

BRIDGING THE GAP (Newsletter Fall 2005)



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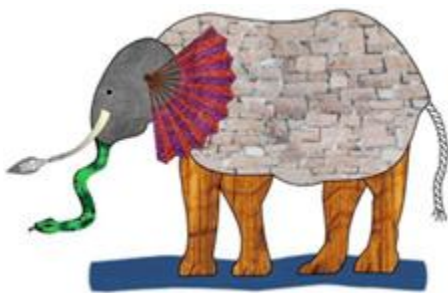
A Canadian's home is his castle ... fortunate then that most are blissfully unaware of the precarious nature of their "ownership", held as it is at the whim of the Crown. At any time the Federal or Provincial Governments, or any body designated by them, may decide to exercise that whim and regain ownership. Sometimes they will compensate the property owner: often-times they will not, though usually this occurs when they abrogate only part of the bundle of property rights that, in total, constitute property ownership. The latter often occurs when the Government imposes planning controls, rezones the property, or moves the serviceable boundary ... as hapless owners in the Halifax Regional Municipality are now finding out to their cost. Property ownership today is dynamic; protection of property rights is not embodied in the Canadian Charter of Rights and Freedoms so it is necessary for owners to aggressively defend the rights they do have by virtue of statute or common law. Vigilance should be the order of the day! Yet most property owners are passive, anxious to co-operate, willing to subjugate their own interests to the common good, quietly confident that they will be treated fairly by any government department needing their property for a new road or redevelopment scheme. In our experience, this confidence is rarely warranted. With the possible exception of the Federal Government, most acquiring authorities conduct their activities based on a strategy of minimising their own inconvenience and cost. No more so is this in evidence, than in New Brunswick. There, the Department of Transportation disports itself in a manner that is often opaque, frequently misleading and at times, threatening. Pity the poor property owner! It is our job to bridge that gap. We currently have two teams working for private property owners in the province, both led by Chartered Surveyors (Fellows of the RICS) and accredited appraisers. Lee Weatherby, a veteran with twenty nine years experience of expropriations, and an outstanding expert witness, is working for owners affected by the twinning of the Trans Canada Highway between Grand Falls and Edmundston. He is assisted by colleague Charlie Dunn. That team is also working for owners affected by the Gunningsville Bridge project in Riverview. Mike Turner assisted by colleague Nigel Turner, is advising owners impacted by the Woodstock to Perth Andover section of the Trans Canada Highway realignment. Mike too is an expropriations veteran and an experienced expert witness.

Beware of Strangers Bearing Gifts

When the acquiring authority first approaches you to open negotiations for the purchase of part, or all, of your property, rarely will they mention the word "expropriation". They may not be motivated solely

by a desire to spare your feelings. The Federal and Provincial Expropriation Acts may be draconian in their powers, but they do have many redeeming features. They establish the legal framework within which the acquiring authority is obligated to act ... and that framework is designed to protect *your* rights. The Acts usually stipulate too that the expropriated party is entitled to the protection and support afforded by proper legal, real estate and other professional advice. Unfortunately, the cost of that advice is not borne by the acquiring authority *unless* your property is expropriated. Nor are you legally entitled to the other protection afforded by the Act *until* your property is expropriated. Previously, we had advised property owners that they should proceed to negotiate so long as the acquiring authority committed itself, in writing, to afford the property owner all the rights and privileges conferred by the Expropriation Act. Based on our experience with the New Brunswick Department of Transportation, we no longer believe this to be sound advice. It is our opinion that property owners should not rely on such assurance, and should instead refuse to negotiate until their property has been formally expropriated ... only then will they enjoy the security afforded by our court system. Property owners have a natural tendency to assume that the acquiring authority will act in their best interest ... or at the very least treat them fairly. This sometimes happens, but in our experience it is the exception, rather than the rule. It would be wise not to take any promise by any acquiring authority at face value ... even if it is in writing. Nor should you assume that the person negotiating with you is knowledgeable in real estate or your business ... or that any appraisal which accompanies their offer of compensation bears any relationship to your loss. It is common practice for the acquiring authority to commission a "baseline" appraisal, particularly in rural areas. The NBDOT does so, as do other bodies such as the gas pipeline companies. The purpose of a baseline appraisal is to establish the "average" land value along the route of the new highway or pipeline. These appraisals ignore depreciation in property value due to, for example, "injurious affection", *usually the most substantive part of any claim*. Yet the acquiring authority may utilise their baseline appraisal figure to demonstrate the "reasonableness" of their offer, which will usually be in excess of their "average" land value and often be in excess of its market value where only part of the property is being acquired. The gloves usually come off if the property owner requests that the acquiring authority commission a "property specific" appraisal to address the actual loss suffered by that particular property. We are told that the usual response to such a request is a warning that it may result in lower compensation than that already offered. If the property owner persists, the acquiring authority will then commission an appraisal from a private company. *However it is NBDOT's practice to place constraints on the assignment, and thus preclude the private appraisal firm from considering all of the items which are properly compensable under the Expropriation Act.*

Different Perspectives: Different Conclusions



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In our view NBDOT's policy of restricting their appraisal reports to a consideration of only part of the loss, is at best misleading, and may result in an erroneous conclusion for the loss that was calculated. The New Brunswick Act, sharing as it does a common heritage with the other Provincial and Federal Expropriation Acts, provides compensation for losses suffered under any or all of the following headings:

- (a) the market value of the land.
- (b) damages attributable to disturbance.

