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## Expropriation Law: A Brief Introduction

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Ursula Melinz - Partner  
Soloway Wright LLP

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Soloway  
Wright | lawyers

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## Expropriation Law: A Brief Introduction <sup>1</sup>

Many municipalities in Ontario have completed or are in the process of undertaking major infrastructure projects. These infrastructure projects require municipalities to obtain land within increasingly built up central areas. If a landowner is not willing to sell to the municipality then an expropriation is necessary. Ottawa's Light Rail Transit project is an example of an infrastructure project that is introducing the term of expropriation to the lexicon of businesses and property owners as well as real estate professionals in a whole new way. Numerous expropriations are already affecting property owners and businesses and more are sure to follow.

The purpose of this paper is to provide a brief introduction to the expropriation process and will include the following:

- Key points to consider for lawyers who may be involved in a land acquisition or expropriation process.
- A summary of the expropriation process and compensation scheme for expropriations in Ontario – what's compensable and what's not? When will expropriated parties receive compensation?
- Tips for small and medium sized business clients facing the threat of expropriation. What costs will a client face? What can they do to make sure they'll be able to recover the expense?

### Key Points for Lawyers

- The *Expropriations Act* R.S.O. 1990, c.26, as amended (the "Act"), is deceptively complicated to apply. While the *Act* itself is brief, the case law is extensive. The case law includes principles established in other Common Law jurisdictions and the full series of case law is not available online. A further problem with case law is that, although it provides considerable guidance, the cases are not precedent setting and each expropriation situation is fact specific.
- Do not under-estimate the emotional impact that an expropriation will have on an expropriated party (owner or tenant). The stress associated with having to relocate and the uncertainty of how much compensation will be received, and when, is difficult.
- Managing a client's expectation of compensation may be challenging. Since every expropriation is different, it is difficult or even impossible to predict how much compensation an expropriated party will be entitled to. This is important to keep in mind when managing client expectations. The assessed value of a property may be valued far lower than the client personally feels it is worth. It can be especially hard on small business owners that have spent most of their lives building the business.

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<sup>1</sup> The author is grateful to Ben Hagen, a student at Soloway Wright LLP, for his research and writing assistance associated with the preparation of this paper.

- Each Expropriating Authority has a different way of negotiating. Some Expropriating Authorities will use their in-house property officers and/or legal counsel to negotiate purchase agreements while others will hire outside consultants, including legal counsel, to proceed with a full expropriation process.

## Governing Act for Ontario

The *Expropriations Act* (the “Act”) governs the process of expropriation in Ontario. The Act applies where land is expropriated by a statutory authority and where work by a statutory authority on adjacent land causes injurious affection (discussed below).

## Expropriation Defined

Expropriation is defined in Section 1(1) of the Act to include “the taking of land without consent of the owner by an Expropriating Authority in the exercise of its statutory powers”. Expropriation is one of the most powerful exercises of a public authority’s power. An expropriation may take all of a property, part of a property, or it may take only a partial interest in a property, for example, an easement or subterranean rights.

An Expropriating Authority is any entity empowered by statute to expropriate an interest in land. Expropriating Authorities can include municipalities, the provincial government, the Ministry of Transportation, utility companies and universities. Of particular note for Ottawa and the surrounding area is the fact that the National Capital Commission (“NCC”) is also empowered to expropriate, however this is done under the federal *Expropriation Act* R.S.C., 1985, c. E-21.

## The Process

The first time an owner or tenant may become aware of a possible expropriation is through the public consultation process related to the infrastructure project. There are usually public notices, newspaper notices and public meetings for the purpose of discussing the proposed project. A separate government approval, with its own public process, may be required for the infrastructure project.

Before an expropriation can occur, the Expropriating Authority must make an application to the Approval Authority for approval to expropriate the land. In some cases the Expropriating Authority and the Approval Authority are the same entity - for example, the City of Ottawa is both the Expropriating Authority and Approval Authority. In other cases the approval authority will be the responsible Minister –provincial highway works (Ministry of Transportation) must seek approval from the Transportation Minister (Section 5).

