or of the utmost importance. In view of the fact that the Cuthberts' land expropriated in 1968 has not been developed as an industrial area seems to contradict the necessity to expropriate. The fact that the property is not being used for

the purpose for which it was expropriated and that it has not been touched by the B.C. Harbours Board in twelve years leads me to believe that there has been a constructive abandonment and the Cuthberts should be entitled to the return of their former property.

B. In addition to the abandonment issue, the Cuthberts' file gives rise to a number of other procedural concerns. The Cuthberts were given no opportunity to negotiate prior to expropriation. Neither were the reasons, purposes and procedures discussed prior to the expropriation. This created a great deal of anxiety and concern for the Cuthberts and their family. It lead to a disruption in the life of the community that may have created unnecessary stress and ill health in certain members. The concept of pre-expropriation hearings has been adopted in some provinces and by the federal government which minimizes the possible ill effects of the expropriation process. In all fairness to the Ministry of Transportation and Highways, I understand that the procedures used by that ministry in this instance do not conform with those normally involved in expropriation matters.

Expropriation legislation in other jurisdictions minimized the adverse affect of compulsory acquisition of land. The law addresses itself to matters of pre-expropriation hearings, abandonment, enabling provisions, principles of compensation, arbitration and injurious affection. One of the advantages of such legislation is that it is applicable to all expropriating authorities within the confines of the jurisdiction, that is it has universal application.

As you know, the Law Reform Commission of British Columbia (in its 1971 report on Expropriation) has recommended that there should be a single expropriation statute embodying its (the Commission's) proposals with respect to procedure and compensation. The report goes into great detail concerning the law in British Columbia and proposals for reform. The "Clyne Report" (1961-63) also recommended the adoption of an Expropriation Act for the Province. I understand that the Province is considering expropriation legislation and I would strongly support such an initiative.

Within the next few weeks I will be providing you with a detailed chronology of events prior to and after expropriation of the Cuthbert property to present date, along with a documents file and more specific recommendations. In the meantime, if you wish to discuss these conclusions, please contact me at 387-5855.

Yours sincerely,

Signed By:  
KARL A. FRIEDMANN  
Ombudsman

Karl A. Friedmann  
Ombudsman

cc: Mr. J.D. King



August 27, 1980.

The Honourable D.M. Phillips, Chairman,  
British Columbia Harbours Board,  
1400 - 1177 West Hastings Street,  
Vancouver, B.C.  
V6E 2K3.

Mr. R.G. Harvey, Deputy Minister,  
Ministry of Transportation and Highways,  
Parliament Buildings,  
Victoria, B.C.

RE: Robert Major CUTHBERT and  
Maureen Gwen CUTHBERT  
2830 River Road West,  
Delta, British Columbia

Dear Sirs:

On February 7, 1980, you were advised of my initial findings in the Cuthbert case. At that time, I requested that you consider adjourning the arbitration respecting the Cuthbert property sine die. I was pleased to hear that the arbitration was, in fact, adjourned.

There are many issues in the Cuthbert case respecting expropriation and the procedures used by the expropriating authority, some of which I referred to in my February letter. I do not, at this time, propose to deal with those many and complex issues, but rather focus on a half-acre parcel of land owned by the Cuthberts for which they have neither received nor accepted compensation.

I am now writing you pursuant to Section 16 of the Ombudsman Act, R.S.B.C., 1979, Chapter 306, to advise you of my more detailed findings, and proposal and reasons for my proposal. Section 16 states as follows:

"Where it appears to the Ombudsman that there may be sufficient grounds for making a report or recommendation under this Act that may adversely affect an authority or person, the Ombudsman shall inform the authority or

.../2

Hon. D.M. Phillips  
Mr. R.G. Harvey

person the opportunity to make representations, either orally or in writing at the discretion of the Ombudsman, before he decides the matter."

I welcome your response to both my findings and proposal.

Copies of letters and documents to which I herein refer are enclosed in a separate folder for your reference. These have been numbered, with the reference number in this letter appearing in the left-hand margin opposite the text citing that particular material. The legislation referred to has been subsequently amended. For ease of reading and reference to the attached material, the old citations have been used.

The Cuthberts seek to have returned to them title of their former home and property, as the purpose for which the land was expropriated has not been realized in the ensuing twelve years since the land was expropriated.

I feel that it would be beneficial to set out a brief chronology of the relevant facts which span the twelve-year period from the time of the expropriation to date.

