

A PRIMER ON EXPROPRIATIONS IN ONTARIO

Raymond G. Colautti
R.G. Colautti Law
Professional Corporation

Introduction:

This paper is meant to be a bare outline of expropriation law and procedures under the Ontario *Expropriations Act*, R.S.O. 1990, c. E.26. It is not meant, and should not be taken, as a definitive treatise on the subject. This paper is meant to be used as a guide only for those who may be facing an expropriation. It must not be taken as an expression of legal opinion on any particular fact situation. In any given situation, resort must be had to the particular provisions of the *Expropriations Act* itself and the case law thereunder.

These materials are copyrighted by Raymond Gary Colautti and Raphael Partners LLP and any use of these materials without the explicit consent of the author are expressly prohibited.

General Principles:

Certain public authorities have a statutory power to forcibly take (expropriate) private lands and premises where the taking of such lands is necessary for the achievement of specific and identified objectives of the expropriating public authority. The Supreme Court of Canada stated in *Toronto Area Transit Operating Authority vs. Dell Holdings Ltd.* [1997] 1 S.C.R. 32, at para. 20:

"The expropriation of property is one of the ultimate exercises of governmental authority. To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights. It follows that the power of an Expropriating Authority should be strictly construed in favour of those whose rights have been affected."

In that case, the Supreme Court of Canada also went on to say that the *Expropriations Act* is a remedial statute, and must be given a broad and liberal interpretation consistent with its purpose. A remedial

statute should not be interpreted, in the event of an ambiguity, to deprive one of established rights unless that is plain in the provisions of the statute.

A presumption therefore arises that whenever land is expropriated, compensation will be paid. Unless the words of the statute so demand, a statute is not to be construed as to take away property without compensation.

In Ontario, the power of expropriation is usually given by provincial legislation to municipal governments, school boards, universities, hospitals, the Ministry of Transportation, the Minister of Natural Resources, certain public utilities, and other governmental agencies such as the Ontario Power Generation Corporation. The *Expropriations Act* applies to any circumstance where land is expropriated by such a statutory authority.

The Ontario *Expropriations Act* contains a complete code of specifications and procedures for the initiation, conduct and resolution of expropriation proceedings governing the taking of private lands and other interests in real property. The Act is a balanced attempt to accommodate the public interest in allowing statutory authorities to proceed with projects for the public good as against the rights of the expropriated property owner to receive fair and full compensation for his or her property and to be "made whole" in respect of any consequential damages which have been incurred and which may be fairly and reasonably linked to the expropriation. The Act also contains protections allowing expropriated property owners to re-acquire expropriated lands, and when those lands are no longer acquired by the Expropriating Authority for the purposes for which they were acquired.

Generally, expropriation procedures under the Act are divided into several parts or stages:

1. The initiation of and approval of a Plan of Expropriation, leading up to the registration of such Plan and the obtaining of possession of the expropriated lands by the public authority;
2. The fixing and payment of fair compensation to an expropriated owner, including fair market value and other damages caused by the expropriation, (note that the word "owner" is not restricted to land owner, but includes a mortgagee, tenant, execution creditor, a person entitled to a limited estate or interest in land, guardian of property, and a guardian, executor, administrator or trustee in whom a land is vested);
3. Procedures related to the determination of compensation payable to other persons who may hold an interest in the expropriated lands, such as mortgagees and tenants;
4. Procedures relating to the determination and compensation for damages caused by the construction of public works, called injurious affection (whether or not any land is taken);
5. Procedures requiring expropriating authorities, where agreement with an owner has not been reached, to serve an offer, supported by an appraisal report on the owner, who may accept that offer without prejudice to his rights to have compensation determined by the Ontario Municipal Board;
6. Provisions which govern the hearing of the claims for compensation under the Act to the Ontario Municipal Board, including the sequence of and service of appraisal reports, and other technical matters governing the conduct of such hearings;
7. Procedures relating to the obtaining of possession, abandonment, re-vesting and disposal of expropriated lands.