## The Notice of Application for Approval to Expropriate

Pursuant to Section 6(1) of the Act, the Expropriating Authority must serve each of the registered owners with a Notice of Application for Approval to Expropriate. The Notice of Application for Approval to Expropriate must also be published in a local newspaper for three consecutive weeks. Once the

landowner receives a Notice of Application for Approval to Expropriate they have 30 days within which to exercise the option of requesting a Hearing of Necessity.

### Hearing of Necessity

A Hearing of Necessity grants an owner the opportunity to question both the extent of the expropriation as well as the necessity of the expropriation. There are, however, several disincentives that an owner must consider before requesting a Hearing of Necessity.

If a Hearing of Necessity is requested, the Province will appoint an Inquiry Officer. The purpose of the hearing is to “inquire into whether the taking of the lands or any part of the lands... is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority” (Section 7(5)). At the hearing it is not open to the owner to challenge the Expropriating Authority’s objectives. The Hearing of Necessity may result in either an increase<sup>2</sup> or reduction of the size of the expropriation. It could include a change from a fee taking to that of an easement. It is unlikely, however, that an owner will avoid the expropriation altogether.

Following the Hearing of Necessity, the Inquiry Officer sends a report to the Approval Authority. The Approval Authority must consider the report but does not need to follow it. If there is a Hearing of Necessity, an Approval Authority must give written reasons for its decision to continue with the expropriation pursuant to Section 8(2) of the Act.

An expropriated owner should be aware of the possible cost consequences of a Hearing of Necessity. Pursuant to Section 7(10) of the Act, the costs of the hearing are limited to \$200.00 (two hundred dollars).

### Plan of Expropriation and Notices of Expropriation

If there is no request for a Hearing of Necessity, or there is a hearing and the Approval Authority has considered the report of the Inquiry Officer and is proceeding, then the Approval Authority can issue a Certificate of Approval to the Expropriating Authority. This Certificate allows the Expropriating Authority to proceed to expropriate.

After obtaining the Certificate of Approval, the Expropriating Authority must proceed to register a Plan of Expropriation within 3 months of the granting of the approval (Section 9). If an Expropriating Authority fails to register the Plan of Expropriation within the prescribed time period, it must start the proceedings anew<sup>3</sup>. Once the Plan is registered, title to the expropriated land vests in the Expropriating Authority. The Expropriating Authority must serve the registered owner with a Notice of Expropriation within 30 days of registration.

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<sup>2</sup> In *Ontario (Ministry of Transportation) v. Marwick* (1998), 67 L.C.R. 154 (Ont. Bd. of Inquiry), the proposed expropriation would have left the owner’s remaining property landlocked hence the Inquiry Officer found that the expropriation should be increased and the entire property should be taken.

<sup>3</sup> *Metcalfe Realty Co. v. Ottawa-Carleton (Regional Municipality)* (1975), 7 L.C.R. 48 (Ont. Div. Ct.).

## Notices of Election and Possession

The Expropriating Authority will usually serve a Notice of Election and a Notice of Possession along with the Notice of Expropriation.

The Notice of Election allows the owner to choose the valuation date for the expropriated property. The value of the expropriated property will be determined as of the valuation date. As outlined in Section 10(2), the owner may choose from three different valuation dates as follows:

- Where there has been an inquiry, as of the date the Notice of Hearing was served;
- As of the date of the registration of the plan; or
- As of the date on which the owner was served with the Notice of Expropriation.

There are many different reasons that will influence what date should be selected – consider the impact that changing real estate markets will have on the value of land (values may go up or down).

The Notice of Possession specifies the date on which the Expropriating Authority will take possession. This date must be at least 3 months after the notice is served. It is also possible for the Expropriating Authority to obtain possession earlier or for the owner to delay providing vacant possession. This may be done by negotiation or if necessary by an application to the Superior Court of Justice.