FINDINGS

1. On March 21, 1968, Mr. and Mrs. Cuthbert were personally served notice by the Department of Highways that the Department was expropriating their property, pursuant to Section 33 of the British Columbia Harbours Board Act, and Section 8 of the Highway Act. The notice, dated March 15, 1968, stated that the land was acquired for the purposes of the British Columbia Harbours Board Act. This was the first notification  
2. received by the Cuthberts and this notice was refused. The actual transfer of the title took place in the week preceding the notification,  
3. and notice of the expropriation appeared in the Gazette dated March 12, 1968. On March 25, 1968, notice was served on the Cuthberts by registered  
4. mail.

5. Several offers of compensation for the expropriated site were made to the Cuthberts, the first on March 27, 1968, and subsequently in June, 1970 and January 1971. All offers were refused.

6. Subsequent to the expropriation, the Cuthberts were permitted to lease their former property on a month-to-month basis. In 1970, the Cuthberts requested that their rent charge be deducted from the amount of the final  
7. compensation. This was refused, and as of December 31, 1970, the Cuthberts have been paying \$137.00 per month, pursuant to a lease of April 16, 1970.

In 1971, the Cuthberts made efforts to acquire property in Surrey. Their intent was to move their house using a house-moving firm, but this proved impossible because of zoning difficulties.

8. In November, 1973, it was announced that all 4,000 acres which were expropriated by the British Columbia Harbours Board were henceforth placed in the Agricultural Land Reserve pursuant to provisions in the Agricultural Land Commission Act, S.B.C., 1973, Chapter 46. On February 28, 1974, the Minister of Agriculture in writing to the Sierra Club, indicated that the "4,000 acres under control of the B.C. Harbours Board will be developed for agricultural use, rather than reserved for further industrial development."

10. On October 10, 1974, the Cuthberts filed a petition with the Lieutenant-Governor in Council to have him recommend that the British Columbia Harbours Board reconvey the property to the Cuthberts. The petition was referred to the British Columbia Harbours Board.

11. A letter of October 25, 1974 to Mr. Lorimer, Chairman of the British Columbia Harbours Board, from Mr. David King, Executive Secretary to the British Columbia Harbours Board, stated the Board's opinion that it would be unfair to treat one individual differently from others. Further, it noted that if the land were returned to the Cuthberts, it would be an isolated island, privately-held, in a large tract of publicly-held land.

12. The petition was also referred to the Attorney-General's office. In a letter dated October 31, 1974, Mr. Norman Prelypchan, Solicitor with the Attorney-General's Ministry, wrote to Mr. King, asking for a report on the expropriation in question and asking specifically if the land was expropriated for Harbours' purposes only at the time of the taking. Furthermore, Mr. Prelypchan stated that if there had been a change in policy in the use of the land expropriated whereby the land may be used for other purposes, he would like to know.

Mr. King replied to Mr. Prelypchan in a letter dated November 22, 1974, indicating the purpose for the expropriation and enclosing an extract from a press release regarding the expropriated land.

"...While I was not associated with the British Columbia Harbours Board at that time, it has always been my understanding that the lands acquired by expropriation were to provide access to and from the port area, to accommodate transportation and utility facilities, and when in Board ownership, would not be subject to the urban sprawl which normally accompanies the development of major transportation facilities. Since its inception, it has been Board policy to keep all lands suited for that purpose in agricultural production where they were not required for development in association with the Port development."

Hon. D.M. Phillips  
Mr. R.G. Harvey

13. "... To make clear the Board policy on the use of its land holdings, the Chairman of the Board issued a press release and held a new conference on November 27, 1973. A copy of this press release is attached. You will note that the Chairman states that the 4,000 acres of farmland owned by the Board will continue to be preserved for varied agricultural uses. You will note that the last sentence of the release states, 'B.C.H.B. ownership of the farmlands immediately adjacent to the Superport encourages orderly development of this part of the Greater Vancouver Region.' No change in policy was indicated."

14. On November 28, 1974, two letters were sent from the Attorney-General's ministry: one to Mr. Norm Pearson, Secretary to the Environment and Land Use Committee from Mr. Norman Prelypchan, proposing that a special Cabinet Committee deal with the petition, and querying whether the Cuthberts and the British Columbia Harbours Board should be heard; the other from the Deputy Attorney-General, Mr. David Vickers, to the Honourable J. Lorimer, Minister of Municipal Affairs and Chairman of the British Columbia Harbours Board, explaining that the petition does not seek relief in the courts and suggesting that the matter is best heard by a special committee of cabinet.

15. The letter went on to say "... If the Board wishes to change its policy in respect of lands expropriated for Harbours Board purposes to prevent urban sprawl which appears to be the case in the Cuthbert property, that decision is one which the Board, in its own wisdom, should make in the form of a recommendation to such a committee." (my emphasis)

16. On May 30, 1974, Mr. Norman Prelypchan responded by letter to a call from Deputy Provincial Secretary, L.J. Wallace, advising him that the Provincial Secretary, the Honourable Ernie Hall, had given instructions regarding the petition. Mr. Prelypchan's feeling was that the decision as to who should hear the petition had been made and that it rested with the Environment and Land Use Committee. He also advised that if anyone is to be heard, the British Columbia Harbours Board as well as the Cuthberts should be heard.