Initiation of the Expropriation:

It is important to understand the difference between an "Expropriating Authority" on the one hand and an "Approving Authority" on the other hand. The Expropriating Authority under the Act means the Crown, or any person, empowered by statute to expropriate lands. Under section 5 of the Act, the Approving Authority is the Minister responsible for the administration of the Act under which the power to expropriate is granted. However, where a municipality expropriates land for municipal purposes, the Approving Authority is the Council of the municipality; and where in the case of a school board, the Approving Authority is the School Board. In the case of universities or other educational institutions, the Minister of Colleges and Universities is the Approving Authority. In the case of hospitals or other medical or health institutions, the Approving Authority is the Minister of Health. In the case of all other corporations, the Approving Authority is the Attorney General. Where an expropriation is made under the *Ontario Energy Board Act*, the Approving Authority is the Ontario Energy Board. Where the expropriation is made under the *Ministry of Governmental Services Act* for the benefit of a ministry or agency of the government of Ontario, the Approving Authority is the Minister or Ministry responsible for the agency for the benefit for which the land is expropriated. In all other cases for any other expropriating not mentioned in the above list, the Approving Authority is the Attorney General.

Application for Approval to Expropriate:

An Expropriating Authority cannot expropriate land without the approval of the Approving Authority. An expropriation is initiated by the Expropriating Authority making an application for approval of the expropriation.

The Expropriating Authority serves a Notice of its application for Approval to Expropriate upon each registered owner of the lands to be expropriated. This notice must also be published in a newspaper as prescribed by section 6(1) of the Act.

Hearing of Necessity:

The service of the Notice of Application now triggers the right of the expropriated property owner to request a "hearing of necessity". The land owner has a right to request such a hearing within 30 days after he/she/it was served with the Notice of Application for Approval to Expropriate.

The purpose of an inquiry of necessity is to determine if the proposed taking of the lands or any part of the lands of an owner or more than one owner, is fair, sound and reasonably necessary in the achievement of the objectives of the Expropriating Authority.

The Inquiry Hearing:

In order to make this determination, the Act provides for the appointment of an Inquiry Officer, appointed by the provincial Attorney General. The Inquiry Officer conducts a hearing. At this hearing, the Expropriating Authority presents evidence showing detailed reasons why the proposed taking is necessary. At least five (5) days before the Inquiry Hearing, the Expropriating Authority must also provide to each party to the inquiry, a notice showing the grounds upon which it intends to rely on at the hearing, and must make available any documents, including maps and plans, that the Expropriating Authority intends to use at the hearing.

At the hearing, each party has an opportunity to present evidence and to examine and cross-examine witnesses.

The Inquiry Report:

Following the hearing, the Inquiry Officer must issue a report to the Approving Authority giving a summary of the evidence and arguments advanced by the parties, the Inquiry Officer's findings of fact, and his or her opinion on the merits of the application for approval with reasons.

Approval by the Approving Authority:

The Approving Authority is required to "consider" the Inquiry Officer's report. However, it is not necessarily bound to follow the report's conclusions and recommendations. The Act requires that the Approving Authority approve or not approve the proposed taking with such modifications as it considers proper. The Approving Authority must give written reasons for its decision and must serve all parties to the inquiry with these reasons within 90 days after the issuance of the Inquiry Officer's report.

Registration of Plan of Expropriation:

The Expropriating Authority must register on the title of the expropriated lands, within three (3) months of the approval of the expropriation, a Plan of Expropriation. At that point, title to the land vests in the Expropriating Authority.

Notice of Expropriation:

Frequently, while all of the above steps are underway, the Expropriating Authority negotiates with the affected land owners and attempts to arrive at a settlement respecting compensation. However, just as frequently, by this stage, no settlement has yet been reached. Where, after registration of a Plan of Expropriation, there is yet no evidence as to compensation, the Expropriating Authority may serve the owner with a Notice of Expropriation within 30 days after registration of the Plan of Expropriation.

Election of Date for Determination of Compensation:

The registration of the Plan of Expropriation also triggers a right on behalf of the land owner to choose the date on which compensation is to be assessed. The land owner can choose one of the following dates:

- a) The date of service of the Notice of Hearing by the Inquiry Officer;
- b) The date of registration of the Plan of Expropriation;

c) The date on which the owner was served with the Notice of Expropriation.

Appraisal of Land by the Expropriating Authority:

Once it has served the Notice of Expropriation and the owner is still in possession of the subject lands, the Authority has the right, either with the consent of the owner or with an Order issued by the Ontario Municipal Board, to enter on the lands in order to appraise their value and determine the amount of compensation payable.

Possession of Expropriated Land:

Where land has been expropriated and is vested in the Expropriating Authority, that authority must serve a registered owner with a Notice that it requires possession of the land on the date specified therein. There are then detailed procedures under the Act to enable the Expropriating Authority to obtain possession of the lands.