## Compensation

Pursuant to Section 13 of the *Act* an owner may be entitled to compensation under four general heads:

- 1) the market value of the land;
- 2) the damages attributable to disturbance (only for a partial taking of land);
- 3) damages for Injurious Affection; and
- 4) any special difficulties in relocation.

An owner may be paid in several different ways and at different times. Note that any claim will require documentation and likely considerable consultation with professionals such as lawyers, appraisers, and possibly land use planners, engineers and architects to quantify and justify any claim.

## Section 25 Offer

In order to obtain actual possession, the Expropriating Authority is required to serve an Offer of Compensation on the owner within 3 months of filing the Plan of Expropriation pursuant to Section 25 of the *Act*. A Section 25(1)(a) offer will be for a full and final amount of compensation which thereby terminates an owner's right to seek further compensation. Alternatively, the owner can accept the

Section 25(1)(b) offer which grants the owner a partial payment without prejudice to the owner's rights to continue to pursue additional compensation under the *Act*.

The offer must be for 100% of the appraised value of the land as estimated by the Expropriating Authority and based upon an appraisal report.

### Market Value

The market value approach is intended to reflect what the property would be worth if it were sold on the valuation date, assuming a willing seller and a willing buyer (Section 14(1)).

Market value must be based on the lands "highest and best use", which means the highest economic use. If the land would need to be rezoned to realize its highest and best use, then the hypothetical rezoning must be reasonably probable based on planning evidence<sup>4</sup>.

A certified appraiser must be retained to prepare an appraisal for the purpose of determining the market value of the land taken. There are different methods that an appraiser can utilize to determine the value<sup>5</sup>. Which method should be used will depend on the existing use of the property and other site specific factors.

### Disregarding the Development or Scheme

Pursuant to Section 14(4)(b) of the *Act*, when valuing the land, any increase or decrease caused by the development, or scheme, which gave rise to the expropriation must be disregarded<sup>6</sup>. In other words, if land is being taken for a highway then reference cannot be made to the proposed highway to either increase or decrease the value of the land taken<sup>7</sup>. Note that this principle is not easy to apply, it is frequently disputed and is often the subject of litigation.

### Disturbance Damages

Although disturbance damages are not defined in the *Act*, they have been held to be damages attributable to the expropriation of lands on which a business or an undertaking was carried on provided they are not too remote<sup>8</sup>. Disturbance damages for a business, owner or tenant may include business replacement costs, relocation costs (moving and advertising), and business losses (Sections 18 and 19). These are out of pocket expenses, caused by the expropriation, that need to be reimbursed in order to make the expropriated owner whole.

In the leading expropriation case of *Toronto Area Transit Authority v. Dell Holdings Ltd.*<sup>9</sup>, the Supreme Court held that disturbance damages should not be limited to losses related to the expropriated land. Instead, the Court held that if it is a "natural and reasonable consequence of the expropriation" that the

<sup>4</sup> *Mouawad v. Leamington (Town)* (2001), 76 L.C.R. 147 (O.M.B.).

<sup>5</sup> A description of the various valuation methodologies is beyond the scope of this paper and presentation.

<sup>6</sup> This is a codification of the common law decision of the Privy Council in *Pointe Gourde Quarrying & Transport Co. v. Sub-Intendant of Crown Lands* [1947] A.C. 565 (P.C.). A discussion of the application of this principle is beyond the scope of this paper.

<sup>7</sup> *D'Amore v. Ontario (Minister of Transportation & Communications)* (1985), 32 L.C.R. 307 (O.M.B.).

<sup>8</sup> *Black v. Brandt (County)* (1972), 1 L.C.R. 325 (Ont. L.C.B.).

<sup>9</sup> *Toronto Area Transit Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32 (S.C.C.).

owner experiences losses with regard to any remaining land then this must come within the definition of disturbance damages.

Disturbance damages may also be sought in the event of a residential taking (Section 18).

### **Damages for Injurious Affection**

An injurious affection claim does not exist when a full taking occurs.

When a partial taking of land occurs, damages for injurious affection may be given to reflect the reduced market value of the lands retained by the owner. Other possible injurious affection claims may include loss of trees and landscaping or loss of access. There must be a causal link between the damages and the expropriation.