17. On June 11, 1974, a letter was sent from the Provincial Secretary to the Minister of Lands, Forests and Water Resources, and Chairman of the Environment and Land Use Committee, the Honourable R.A. Williams, confirming that the matter lay with the Environment and Land Use Committee, and asking that, if he agrees, instructions be given to the Environment and Land Use Committee to proceed with the petition. On June 17, Mr. Williams replied that it appeared British Columbia Harbours Board

18. ownership was justified, but that he was not familiar with the legal processes. The Provincial Secretary wrote to Mr. Williams on July 28, 1975, endorsing the Environment and Land Use Committee role, and indicating that although there was no requirement for such a hearing, in the interests of having the petition fairly dealt with, the Environment

19. and Land Use Committee should hear the matter.

Hon. D.M. Phillips  
Mr. R.G. Harvey

On August 15, 1975, Mr. Williams, as Chairman of the Environment and Land Use Committee, wrote to Mr. Hall indicating as follows:

20. "The opinion of the Committee was that the Cuthbert land was no longer required for industrial purposes and would not conflict with the future agricultural use of the property. The Committee, therefore, decided that the petition of the Cuthberts for release from expropriation should be granted and that the expropriation proceedings for this property should be halted."

21. On September 15, 1975, Mr. Hall wrote to Mr. Lorimer, in his capacity as Chairman of British Columbia Harbours Board, advising him of the decision of the Environment and Land Use Committee and advising that the report of the Committee will probably be directed to Cabinet for formal approval or rejection. Mr. Hall suggested that Mr. Lorimer may wish to make his views known.

22. A letter was sent to the Deputy Provincial Secretary from Mr. Norman Prelypchan advising of procedure in the event Cabinet adopts the Environment and Land Use Committee recommendations, and indicating possible problems for the Department of Highways in making certain that the return of the property does not set a dangerous precedent in the Roberts Bank or other acquisitions.

On October 9, 1975, Cabinet met to decide the issue of whether or not to return the property to the Cuthberts. The decision was that the property should not be returned and the Environment and Land Use Committee recommendation should be turned down, apparently based on Mr. Prelypchan's memorandum pointing out legal complications. The Cuthberts were not advised of this decision. A provincial election took place during the interval of the Cabinet decision of October 9, 1975 and the next consideration of the Cuthbert petition by the Environment and Land Use Committee.

23. On March 18, 1976, Mr. Redel, Assistant Deputy Minister of Environment wrote to the Honourable Mr. Jim Nielson, Minister of the Environment with his personal recommendation that the British Columbia Harbours Board should drop the expropriation. His reasons are as follows:

"(a) This land is no longer required for industrial development.

(b) It is doubtful if the Land Commission of the Environment and Land Use Committee would approve development of 4,000 acres of high value agricultural land for industrial use even if the British Columbia Harbours Board was anxious to develop same."

"(c) The Cuthbert property is a small surveyed parcel fronting on an established road that has been occupied as a homesite for many years and continues to be used for this purpose.

(d) I believe British Columbia Harbours Board could simply exclude this parcel from expropriation on the grounds that it was no longer required for industrial use."

24. A meeting was held on April 9, 1976 with the Environment and Land Use Committee and the British Columbia Harbours Board to consider the petition again, apparently as a result of a discussion between Charles Johnstone, Solicitor for the Cuthberts, and Mr. Jim Nielson, Chairman of the Environment and Land Use Committee. The result of the meeting, according to Mr. King's notes, was that the expropriation should stand.

25. In a letter dated April 15, 1976, Mr. Nielson wrote to the Cuthberts to confirm the decision of both the Environment and Land Use Committee and Cabinet stating as follows:

"Our review with the British Columbia Harbours Board indicated that you have concluded a satisfactory rental agreement with the Board. This agreement promises that you may continue to occupy your present property for as long as it remains in Agricultural use and is not required for other public use. We believe this to be a desirable resolution."

26. The decision of the Environment and Land Use Committee was communicated in a letter of April 21, 1976 from the Acting Director of the Environment and Land Use Committee to the Executive Secretary of the British Columbia Harbours Board, with the suggestion by the Committee that maximum possible notice be given to the Cuthberts in the event that their property is required for public purposes.

27. On May 5, 1976, Mr. King wrote to Mr. Drew, the Assistant Chief Property Negotiator, Department of Highways, stating the Environment and Land Use Committee and Cabinet position on the matter and stating that he had been instructed by the British Columbia Harbours Board on February 27, 1976, to arrange for completion of the payment for compensation and, if necessary, to use arbitration procedures to accomplish this. He requests the Department of Highways to take the appropriate action.