- (c) damages for injurious affection.
- (d) any special economic advantage.

NBDOT instructs their appraisers to consider only Item (a) and part of Item (c) i.e. *"the market value of the takings and any loss in market value to the remaining lands"*. Most, though not all, of the appraisal reports are careful to spell out this constraint. However many property owners, lacking expertise in expropriation law and valuation, fail to appreciate that other losses have been ignored. Worse, the constraint may colour the appraiser's conclusions since the losses are interrelated ... somewhat akin to the individual conclusions reached by the six blind men given access to different parts of the same elephant ... This is not to imply that the private sector appraisers are biased but rather to suggest that NBDOT's policy is misguided and frequently misleading.

We recommend therefore that you carefully check that any appraisal report tendered by NBDOT addresses all heads of claim. If, as is likely, it does not, insist that they provide you with a new appraisal report under the terms of reference contemplated by the Expropriation Act. They have a statutory obligation to do so.

Market Value

If they only want part of your property, NBDOT will probably over-state the value of the land they are taking, hoping that you will accept their offer, and perhaps overlook, or fail to appreciate, that you have suffered other losses. They may indicate that a property specific appraisal will indicate a lower figure for the land (as indeed it might) and thus attempt to dissuade you from insisting on it. However if you have suffered other losses, chances are they will far outweigh their over-appraisal of your land. Make clear to NBDOT that their appraisal has to include *all* heads of claim. We suggest you commit this concern to paper and make it clear that NBDOT have a statutory obligation to provide a complete assessment of your losses resulting from the expropriation.

Disturbance

This is payable to occupiers, be they owners or tenants, and covers removal and relocation costs, both residential and business. However in the case of a business relocation, the losses cannot be assessed until the business has relocated and been in operation for nine months, or until two years has elapsed since the expropriation, whichever occurs first. If the business cannot be relocated because, for example, the owner is too old to start afresh, or no suitable property is available, compensation will be based on the total extinguishment of the business. The purpose of this head of claim is to compensate the occupier for any loss which arises by virtue of the forced sale and would include, for example, expropriation of part of a farm. *The appraisal reports commissioned by NBDOT exclude consideration of disturbance loss.*

Injurious Affection

Injurious affection occurs when part of the land is expropriated and includes (1) the reduction in value of the remaining property and, (2) personal and business losses resulting from the construction on, and use of, the property acquired.

The reduction in value to the property remaining after the expropriation is usually substantial, far outweighing the loss of the land itself. A new road severing an established farm will severely disrupt the economic unit: farm buildings will no longer be as accessible, land adjacent to the highway may be susceptible to salt damage, drainage patterns may be disrupted, fields may no longer be of optimum shape or size, woods roads may have to be relocated, pasture land lost to the highway may have to be

replaced by cultivated land, productive land will be lost permanently to the additional headlands, and so on.

The business loss too can be extensive. The loss of productive land will cause injurious affection to the fixed assets such as potato and grain storage, outbuildings, and farm machinery, because it will render part of them surplus. Whilst the actual loss will vary by farm unit, it is apparent from our research that an investment of between \$1,250 to \$2,000 per acre is usual. *The appraisal reports commissioned by NBDOT exclude consideration of personal and business damages despite the fact that they are codified in the Expropriation Act and are well recognised in case law (Berry et al v. The Queen. Land Compensation Board, Alberta, March 8, 1979).*

Special Economic Advantage

The Expropriation Act provides that owner occupiers may be compensated for losses that are not reflected in the market value of the land. In order to be compensable, Special Economic Advantage must be (a) special, (b) economic and (c) arise out of use and occupation. The 1957 Supreme Court of Canada decision "*Gagetown Lumber Co. v. R.*" is the leading case and illustrates it well. The Crown expropriated timber limits owned by an established logging company which had a mill located in the vicinity. The Court decided that the timber had greater value to the owner because they owned the nearby mill. A similar situation pertains with land that has been farmed by the owner occupier for a number of years. Because the land has been worked by the same family for a length of time, sometimes generations, they are intimately aware of its characteristics and can work it to the best advantage. Land forming part of the existing farm unit is therefore more valuable to the present owner occupiers than similar quality land available for purchase, because they are familiar with it. This is known as the "endowment effect". *The appraisal reports commissioned by NBDOT exclude consideration of Special Economic Advantage despite the fact that it is codified in the Expropriation Act and is well recognised in case law.*