In *Windsor (City) v. Paciorka Leaseholds Ltd.*<sup>10</sup>, the Court of Appeal confirmed that only those damages caused by the City's acquisition of the owners' lands, not damages caused by the entire expropriation scheme as a whole, were compensable on the basis of injurious affection.

If no lands are taken, there is a more restricted remedy which is limited to losses arising out of the construction, but not the use of the works, on the lands expropriated from another. In the recent Supreme Court of Canada decision of *Antrim Truck Centre Ltd. v. Ontario (Transportation)*<sup>11</sup>, the Court held that in order to recover damages for injurious affection where no land is taken, the claimant must meet three requirements: first, the damage must result from action taken under statutory authority; second, the action would have given rise to liability but for the statutory authority; and third, the damage must result from the construction and not the use of the works. The *Antrim* decision also addressed the issue of public purpose versus private impact.

The main issue on this appeal is this: How should we decide whether an interference with the private use and enjoyment of land is unreasonable when it results from construction which serves an important public purpose? The answer, as I see it, is that the reasonable of the interference must be determined by balancing the competing interests, as it is in all other cases of private nuisance. The balance is appropriately struck by answering the question whether, in all of the circumstances, the individual claimant has shouldered a greater share of the burden of construction than it would be reasonable to expect individuals to bear without compensation<sup>12</sup>.

A critical element of an injurious affection claim is that an owner must notify the Expropriating Authority of the damages or loss within one year of the damages being sustained otherwise the claim is statutorily barred (Section 22(1)).

### **Special Difficulties in Relocation**

A special difficulty in relocation claim allows owners who experience manifest difficulty in relocating their business or home due to the property's special attributes, or specific challenging market

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<sup>10</sup> *Windsor (City) v. Paciorka Leaseholds Ltd.*, [2012] O.J. No. 2822 (O.N.C.A.), paras 39 and 42.

<sup>11</sup> *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, [2013] S.C.J. No. 13 (S.C.C.).

<sup>12</sup> *Antrim*, supra, para 2.



conditions, to be compensated for the costs required in order to relocate to a similar property. Note that this type of award is not frequently given.

An example of special difficulties for a business occurred in *Gray Coach Lines Ltd. v. Hamilton (City)*<sup>13</sup> where the coach line was required to relocate its bus garage as a result of the expropriation. The needs of the business and the nature of the equipment used by the claimant restricted the potential replacement sites to a small area. Further, the urban renewal that necessitated the expropriation resulted in zoning regulations that made it impossible to locate a bus garage in the surrounding area. The claimant found a suitable site that was larger and was awarded compensation for the difference between the market value of the land at the old site and the amount the claimant needed to spend for the minimum amount of land necessary to duplicate the old site.

In a residential situation, Section 18(1)(a) and (c) sets out some factors that will be considered in order to grant compensation due to the relocation. An additional amount of compensation may be granted to a homeowner if, in the opinion of the Board, it is necessary “to enable the owner to relocate his or her residence in accommodation that is at least equivalent to the accommodation expropriated” (Section 15).

### Tenant Compensation

Pursuant to Section 1(1) of the *Act* “owner” is defined as including a tenant. A “tenant” is defined in the *Act* to include a lessee or occupant under any tenancy whether written, oral or implied. Tenants have some rights to compensation but any compensation will be evaluated according to the terms of the lease (Section 18(2)). In practice, there is very little certainty as to what compensation a tenant will receive or when they will receive it.

If a tenant is in a lease that has been frustrated by an expropriation then the tenant should be entitled to moving and advertising expenses as well as reasonable tenant fit-up costs at the new location. However, there is no legislative statement as to when a tenant is to be paid, and therefore compensation may not occur until after the tenant has relocated into a replacement property. This means that the tenant will likely have to pay the relocation costs upfront and then seek reimbursement later.