28. The Assistant Chief Property Negotiator wrote to his Regional Negotiator instructing him to reopen negotiations with the Cuthberts and suggesting a lawyer, in the event the matter goes to arbitration. On July 16, 1976,  
29. Mr. King advised the British Columbia Harbours Board that a lawyer had been appointed to represent it and the Department of Highways in effecting a settlement through arbitration.



Hon. D.M. Phillips  
Mr. R.G. Harvey

Page 7

30. On October 8, 1976, the solicitor for the Cuthberts wrote to Mr. Nielson as Chairman of the Environment and Land Use Committee with respect to his letter of April 15, 1976. Mr. Johnstone indicated that there may have been some misunderstanding of the petition, as the petition was directed to abandoning the expropriation rather than occupancy of the premises. He also stated that he understood that the Environment and Land Use Committee had recommended return of the property the previous fall.

31. Mr. Nielson responded to Mr. Johnstone indicating that the petition had not been misunderstood and that the decision of the Environment and Land Use Committee (his cabinet colleagues) was a desirable one.

32. Negotiations continued and the lawyer for the British Columbia Harbours Board and the Department of Highways suggested in a letter that if the current offer was not accepted, the matter should proceed to arbitration. Mr. Drew discussed this letter with the Assistant Deputy Minister of Highways who contacted his Minister. The Minister, the Honourable Alex Fraser, instructed that no further actions were to take place at the present time. On March 16, 1977, Mr. King wrote to the Assistant Deputy Minister of the Department of Highways asking the Department of Highways  
33. to reconsider its position in order to resolve compensation to the Cuthberts as quickly as possible. On March 24, the Minister of Highways  
34. agreed that the Department proceed with arbitration if necessary and Mr. Drew was so advised.

35. Inquiries were made by Mr. Johnstone again in February 1977, and on April 14, 1977, the Provincial Secretary, the Honourable Grace McCarthy, reiterated the contents of the prior letters from the Honourable J.A. Nielson, to allow continued occupancy until the property be required for public use.

36. On November 8, 1977, Mr. Johnston resubmitted the petition in a letter to the Premier, the Honourable William A. Bennett. He indicated that the correspondence from the Environment and Land Use Committee and the British Columbia Harbours Board did not address the issue in the petition, and asked the Premier to intervene.

37. On February 7, 1978, the Minister of Energy, Transport and Communications the Honourable Jack Davis, replied that the Provincial Secretary's letter of April 14, 1977 clearly stated the decision of the government on the matter in question. Mr. Davis advised that the Board was anxious to pay compensation to the Cuthberts.

From April 14, 1977 to September 26, 1979, matters of the arbitration were being arranged, and on September 26, 1979, a single arbitrator was appointed, pursuant to Section 16 of the Ministry of Highways and Public Works Act, to decide on compensation to the Cuthberts.

Hon. D.M. Phillips  
Mr. R.G. Harvey

On December 10, 1979, Mr. Parfitt, Solicitor for my office appeared at a hearing before the Arbitrator and the hearings were further adjourned until February 7, 1980 so that the Ombudsman could make his recommendations.

On February 7, 1980, I delivered my initial findings to the Ministry of Highways and the British Columbia Harbours Board and requested that the arbitration proceedings be adjourned sine die. The arbitration was adjourned on March 31, 1980 at the request of the Solicitor for the Ministry of Highways.

The Cuthberts were asked by my staff as to whether or not they have been approached directly or indirectly by the British Columbia Harbours Board or the Ministry of Highways regarding utilization or proposed utilization of their former property by those agencies. They stated that they have not been so approached in the twelve years subsequent to the expropriation.

Mr. B.R. Carpenter, Manager, Special Projects, of the British Columbia Harbours Board was recently contacted and asked whether the British Columbia Harbours Board had any intentions of developing the Cuthbert property. He indicated that, to the best of his knowledge, he knew of no development planned for the subject property, certainly within the next few years.

PROPOSAL

Property may be acquired under Section 33 of the British Columbia Harbours Board Act, 1967 "as may be necessary for the purposes of this act." (my emphasis) These purposes are noted in Section 6 of the Act, which reads:

"The Board was developed for the purposes of developing or encouraging the development of harbour facilities in the province, to provide access to and from such harbour facilities, and to assist and promote the industrial development, subject to Sections 4 and 7 of the Railway Act, to construct, own and operate a railway and to act as a carrier of passengers and freight."

The Cuthbert property was acquired, ostensibly for these purposes, through the Ministry of Highways, in 1968. There has not been, in the twelve years that followed, any development of the Cuthbert property in line with the purposes of the Act. Rather, the land was placed in the Agricultural Land Reserve in 1973.

