Expropriation: Beware of Strangers Bearing Gifts

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Expropriation, the forcible taking of part of your property by a municipality, province or federal government for a road widening or other public purpose often engenders fear, loathing and despair on the part of the unfortunate property owner, yet it may actually be the lesser of two evils. During our almost fifty years of representing property owners and governments, providing the valuation compensation reports and undertaking negotiations, we have witnessed many of the frustrations flowing from forcible acquisitions. We may not have experienced everything but we have seen enough to know the best strategies to employ. However, there is little point in sugar coating it. Expropriation is frequently an unpleasant business and the tactics employed by *some* government bodies are on the darker side of grey. The good news is that you have the protection of a generally fair and knowledgeable court system that should err on your side if you know when and how to seek its protection.

How Can I Prevent Expropriation?

For all intents and purposes, you cannot do so. Some of the Expropriation Acts provide opportunity for the property owner to object but, in our experience, this is really window dressing. The acquiring authority, be they a municipality, province, federal government or other body with expropriation powers such as the electrical or gas transmission company, will rarely threaten expropriation when they first approach you. Most will prefer to negotiate with you first and that really is your best option *provided the acquiring authority agrees to extend all of the rights and protections that would be available by law had you been expropriated.* It is wise to get this in writing prior to opening negotiations. If the acquiring authority has already commissioned an appraisal report they will tender it with their offer. Under some circumstances you will be entitled to get your own valuation report at their expense… in fact some acquiring authorities may suggest that you commission an appraisal report from a list of approved companies and may then also rely on it themselves. So long as you satisfy yourself that the firm of your choice is impartial and competent, this is the best route to pursue. The Province of Nova Scotia often employs this strategy. Don't be tempted to select an appraiser who lacks impartiality… their reputation will have preceded them and the acquiring authority will place little or no weight on the appraisal report. Expropriation legislation mandates that you are entitled to be "made whole" i.e. be placed in the same position financially after the forcible taking as you were before it. It does not anticipate however that you benefit financially from the taking; however there is ample case law suggesting that you should be given the benefit of any doubt. It is common for most acquiring authorities to commission their own appraisal;

however, they do not always address all of the heads of claim. It has been our experience that the Province of New Brunswick usually instruct their appraiser to exclude "injurious affection" and whilst this omission should be so stated in the appraisal report it may not be obvious unless you look for it. If only part of your property is being acquired, Injurious Affection (explained later in this article), may be the most substantive part of your loss. Appraisal reports prepared for municipalities, especially the smaller communities, may well exclude certain compensable items (explained later in this article) perhaps because they want to minimise the compensation or they have hired an appraiser unfamiliar with the compensation provisions of the Expropriation Act. *Be aware that the acquiring authority is not obliged to comply with the compensation provisions of the Act until your property is expropriated or unless they are proceeding on that assumption (in which latter event it will be so stated in the appraisal report).* In our experience the Federal Government and Province of Nova Scotia commission appraisal reports covering all heads of claim, prior to the property being expropriated, but other provinces and most municipalities do not do so. Watch your back! If the acquiring authority commissions its own appraisal report it is wise to ask us, or another competent party, to review it. Unless your property has been expropriated it is premature to commission your own appraisal until you have had somebody such as ourselves review the acquiring authority's appraisal report. Since at this stage there has been no expropriation the acquiring authority may be open to negotiation, particularly if they are constrained by time to get the project started, are concerned about backlash against the potential expropriation per se, or do not have suitable qualified personnel on staff. Under the foregoing circumstances it would not be unusual for the finally agreed compensation to far exceed that first offered by the acquiring authority. We are well experienced in negotiations for this purpose and our professional Counselling Division staff are educated and trained in the process so will conduct the negotiations on your behalf.

Heads of Claim (Compensable Items)

Identifying and calculating the Heads of Claim under the various Expropriation Acts is a specialised field. It is necessary to have knowledge and understanding of the relevant Expropriation Act, Federal or Provincial. Keeping abreast of evolving Expropriation Case Law is also essential. We therefore subscribe to services that report on Expropriation Case Law in Canada and other jurisdictions that have commonalities with our legal system. The legal and fiscal attributes of real estate often have greater relevance than the physical component when assessing expropriation compensation. Today's expropriation expert requires a broad education and training, a knowledge of the major disciplines that impact on real estate … finance, economics, law, planning, geosciences, construction, as well as expropriation appraisal. If the expropriated property is a business asset, knowledge of accounting, marketing, strategic management, business research and operations management are necessary prerequisites to successfully formulating accurate expropriation claims for *Injurious Affection and Disturbance* … two items that are usually ignored or misunderstood by real estate appraisers acting for acquiring authorities in expropriation cases. Compensation for financial loss resulting from the expropriation of real estate will fall under some, or all, of the following Heads of Claim:

Market Value – of the property actually acquired from the freeholder and leaseholder (if there are tenants). this is the most obvious compensable item. Market Value is the amount of money the property owner would have obtained for the expropriated interest in the property, had it been sold in the open market by a willing seller to a willing buyer. If only part of the property is expropriated, the acquiring authority has to pay the property owner the Market Value of the portion expropriated plus "Injurious Affection" i.e. any loss in value to the remaining property. Injurious Affection is often more substantial than the value of the property acquired, particularly if the remaining property is "improved" with a residence, commercial, industrial or institutional building.

The owner will not get any extra expropriation compensation however if the property has a "special" value to the expropriating authority, over and above its Market Value unless it was targeted for acquisition for that purpose. An example would be the acquisition of a commercial gravel pit the product of which was then used by the acquiring authority for its road construction (Stephen Moffett v. New Brunswick [Minister of Transportation] NB Court of Queens Bench 81 L.C.R. 2004 Page 161) details of which are available on our web site. https://www.turnerdrake.com/services/counselling-advice/expropriation-tax-law/. Sentimental attachment, often a major blow in the case of losing a home, is also not compensable. However, if the house has been adapted for disabled living the cost of doing so is compensable.

Home For A Home - If the expropriated property is an owner occupied family home, which has been expropriated in its entirety, or has been so adversely impacted by a partial taking that it is no longer suitable for a family home, the owner may be entitled to additional expropriation compensation. If, for example, the expropriated property is located in a neighbourhood of higher priced homes, and the Market Value compensation is inadequate to purchase a

replacement property in the same neighbourhood, the expropriated property owner will be able to claim additional compensation sufficient to purchase a replacement home, albeit superior to the expropriated property. If no homes are available for purchase, some Expropriation Acts provide sufficient compensation to purchase a lot and build an identical dwelling in the same neighbourhood.

Disturbance - When a property owner is forced to move out of their home because it has been expropriated, they will be able to claim for the cost of moving expenses, together with items such as new drapes, etc. If it is not practicable to estimate these costs, some Expropriation Acts (Federal and Nova Scotia) provide an allowance instead of up to 15% of the Market Value of the expropriated property. The New Brunswick Expropriation Act allows, in addition to moving expenses, 5% of the Market Value of the residential portion of the expropriated property to compensate for the cost and inconvenience of finding another residence.

When business premises are expropriated the occupant will suffer a variety of losses because they are forced to relocate. The firm will have to print new stationery, inform its customers, incur staff overtime packing and unpacking prior to and after the move, new signage, etc. as well as the cost of the move itself. Whether the business moves or not, profits will usually be adversely impacted, especially by a road widening scheme, and/or the relocation. Trade, once lost to competitors, may take years to recapture, or may be lost forever. The resultant loss, capitalised as "goodwill" will be compensable together with the remaining disturbance costs resulting from the property expropriation. However, the stress and strain resulting from the expropriation, and loss of the business owner's time, is frequently not compensable, something which is patently unfair. In the case of Shute v. Paradise 9 (Town), 2023 NLSC 24 the Supreme Court of Newfoundland and Labrador overturned the decision of the Board of Assessors awarding non-pecuniary damages for anxiety, stress and loss of peaceful enjoyment of their residential property (part of which had been expropriated) during the road widening work.

Unfortunately, where the business is forced to relocate, most Expropriation Acts will defer the calculation of business loss until the business has been in operation for twelve months at its new location.

Special Purpose Properties - Some types of properties do not normally sell on the open market: churches, schools, hospitals, religious and charitable institutions, are examples. If the expropriated property falls into this category and the owner has, and intends, to relocate, they are entitled to base their compensation claim on the reasonable cost of creating a similar property (technically known as "the cost of equivalent reinstatement"). Even though the property they are vacating may be old, their claim can be based on the cost of building a new, otherwise identical structure, plus the cost of acquiring a replacement site. However, the Federal and New Brunswick Expropriation Acts attempt to claw back some of the compensation if the owner has improved their position. The Federal Expropriation Act extends equivalent reinstatement to all properties that do not normally sell on the open market, but the other Acts generally restrict this provision to institutional properties.

Injurious Affection - If only part of the property is expropriated the acquiring authority has to pay the owner the Market Value of the portion they have acquired. They also have to compensate the property owner for any loss in value to the remaining property resulting from (1) the expropriation of part of the property and the construction of works thereon, and (2) the use of the expropriated property.