Compensation:

The general intention of the Act is to ensure that the expropriated property owner is made whole. The Act therefore is intended to provide full and complete compensation, including all reasonable legal and appraisal fees, incurred during the process in determining the compensation payable.

Compensation payable to the owner is based upon:

- a) The market value of the lands taken;
- b) The damages attributable to disturbance caused by the taking;
- c) Damages for "injurious affection" (discussed more fully below);
- d) Damages arising out of any special difficulties in relocation.

Market Value:

Generally speaking, the Act provides that the market value of lands expropriated is the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer.

There are two exceptions to this principle. First, where the expropriated land is devoted to a special purpose or nature such that there is no general demand or market for land for that purpose, and it can be shown that the owner intends to relocate to a similar premises, then the market value is deemed to be the reasonable costs of equivalent reinstatement.

The second exception to the market value of land taken is where only a part of the land of an owner is expropriated. Where such part is of a size, shape or nature for which there is no general demand or market, then the market value and damage to the remaining land caused by the taking can be determined by estimating the market value of the whole of the owner's land and deducting the market value of the land after the taking (called the "before and after" approach).

There is a third important concept qualifying the general market value approach. This occurs where land is expropriated or adversely affected by public works to be constructed by a statutory authority, but where some alteration or additional works could be done to alleviate the impact on the remaining lands. As an example, after a partial taking a land owner may be left with a building in close proximity to a public works such as a highway. Adverse impact to that building could be attenuated by the construction of a sound barrier, the use of a superior type of insulation in the walls of the structure of the building, and the addition of trees, berms, etc. In such a case, compensation is determined by taking into account these extra works or undertakings at the public authority's expense.

In determining the market value of lands taken, no account is made of:

- i) the special use to which the Expropriating Authority will put the subject lands;

ii) any increase or decrease in the value of the land resulting from the development or imminence of development in respect of which the expropriation is made;

iii) any increase to the value of land resulting from the land being put to a use that could be restrained by a court or is contrary to law or is detrimental to the health of the occupants or to the public health.

Where land is taken, an expropriating property owner may have to relocate their home elsewhere. The Act provides that, in addition to determining the market value of the lands taken, a further amount as is reasonably necessary to help an owner relocate their residence into accommodation that is at best equivalent to the expropriation proceedings, shall be taken into account.

There are a number of other important principles that apply to help determine the market value of the expropriated land. These principles have been developed in case law.

First of all, the determination of the market value depends upon the concept of "highest and best use" of the subject lands. This means that the highest economic use to which a willing and knowledgeable buyer and seller would reasonably anticipate the lands would probably be put, should be the basis upon which market value is determined. The zoning and Official Plan designations of the subject piece of land are not, in and of themselves, conclusive of its highest and best use. That issue is to be determined, having regard to evidence from land use planners, land economists, appraisers, engineers, etc. That evidence should detail what the site is suitable for and the economic viability of that use. Where the land is expropriated from an owner who could not be expected to develop the land to its highest and best use, compensation may nevertheless be based upon what a reasonable developer might pay for the land at the time of the expropriation.

Market value is proven by evidence. That evidence usually consists of expert opinion evidence of qualified appraisers, and supported by land use planners, architects, engineers, accountants, etc. All of these persons have to have appropriate professional qualifications, so their evidence can be accepted as expert opinion evidence before the Ontario Municipal Board.

Market value is often based on the comparable sales (market data approach) or other approaches such as "reproduction cost" or the "income/capitalized value" approach. Other evidence of market value may include actual offers that have been received prior to the expropriation.

It is obvious that selection of an experienced, qualified and objective appraiser is a crucial part of the compensation determination process. Proper selection of real comparables and the application of reasonable adjustments to the indicated values, are important to the ultimate determination of the value.