Furthermore, on a number of occasions, either a Cabinet Committee or a government official has favourably considered the return of the property to the Cuthberts.

Hon. D.M. Phillips  
Mr. R.G. Harvey

Page 9

Section 33 speaks of the property being "necessary" for the purposes of the Act. This wording, in conjunction with the drastic nature of expropriation, denotes some immediate need by the expropriating authority in pursuit of the purposes outlined. A lapse of twelve years, where still there are no specific plans for development, is an unreasonable length of time, and reflects that the property was and is not "necessary" for the purposes of the British Columbia Harbours Board Act.

As the British Columbia Harbours Board has neither

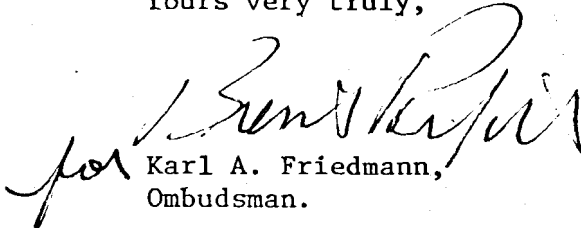
- (a) utilized the expropriated property formerly owned by the Cuthberts, nor,
- (b) compensated the Cuthberts for that property, (The Cuthberts are unique from the other former owners of expropriated property in the Roberts Bank area in this regard.) and,
- (c) as there appears to be no future development planned within the foreseeable future,

I propose that title to the property be returned to the Cuthberts.

As I have previously indicated, there are many issues concerning the expropriation that have arisen in my investigation of the Cuthbert case which I could comment on, but in the hope of a speedy resolution to the complaint, I make this proposal.

I look forward to your response to both my findings of facts and proposal within the next three weeks. If you should require more time, please contact Mr. Parfitt at my office at 387-5855.

Yours very truly,

  
for Karl A. Friedmann,  
Ombudsman.

encl.

MEMORANDUM

TO Mr. K. A. Friedmann  
Ombudsman  
Office of the Ombudsman

MINISTER OF ECONOMIC DEVELOPMENT  
PROVINCE OF BRITISH COLUMBIA

Buildings

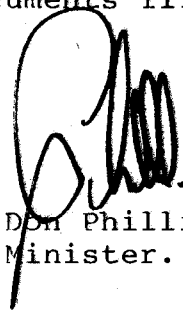
VICTORIA, B.C., March 7, 1980

Re: R and M Cuthbert  
2830 River Road West, Delta, B.C.

Further to your memo regarding arbitration proceedings dealing with the expropriation of the above-noted property, I have instructed the Ministry of Transportation and Highways to postpone these hearings until further notice.

This adjournment of the hearings is to allow the Government to review the findings and recommendations of your office into this case.

I look forward to receiving the detailed chronology of events prior to and after expropriation of the Cuthbert property to present date, along with a documents file and the Ombudsman's more specific recommendations.



Don Phillips  
Minister.

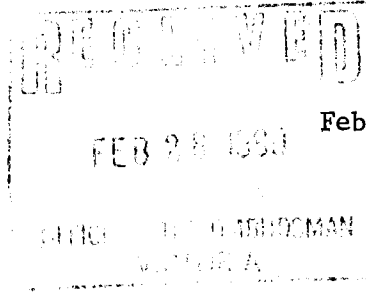
RECEIVED  
MAR 16 1980  
OFFICE OF THE OMBUDSMAN  
VICTORIA

*cc - Bent*



YOUR FILE: .....

OUR FILE 14-20-20 .....



February 25, 1980

Mr. Karl A. Friedmann  
Ombudsman  
Office of the Ombudsman  
8 Bastion Square  
Victoria, B.C.  
V8W 1H9

Dear Sir:

Re: Robert Major Cuthbert  
and Maureen Gwen Cuthbert  
2830 River Road, Delta, B.C.

Kindly excuse the delay in response to your letter of February 7, 1980. I have been indisposed recently but I did wish to take part personally in writing as I am aware of the Cuthbert case.

I enclose a report from Mr. Drew, our Director of Property Services to myself. Mr. Drew is quite specific and I believe direct in his statements. I would like to underline the fact that in our dealings for these properties we have had, interposed between us, the Ministry, and the affected party, the B.C. Harbors Board.

Normally we have not such complication and the Minister exercises or does not exercise his prerogative to go to arbitration at wholly his own discretion, and at his own timing for such action. We did not have this discretion left to us wholly in this action.