For example, a property owner may lose part of their front yard because the municipality widens the highway. The front yard provides amenity space for the dwelling and affords it a privacy and noise buffer, all of which will be lost because of the expropriation. In addition, if the expropriated land is to be used as a new traffic lane the road will then be closer to the dwelling and there will be increased traffic noise, fumes, visual intrusion, etc. The new highway may be at a higher grade than the old road too, resulting in drainage or access problems for the property. In addition, the expropriation may deprive the property of its parking, or it may be more difficult to get out of the driveway. The remaining property will suffer Injurious Affection i.e. be depreciated in value as a result of the foregoing.

Or perhaps the property comprises a woodlot or a farm. If land expropriated for a new limited access highway cuts through the middle of a farm it will render part less accessible and severed from the farm buildings. This is called *severance*. The less accessible land will be worth less as a result of the severance. Or the remaining farm buildings may be worth less than was the case before the expropriation, because the land base they support is much diminished by the loss of acreage for the new highway.

Some Expropriation Acts include Disturbance (and loss of Goodwill) under the heading of Injurious Affection. This is not significant other than the fact that some expropriating authorities, such as the Province of New Brunswick, will not calculate Injurious Affection until well after the event.

In our experience Injurious Affection is generally the most substantive part of any loss resulting from expropriation. It is usually calculated by the "Before and After" method i.e. the property is valued before part is expropriated and then valued again on the assumption that the expropriation has taken place. The difference between the two values, less the Market Value of the land expropriated, is the Injurious Affection.

Special Economic Advantage - If the expropriated property is owner occupied i.e. not rented, the property owner may be able to claim for any *special economic advantage* arising out of, or incidental to, their occupation of the property, to the extent that they have not been compensated under the other Heads of Claim.

If for example, the property owner, or a member of their family, is disabled and the home has been adapted to meet their requirements, e.g. with paraplegic ramps, grab bars, wider doorways and hallways, stair lifts, etc. the owner will be able to claim for the cost of these improvements.

The same conditions apply too with commercial property that has been adapted to suit the unique requirements of the business. It applies as well to property that has additional value because of its location, such as a woodlot proximate to the owner's mill and therefore more valuable to the mill owner than its Market Value would indicate (Gagetown Lumber Co. Ltd. v. the Queen, [1957] S.C.R. 44) or a gravel pit which supplied a nearby concrete plant and construction business under the same ownership (The Province of New Brunswick v. Fundy Contractors Limited and Young NB Court of Appeal 2023 NBCA 57).

Some Expropriation Acts e.g. Newfoundland and Labrador, Prince Edward Island, do not mention Special Economic Advantage specifically but it would, in our view, still be a valid compensable item.

Professional Fees - The governing principle is quite clear; expropriation is the exercise of police power by the state, the expropriated property owner has to assert a claim for their loss against an expropriating authority with more resources and deeper pockets; in this David versus Goliath scenario the expropriating authority has a moral responsibility to level the playing field by providing the expropriated party with paid **appraisal, legal and other advice**. Unfortunately, only the Federal Expropriation Act rises to the challenge, most of the Provincial Expropriation Acts fall short and it is under the latter that municipalities expropriate. The Federal Expropriation Act requires that the expropriating authority pay the legal, appraisal and other costs reasonably incurred in ascertaining a claim for compensation. (The property owner is obligated to ensure that the costs are reasonably incurred, rather than being responsible for ensuring that they are reasonable). The Nova Scotia Expropriation Act provides for the payment of "reasonable costs necessarily incurred" and make payment conditional on the outcome of the Board (court) decision. New Brunswick and Newfoundland make payment conditional on the outcome of a subsequent court action, Prince Edward Island has yet to acknowledge the necessity to protect expropriated property owners. In practice however, expropriating authorities want to avoid the adverse publicity, time and cost of proceeding to court so are usually willing to reimburse the expropriated property owner their reasonable appraisal and legal costs as part of the negotiation process.

Betterment - If part, or all, of the property remaining after the expropriation increases in value as a result of the scheme the resultant increase (Betterment) usually has to be "offset" against the total compensation payable, Heads of Claim other than the value of the land taken, or the property remaining after the expropriation, depending on the terms of the applicable Expropriation Act.

No Land Taken

Compensation is payable, in certain circumstances, to property owners who have lost part of their property due to a *constructive taking* i.e. where the acquiring authority acquired a *beneficial interest* without transfer of title and thus deprived the property owner of any reasonable use of their property. The most recent Supreme Court of Canada case, hot off the press, is Annapolis Group Inc. v. Halifax Regional Municipality, 2022 SCC 36. We will cover the details in our Newsletters (if you are not yet a subscriber your free subscription awaits at https://sub.turnerdrake.com/Signup).