Disturbance Damages:

Disturbance damages are all damages which arise as a result of the natural and reasonable consequence from the expropriation. These damages can include losses that were incurred before the expropriation that resulted from actions taken by the Expropriating Authority as part of the process of acquiring the lands prior to the initiation of the actual expropriation process. Case law shows that, in the past, disturbance damages have been awarded for the following types of losses:

- business loss where the owner is unable to relocate within the same trading area;
- business loss including extra costs of dislocation and relocation;
- business loss in respect of a new business;
- temporary business loss;

- business loss which arose because it was not feasible for an owner to relocate for a five (5) year period;
- business loss caused by relocation;
- business loss caused by a delay in the expropriation;
- costs of closing down a business;
- construction damage;
- crop damage;
- the costs of removing debris left on an owner's land;
- demolition costs of building on expropriated lands where the demolition was required by the Expropriating Authority;
- lost depreciation;
- cost of equipment;
- cost of a fence;
- losses arising out of a frustration of a contract caused by the expropriation;
- cost of construction of a garage;
- household furnishings lost or replaced;
- income loss;
- losses arising out of increased costs of construction;
- cost of insurance on equipment placed in storage;
- insurance premiums for houses on expropriated properties;
- interest on money borrowed in order to relocate;
- interest on money borrowed for bridge financing;
- interest on money borrowed to pay professional fees;
- interest on mortgage for the relocation property;
- loss on disposal of inventory;
- legal fees on land transfer taxes;
- loss of future profits expected from a farm operation;
- loss of use of profits from a business venture which was interrupted and frustrated by the expropriation;
- mortgage bonus to discharge a mortgage on new premises;
- mortgage discharge costs;
- mortgage pre-payment costs;
- moving costs;
- noise, dust and salt damages during construction where there was a partial taking of the lands;

- loss of parking spaces;
- professional fees thrown away;
- loss of profit;
- loss on sale of agricultural quotas;
- costs of relocation of a driveway and a fuel tank;
- relocation costs of a business with reversionary interests;
- business relocation costs;
- the cost of relocating farm buildings due to proximity to a new highway;
- relocation of farm improvements;
- relocation of a residence;
- relocation of a laneway and grading;
- remedial work, including the cost of fill to reconstruct a beach and parking area on contiguous lands;
- loss of rent;
- loss of revenue;
- storage costs;
- excess costs of acquiring and renovating substitute premises;
- cost of a shed;
- cost of a survey;
- cost of temporary facilities;
- cost of test pumping well;
- time lost by an owner or officer or employee of a corporation as a result of expropriation;
- loss consequent on a sale of trade fixtures and equipment;
- loss of trees on a partial taking;
- loss of trees on a total taking of land when the commercial value of the trees was not reflected in the market value of the lands;
- loss on the partial taking of a trout pond;
- additional trucking expenses;
- extra wages of office staff;
- loss of water from a well;
- losses consequent on water damage to a building

Injurious Affection:

The Act defines this type of damage as follows:

"Injurious affection means,

a) where a statutory authority acquires part of the land of an owner,

i) the reduction and market value thereby caused the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and

ii) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute,

b) where the statutory authority does not acquire part of the land of an owner,

i) such reduction in the market value of the land of the owner, and

ii) such personal and business damages,

resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute,

and for the purposes of this clause, part of the lands of an owner shall be deemed to have been acquired where the owner from whom the lands are acquired retains lands contiguous acquired or retains lands of which the use is enhanced by the unified ownership with those acquired."

Under this head of damage, compensation in the case law has been held to include business income losses, physical damage to the remaining property, losses caused by physical objects made useless by the public works, interference with the reasonable use and enjoyment of property and the price of expenditures "thrown away" as a result of the taking. The following are examples of some losses under this head of damages that have been recognized in the case law:

- business loss arising from closure of premises during construction;
- business loss from interference with access to business premises during construction;
- cost of constructing a large culvert and by-pass to allow access to affected lands;
- crop damages;

- damages for loss of trees;
- delay causing increased construction costs;
- dirt and noise from construction;
- cost of air conditioning, rug and furniture cleaning, sound deadners and painting interior of house;
- replacement of driveway and retaining walls;
- damages to farm implements and farm vehicles;
- replacement of septic system because of flooding;
- flooding due to construction of inadequate drainage ditches;
- damages resulting from reduced front yard on road widening;
- inconvenience to a farmer in working around transmission line towers;
- relocation of lamp standards;
- replacement of landscaping;
- loss of visibility;
- lost exposure to highway;
- replenishment of topsoil;
- noise from construction of ditches;
- nuisance from erection of hydro transmission towers interfering with radio and television reception and the cost of moving a home;
- nuisance from noise, vibration and petty trespass;
- professional fees for services rendered obsolete by the expropriation;
- proximity damage and increased noise;
- proximity of roadway and cost of anti-noise insulation aesthetic berm;
- replacement land remote location and one time start up costs;
- structural damage to a home;
- temporary construction and maintenance of a truck haul route.