We in this Ministry are proud of our record of proper discretion through the years in not abusing these prerogatives and we are well satisfied that both in timing, in preparation, and in consideration given to the rights and privileges of others, we have reduced greatly the need and exercise of expropriation. We believe we have conducted ourselves in arbitration with an outstanding success record indicating in the very great majority of such actions that the procedure was in fact not necessary.

.....2

Mr. Karl A. Friedmann

- 2 -

February 25, 1980

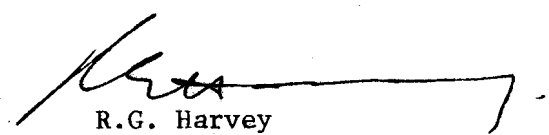
Therefore I am afraid I cannot agree with you, with all due respect, in your opinion that drastic expropriation legislation is necessary in British Columbia. Some changes may be necessary but the expropriation legislation as currently proposed as an extension of the Law Reform Commission report, and in excess of it, we believe to be neither necessary nor advisable.

Unfortunately it may be that other public bodies than this Ministry operate otherwise than us in expropriation moves. More particularly other bodies may exercise expropriation much less reluctantly and for much less demonstrated need than we in this Ministry do; whether or not such assessment applies to B.C. Harbors Board I leave to you to judge.

As Mr. Drew says - "the main issue with the Cuthberts is the expropriation ....it is not a matter of money", and "whether the property should be returned to the Cuthberts is not a decision which rests with our Ministry".

In other words, we were only the carriers of the expropriation flag, we were not the ones who raised it, and we should not be the ones to say it should be hauled down, that rests with the B.C. Harbors Board.

Yours very truly,

  
R.G. Harvey  
Deputy Minister

Attach.

RGH/ek

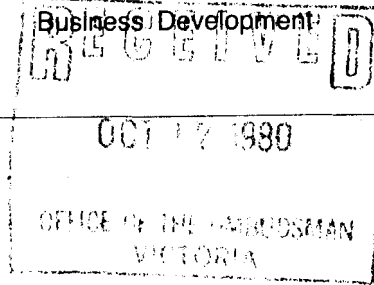


Province of  
British Columbia

OFFICE OF THE MINISTER

Ministry of Industry  
and Small

Business Development



Parliament Buildings  
Victoria  
British Columbia  
V8V 1X4

October 6, 1980

The Office of the Ombudsman  
8 Bastion Square  
Victoria, British Columbia  
V8W 1H9

Dear Sir:

Re: Robert Major Cuthbert and  
Maureen Gwen Cuthbert,  
2830 River Road West,  
Delta, British Columbia.

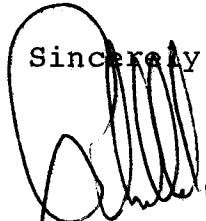
This is in reply to your letter dated August 27, which constituted your report pursuant to Section 16 of the Ombudsman Act.

First of all, let me say that as far as the British Columbia Harbours Board is concerned there is no substantial dispute with the facts as outlined in your report except for one matter. I would respectfully point out that the fact as noted on page 9 of your report, to the effect that the Cuthberts have not been compensated to-date for the property acquired, cannot be laid at the foot of the British Columbia Harbours Board. Over the intervening period, the Board has made repeated efforts to conclude the matter of compensation, either by way of negotiation or by arbitration with the Cuthberts, but to no avail.

The Board's legal advisors have reviewed this matter in its entirety and simply put, have advised that as a matter of law, the acquisition of the property in question by the Board was and is valid and that subsequent events since that date have no effect on the legal validity of the initial expropriation. In particular, the view of the Board's legal advisors is that the proposition put forward on page 9 of your report to the effect that the use of the word "necessary" in Section 33 of the Harbours Board Act, denotes some sort of immediate need by the expropriating authority, is not supported in law. The Courts have held that is sufficient that an expropriating authority holds a bona fide belief that the expropriated land could be used for the specifically enumerated purposes or for purposes ancillary thereto. Such honest belief was held by the British Columbia Harbours Board at the time of the acquisition.

In the circumstances, it is the considered opinion of the British Columbia Harbours Board that the matter should now proceed by way of compensation, through the re-opening of arbitration hearings.

Sincerely,

A handwritten signature in black ink, appearing to be 'Don Phillips', written over the word 'Sincerely,'.

Don Phillips  
Minister and Chairman,  
British Columbia Harbours Board.





Province of  
British Columbia

Ministry of  
Transportation  
and Highways

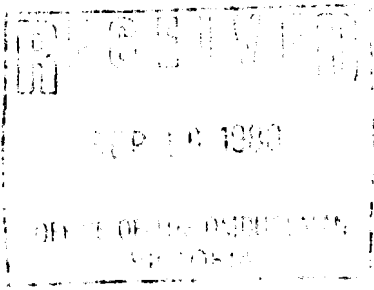
940 Blanshard Street  
Victoria  
British Columbia  
V8W 3E6  
Phone: 387-3280

OFFICE OF THE  
DEPUTY MINISTER

YOUR FILE: .....