### Abandonment of Expropriated Land

Pursuant to Section 41(1) of the *Act* if, at any time before the compensation for an expropriation is paid in full, an Expropriating Authority deems the land or any part thereof unnecessary, then the Expropriating Authority must notify each owner who was served with the Notice of Expropriation that the land is no longer required.

The owner then has a choice as to whether he or she wants to take the land back or require the Expropriating Authority to retain the land and seek full compensation. If the owner takes the land back he or she has a right to compensation for “consequential damages”. Although consequential damages is not defined in the *Act* it has been held to mean “all damages sustained and all costs incurred by [the

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<sup>13</sup> *Gray Coach Lines Ltd. v. Hamilton (City)*, (1971), 1 L.C.R. 181, [1971] 2 O.R. 689 (C.A.), affirmed (1972), 3 L.C.R. 1, [1973] (S.C.C.).

owner] in consequence of the expropriation and abandonment”<sup>14</sup>. This could include legal fees and disbursements, lost rents, appraisal fees and any decrease in market value.

## Section 30 Agreement

Section 30 of the *Act* provides a mechanism through which an Expropriating Authority can avoid the formal expropriation process (the Application for Approval to Expropriate and Notice of Expropriation) if an owner agrees to transfer the required property to the Expropriating Authority for compensation. The owner can agree to the transfer, receive the compensation offered by the Expropriating Authority in the Section 30 Agreement and the owner still retains the right to continue to pursue a claim for compensation as if the land had actually been formally expropriated. This is a more efficient process that is usually beneficial to both the owner and the Expropriating Authority. The Section 30 process will not work if there are several interests involved (owners and tenants) and one interest will not consent which would necessitate the full expropriation process.

## Board of Negotiation and OMB

### Board of Negotiation

Appropriate compensation for most expropriation matters is determined by way of negotiation. Typically, professional reports such as property appraisals, will be exchanged in order to inform settlement discussions. If an agreement regarding the amount of compensation to be paid is not reached, either the owner or the Expropriating Authority has the right to serve a Notice of Negotiation on the other. The parties may elect to proceed to a mediation tribunal called the Board of Negotiation (Sections 26(1) and 27). The Board of Negotiation provides mediation services to attempt to settle the expropriation claims.

If a claim cannot be settled at the Board of Negotiation, or if the parties agree to waive attendance at the Board of Negotiation, then either the owner or the Expropriating Authority may file an application for binding arbitration before the Ontario Municipal Board (“OMB”) by issuing a Notice of Arbitration and Statement of Claim simultaneously in one document<sup>15</sup>. The claim should detail what compensation is being sought and briefly summarize what facts are being relied upon in support of the claim. Within 20 days of being served with the claim, a Reply Statement must be filed by the Expropriating Authority.

### OMB Hearing

The OMB has the jurisdiction to determine all compensation claims (Section 29). An OMB hearing to determine compensation for an expropriation matter is an interesting hybrid of Ontario Municipal Board and Superior Court rules and proceedings. In expropriation matters, there are rights and obligations associated with full production, admissions and discovery, and the establishment of a Procedural Order which sets key dates for documents to be exchanged and expert meetings to occur. Note that the OMB Rules of Practice and Procedure require expropriation hearings to be recorded by a reporter<sup>16</sup>.

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<sup>14</sup> *Buckhorn Lodge Ltd. v. Minister of Transportation and Communications* (1972), 3 L.C.R. 105 at 128 (Ont. L.C.B.).

<sup>15</sup> Section 26(2) and Ontario Municipal Board Rules of Practice and Procedure, Section 122.

<sup>16</sup> Ontario Municipal Board Rules of Practice and Procedure, Section 137.

An OMB hearing requires the attendance of professional witnesses, including an appraiser and likely a land use planner, to justify the amount of compensation sought by the owner or offered by the Expropriating Authority. A written decision is issued by the OMB at the conclusion of the hearing. An OMB decision may be appealed to the Divisional Court on a question of law or fact or both, within six weeks of the decision being issued (Section 31).

