# EXPROPRIATION: THE EMPIRE STRIKES BACK!

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It was an unfortunate coincidence. The ink had barely dried on our Expropriation: Beware of Strangers Bearing Gifts! article extolling the protection afforded by our excellent and independent judicial system, when the Province of Nova Scotia changed the law. If you are adversely impacted by a provincial, municipal or other scheme proceeding under the Nova Scotia Expropriation Act, the changes may render it more difficult, expensive or impossible to pursue your claim for just compensation. Earlier last year the Province had introduced regulations to limit the amount they were willing to pay in legal costs and appraisal fees, something they were allowed to do under their Expropriation Act. They had not done so during the two decades of the Act's existence but reportedly copied similar action taken in British Columbia. Courts across the land have recognised that an important part of their job is to level the playing field and ensure that property owners are able to adequately pursue their claim for fair compensation against an acquiring authority with substantially greater financial resources. Until the Province introduced their regulations last year, the responsibility for ensuring fair play lay within the jurisprudence of the courts. It is now constrained by the regulations: the property owner may have to pick up part of the cost or forego some professional advice.

The other changes appear to be a response, in large part, to a Nova Scotia Utility and Review Board ("NSURB") decision in the case of "*S. & D. Smith Central Supplies Limited v. Province of Nova Scotia*", according to a media interview with Justice Minister Mark Furey. The Province had offered the expropriated property owner, S. & D. Smith Central Supplies Limited ("*Central*"), compensation of $266,000 for seizing part of their Lower South River, Antigonish property. *Central* disputed the compensation and also filed a claim for business disturbance. NSURB issued their decision on July 26th 2017 determining that the total compensation, including interest, should be properly assessed at $8,180,497. Our analysis of the 277 page NSURB decision can be found on our corporate web site at www.turnerdrake.com/products/expropriation_caselaw.asp > Business Disturbance (S. & D. Smith Central Supplies Limited). The Province appealed that decision to the Court of Appeal. It, and the cross appeal, were dismissed by the Court on March 26th 2019. In an interview with the CBC on July 28th 2017, *Central's* owner, Stephen Smith, bitterly recounted a traumatic legal dispute spread over 19 years and stated *"This litigation will only have a happy ending if*

*lessons are learned and changes are made by the government of Nova Scotia".* Apparently the latter were listening, albeit their response was somewhat different from that hoped for by Mr. Smith. The changes to the Expropriation and Public Highways Acts, introduced by the Province in October 2019, are intended to defeat a similar claim for business disturbance in the future. The changes to the Expropriation Act (Bill 169) and the Public Highways Act (Bill 170) potentially impact any property owner operating a business that is adversely impacted by a current or future highway acquisition. The legislation is retroactive to June 1st 2019, more than four months prior to it being presented to the Legislature.

Under the Public Highways Act (Section 12) the Minister already had the right to "reserve" land that would be required for the construction of a public highway, for up to five years, without paying compensation. During that period the owner would continue to own and pay taxes on the property but would not be compensated for "any building, wall, fence, wharf, breakwater or other structure of a permanent nature" (with the exception of improvements to a dwelling) should the Minister eventually decide to purchase the property. This Section has now been extended by Bill 170 to *exclude any enhancement in the value of the land due to the obtaining of permits, approvals or other rights appurtenant to or that benefit the land.* There is no obligation on the part of the Minister to acquire the property during the reservation period and nothing to stop him/her slapping another "reservation period" on the property after the first has expired. Effectively the Province has granted itself the right to sterilise land for development in perpetuity, for up to five years at a time, and then acquire it for less than Market Value… during which period, or periods, the unfortunate property owner has to pay property taxes. Consider this situation: a piece of woodland is "reserved" for a highway use for five years. During that period the area in the vicinity of the property is redeveloped for residential use and the owner of the parcel, of which the "reserved property" is part, applies for and receives subdivision approval. The entire parcel increases substantially in value as a result. The Province subsequently acquires the "reserved property" but will only compensate the owner at its woodland value because the increase in value occurred during the reservation period. In the *Central* case, the municipality extended a water line to the property, thus enabling its redevelopment with a "big box" Retail Store and Distribution Centre, something for which a building permit would not have been granted without the installation of a sprinkler system. Bill 170 appears to be designed to defeat compensation for any increase in value resulting from the issuance of a building permit in similar circumstances.

The changes to the Expropriation Act enacted by Bill 169 appear to be an attempt to thwart the principle confirmed by the Supreme Court of Canada decision in this country's leading "shadow expropriation" case *"Toronto Transit Operating Authority v. Dell Holdings Ltd, [1997] 1 S.C.R. 32 ("Dell")* that the purpose of expropriation legislation is *remedial*; it is intended to make the expropriated party "whole" by placing them in the same position after the expropriation, as they were before it, insofar as it is possible to do so by the payment of financial compensation. This overarching principle, and the lodestone that expropriation legislation should be interpreted in a *broad, liberal and purposive manner*, is fundamental to protecting the rights of property owners against abuse by an Orwellian State. Bill 169 implements the following changes to the Nova Scotia Expropriation Act:

(1) It defines "disturbance" as the *"pecuniary losses actually incurred by an owner by reason of having to vacate the expropriated property"*. "Disturbance" was not defined in the Expropriation Act when *Central's* land was expropriated. The bulk of *Central's* award related to lost profits flowing from their inability to expand their business on the land remaining after the expropriation. *Central* did not vacate the land expropriated and continued their business on the land remaining, albeit in a much diminished form than they had planned prior to the highway acquisition. By defining "disturbance" as outlined above, Bill 169 attempts to prevent business owners from claiming compensation for the type of business loss that was fundamental to *Central's* claim, indeed it may prevent businesses being compensated for any losses unless they are forced to relocate. The reference to "pecuniary" losses may be an attempt to restrict compensation for a business that has to relocate, to cash payments flowing from the move such as moving expenses, and to disallow claims for loss of goodwill.

(2) It amends the Act by restricting the payment of interest (on any unpaid compensation) to the time **after** *"the date the expropriation documents are deposited in the registry of deeds*". In the *Central* case the property owner was advised in May 1998 by the Provincial Department of Transportation (DOT) that their property was a potentially impacted by the Trans-Canada Highway re-alignment and were warned that they would not be compensated for any buildings they erected on land subsequently acquired for the highway. *Central* therefore refrained from developing this land and altered their expansion plans to mitigate their loss in profits. They attempted without success to engage in negotiations with DOT but only received an offer of compensation in August 2013 (the land had been formally expropriated on May 1st 2012), after DOT's appraiser had completed his report. The NSURB

decision awarded interest from the date lost profits started on May 1st 2001. Bill 169 would have restricted interest to the post May 1st 2012 period and thus rendered most of *Central's* claim for interest non-compensable.

(3) *In cases where* the property owner suffers a loss, but no land is expropriated, the NSURB no longer have the authority to hear the case. It must instead by heard by the Supreme Court of Nova Scotia. This change results from the abortive attempt by adjacent businesses to be compensated for lost profits during the construction of the Nova Centre in Halifax's Central Business District according to a media interview with Justice Minister Mark Furey.