OUR FILE .....14-00-97....

September 12th, 1980.



Mr. Karl A. Friedmann,  
Ombudsman,  
8 Bastion Square,  
Victoria, B. C.  
V8W 1H9

Attention: Mr. Brent Parfitt

Dear Sirs:

Re: Robert Major & Maureen Gwen Cuthbert,  
2830 River Road West, Belta, B. C.

I make reference to your letter of August 27th, 1980 to the Honourable D. M. Phillips, Chairman, British Columbia Harbours Board, and to Mr. R. G. Harvey, Deputy Minister, Ministry of Transportation & Highways, in which you propose that title to certain property in the Roberts Bank area be returned to the Cuthberts.

I understand that the British Columbia Harbours Board will respond directly to this proposal, however, we have also reviewed the file and would make one observation. It is not within our authority to determine whether or not the Cuthbert land is required, however, to abandon our claim to this parcel at this time could initiate similar demands from other former owners. While we may not be legally bound to consider such further demands, we would have difficulty in retaining the land if we accede to your proposal.

As a matter of interest, this total land assembly on behalf of the British Columbia Harbours Board exceeded \$5,000,000.00.

Yours very truly,

A. E. Rhodes,  
Asst. Deputy Minister.



DEC 24 1980

DEC 2 1980

The Honourable D. M. Phillips  
Chairman  
British Columbia Harbours Board  
1400 - 1177 West Hastings Street  
Vancouver, British Columbia  
V6E 2K3

Dear Mr. Phillips:

Re: Robert Major Cuthbert &  
Maureen Gwen Cuthbert  
2830 River Road West  
Delta, British Columbia

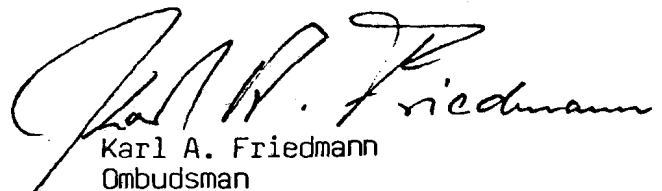
Thank you for your letter of October 6, 1980.

I have now decided that the Cuthberts' complaint, concerning the parcel of land which was expropriated from them in 1968, is substantiated. I am now writing pursuant to Section 22 of the Ombudsman Act.

As a result of my investigation into this complaint, it is my belief that the refusal of the Board to return the property to the Cuthberts is unjust. While it may well be that, at the time of the expropriation in 1968, the Board held a bonafide belief that the land was necessary for the purposes of the Board, the subsequent twelve years have provided ample evidence that such belief was not well-founded. For the Board to continue to hold the land for purposes other than those provided in the Harbour Board Act is, in my view, without justification. Given my belief as stated above, and the fact that the property in question is a one-half acre residential lot for which the Cuthberts have never accepted compensation, I recommend that title to the property be immediately returned to the Cuthberts. Pursuant to section 23(1) of the Ombudsman Act, would you kindly advise me by January 23, 1980, of the steps that have been or are proposed to be taken to give effect to this recommendation. If no steps have been taken or are proposed to be taken would you inform me, by the same date, of the reasons for not following my recommendation.

Thank you for your assistance in this matter.

Yours sincerely,

  
Karl A. Friedmann  
Ombudsman



OFFICE OF THE MINISTER

January 22, 1981

Mr. Karl A. Friedmann  
Ombudsman  
Province of British Columbia  
8 Bastion Square  
Victoria, British Columbia  
V8W 1H9

Dear Mr. Friedmann:

This is to confirm receipt of your letter dated December 24, 1980, pursuant to Section 22 of the Ombudsman Act concerning the Cuthbert expropriation. Thank you for extending the date upon which you required a reply to January 27.

The British Columbia Harbours Board has examined very carefully your conclusions and recommendations.

However, I must reiterate that after again closely considering this matter, it is the position of the British Columbia Harbours Board that the expropriated property in question should not be returned to the Cuthberts, but, that the matter should now proceed, again by way of compensation, through the re-opening of the arbitration hearings.

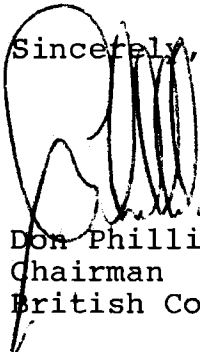
The British Columbia Harbours Board has decided to maintain this earlier stated position for basically two reasons.