## Costs and Interest

Pursuant to Section 32(1) of the *Act* if the OMB awards an amount in excess of 85% of the Expropriation Authority's offer then the land owner is entitled to recover their "reasonable" legal, appraisal and other expenses incurred as part of the process in order to determine compensation payable<sup>17</sup>. Costs may be disallowed if they are not deemed to be for the purposes of determining compensation payable or if they are not reasonable. The *Act* does not provide a definition or formula to calculate what is reasonable. This may require further negotiations with the Expropriating Authority or submitted to a Court appointed assessment officer.

An expropriated owner is also entitled to be paid interest on the portion of the market value of the owner's interest in the land and on the portion of any allowance for injurious affection. Interest is not applied to a disturbance damage award. Interest is at the statutory rate of 6% a year calculated from the date the owner ceases to reside on or make productive use of the lands (Section 33(1)). When the owner ceases to make productive use of the land is frequently a subject of discussion and litigation. The interest rate may be reduced below the statutory amount if the conduct of the owner resulted in a delay in determining the amount of compensation payable (Section 33(2)). Conversely, the interest rate may be increased up to 12% if the delay in determining compensation is attributable to the expropriating authority (Section 33(4)).

## Tips for Lawyers and Expropriated Parties - Small and Medium Sized Businesses

For small and medium sized businesses, it is advisable to seek legal advice as soon as they receive a Notice of Application for Approval to Expropriate. The Notice essentially triggers the *Act* and hence the entitlement to be reimbursed for reasonable legal and appraisal costs. If an owner or tenant retains a lawyer or an appraiser too soon, and the expropriation never occurs, then the owner or tenant may be liable for the costs.

As noted above, if a business requests a Hearing of Necessity they will only be able to recover a maximum of \$200 in costs. This means even a successful expropriated owner can be liable for a majority of their lawyer's fees if they are represented at the hearing.

Expropriated parties will likely have to pay costs such as renovations or tenant fit-ups, moving and advertising upfront, while pursuing their claim. Depending on the business' financial situation, it may be advisable to attempt to negotiate a fair Section 30 agreement early in the process in order to have some capital to relocate and continue business as usual. As always, lawyers need to be cautious as to what

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<sup>17</sup> Section 32(1) says the Board "shall" make an order for costs. Section 32(2) states that costs may be granted if the amount awarded by the Board is less than 85% of the Expropriating Authority's offer.

they advise their clients to sign and ensure that the Section 30 agreement will not prejudice any future claims.

Businesses must keep very meticulous records of expenses incurred with regards to all aspects of the relocation. If this is not done properly the ability to seek full compensation for all expenses will be compromised.

Expropriated owners should advise their insurance company immediately after the Plan of Expropriation is registered because the Expropriating Authority will then own the land. The Expropriating Authority will have insurance on the property but it remains the expropriated owner's responsibility to maintain tenant/content insurance.

If businesses are planning on relocating it is important for them to keep in mind that any compensation received by an owner of an expropriated property will trigger a capital gain payment unless a replacement property is purchased within 2 years. Also note that it may be possible to receive a Land Transfer Tax reimbursement for the value paid to purchase the replacement property.

Expropriated owners should mentally prepare themselves for the process of expropriation. Although the object of the Act is to make the expropriated owners whole, the process in many cases will be drawn out and mentally exhausting leaving most owners feeling like they lost out at the end of the day.

## **Other Areas of Compensation Not Discussed in this Paper**

Additional business claims may exist. A business may claim compensation for business losses experienced due to the requirement to relocate (Section 19(1)). Note that this claim requires documentation that demonstrates the reduction directly attributable to the requirement to relocate because of the expropriation.

Another party that has rights under the Act, but not discussed in this paper, is a security holder or mortgage holder<sup>18</sup>. Generally, a mortgage holder or security holder is entitled to be paid for its interest directly from the Expropriating Authority from the initial market value determination. In other words, not all of the assessed market value will be given to the owner. The mortgage holder is paid first.

May 2, 2013

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<sup>18</sup> For example, refer to Sections 16, 17 and 20 of the Act.