Firstly, and to reiterate the position as outlined in my letter to you dated October 6, 1980, it is the view of the British Columbia Harbours Board, that as a matter of law, the acquisition of the property in question by the Board was and is valid and that any subsequent events since the acquisition have no affect upon the legal validity of the initial expropriation. As long as an expropriating authority holds a bona fide belief that the expropriated land could be used for the specifically enumerated purposes or for purposes ancillary thereto, then subsequent events cannot destroy that bona fide belief. You have, in fact, indicated that you would concur with this finding of fact that at the time of the expropriation the British Columbia Harbours Board acted bona fide, and it would therefore appear that a court of law would not order return of the property from the British Columbia Harbours Board to Mr. & Mrs. Cuthbert. If the Board is wrong in its view of the law, then that would be a matter for the courts to decide.

Secondly, as Mr. & Mrs. Cuthbert, alone among the many former owners of property involved with the initial expropriation carried out on behalf of the British Columbia Harbours Board, have refused all offers of compensation, it would be, as a matter of policy, unfair to treat them, as individual holders, in a manner different from all the others. To transfer title to the Cuthberts at this stage would confer a substantial benefit on them to which they are no more entitled, in principle, than any of the other former owners.

Therefore, the British Columbia Harbours Board cannot accede to your request, that title to the property in question be returned to Mr. & Mrs. Cuthbert.

Sincerely,



Don Phillips  
Chairman  
British Columbia Harbours Board



June 29, 1981

Dr. Karl A. Friedmann  
Ombudsman  
8 Bastion Square  
Victoria, British Columbia  
V8W 1H9

Dear Dr. Friedmann:

This letter is in response to your report to the Lieutenant Governor in Council, pursuant to Section 24(1) of the Ombudsman Act, concerning the expropriation on behalf of the British Columbia Harbours Board of property situated at 2830 River Road West, Delta, British Columbia, which prior to the expropriation was registered under the name of Robert Major Cuthbert and Maureen Gwen Cuthbert.

The review of your report by the Lieutenant Governor in Council consisted of a full examination of the report, its findings, and full consideration was given to your conclusions and recommendations.

It has been determined by the Lieutenant Governor in Council that the property in question should not be re-conveyed to Mr. and Mrs. Cuthbert, and that the arbitration hearings to determine compensation, which were adjourned in order that you could conduct an investigation in this matter, be re-instituted as soon as possible.

However, the Lieutenant Governor in Council has decided that provision should be made for the use of the property by the Cuthberts for a term more satisfactory than the current month to month lease.

In closing, I would like to thank you for your report.

Sincerely,

Don Phillips  
Minister.

*By courier*

81-0629  
cc RBF  
BP

June 30, 1981

The Honourable D. M. Phillips  
Minister of Industry and Small Business Development  
Parliament Buildings  
Victoria, B. C.

Dear Mr. Phillips:

Thank you for your letter of June 29, 1981, concerning the decision of the Lieutenant Governor in Council with respect to my report on the complaint I had received from Robert and Maureen Cuthbert. I appreciate the serious consideration of this report by the Lieutenant Governor in Council, although I am disappointed that my recommendation was not accepted.

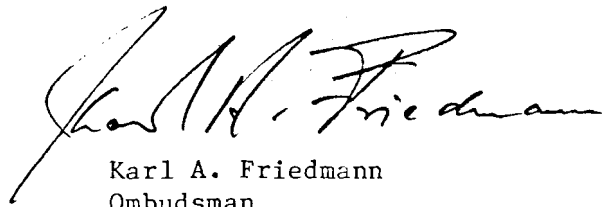
I was pleased to be advised that the Lieutenant Governor in Council has decided that provision should be made for the use of the property by the Cuthberts for a term more satisfactory than the current month-to-month lease.

It remains my belief that the Harbours Board has acted unjustly by refusing to reconvey this property, which was expropriated from the Cuthberts in 1968, back to the Cuthberts. I intend therefore to submit a report on this matter to the Legislative Assembly, pursuant to section 30 (2) of the Ombudsman Act, in the very near future.

In closing, may I express my appreciation for the high degree of cooperation received from you and your staff at the Harbours Board during my investigation of this complaint. While we remain in disagreement on the implementation of my recommendation, I believe we have had a full discussion of the merits of the Cuthbert's complaint, and a full consideration of my report by the Government. I regret that we were unable to achieve agreement on resolving this long-standing grievance.

While I respect your and the Lieutenant Governor in Council's right to come to a different conclusion, I believe I must continue to press this matter forward because of my belief that an injustice has occurred. I trust you will appreciate that under the circumstances I must refer this matter to the Legislative Assembly for their review. I would therefore ask you, finally, to consider postponing arbitration on the matter of compensation to be paid the Cuthberts until the Legislative Assembly has reviewed my report. .

Yours sincerely,



Karl A. Friedmann  
Ombudsman