Special Difficulties in Relocation:

This head of damage is intended to compensate owners who are unable to find, or experience difficulty in replacement property with similar attributes. It may be, for instance, that the expropriated owner is

required to move to other premises, but because of zoning and building code requirements, requires a larger parking area or a larger show room, or upgraded electrical and plumbing fixtures. These losses should all be compensable.

Expropriation of Other Interests in Land:

When land is taken by an Expropriating Authority, other parties may have interests in that land that are affected. Such parties would include a mortgagee, or security holders, and tenants.

The scheme of the Act provides for compensation payable separately to each of these affected interests.

A security holder is entitled to be paid, to the extent possible, in accordance with the security holder's priority, out of the compensation payable to the owner.

Tenants who suffer disturbance damages, and relocation costs, are also entitled to similar compensation to the extent of their losses.

Tenants are entitled to be compensated for inconvenience and cost of finding another leased residence or leasehold premises, leasehold improvements, cost of finding replacement premises and moving, legal and survey costs having regard to:

- i) the length of the remaining term of their lease;
- ii) any renewal rights to that lease;
- iii) the nature of any business carried out in the leased premises;
- iv) the extent of the tenants' investment in the land.

Inconvenience and Cost of Finding Other Premises:

Where a land owner's residence is expropriated, they are entitled to an allowance, equal to five (5) per cent of the market value of that part of the premises used for residential purposes, to compensate them for the inconvenience and cost of finding another residence, as long as that residence was not being offered for sale at the time of expropriation.

Furthermore, an expropriated land owner may also receive an allowance for improvements on the land which are not reflected in the market value of the land, and that land owner's cost of finding premises to replace those expropriated. Land owners are also entitled to relocation costs, including moving costs and the legal and survey costs and the other non-recoverable expenditures incurred in acquiring other premises.

Business Loss:

Where a business is located on the expropriated land, the Expropriating Authority must pay compensation for any business loss resulting from the relocation of the business. Normally, such claims are not determined until after the lapse of a six (6) month to three (3) year time period after the business has moved.

Time Limit for Claims for Injurious Affection:

Persons entitled to claim for injurious affection as described above, must make such claims in writing by the person suffering such loss within one (1) year after the damage was sustained or became known, failing which, such a claim is forever barred.

Offer of Compensation:

The Expropriating Authority is obliged, within three (3) months after the registration of Plan of Expropriation as discussed above, to serve on the registered owner with an Offer of Compensation in full of the registered owner's interest and a statement of the total compensation being offered for all interests in the land, excepting business losses. In addition, the Expropriating Authority is obliged to offer the registered owner immediate payment of 100% of the market value of the owner's land as estimated by the authority. In addition, the authority must advise the registered owner in writing, that the amount of compensation is adjusted by any amount subsequently determined by the Ontario Municipal Board in an arbitration proceeding under the Act. Under the Act, the Expropriating Authority is mandated to base

its offer of compensation upon an appraisal report appraising the market value of all lands being taken and damages for injurious affection. This report must be served upon the owner at the time the offer is made.

The owner has the right to accept that compensation offered without prejudice to his/her/their right to have compensation payable determined in arbitration proceedings before the Ontario Municipal Board.

Arbitration of Compensation Before the Ontario Municipal Board:

Ultimately, if the parties cannot agree to compensation, it is determined in arbitration proceedings before the Ontario Municipal Board. That Board has full authority to hear evidence and determine and fix all compensation payable under the Act.

Reasonable Legal and Appraisal Fees of Expropriated Land Owners to be Paid by the Expropriating Authority:

The Ontario Municipal Board, after a hearing, determines the compensation payable, and where that compensation is 85% or more than previously offered by the Expropriating Authority as set out above, the Board is required to order that the authority pay all reasonable, legal and appraisal and other costs actually incurred by the owner for the purposes of determining the compensation payable.

Where the compensation determined by the Ontario Municipal Board is less than 85% of the offer, the Board may make any order as to costs which it considers appropriate.

Interest:

An owner is entitled to interest on any award for the market value or injurious affection at a rate of six (6) per cent per year calculated from the date that the owner ceased to reside on or make any productive use on the lands. The Ontario Municipal Board may award a higher rate of interest of up to 12% where it is of the opinion that

any delay in determining compensation is attributable in full or in any part to the Expropriating Authority.

Abandonment and Disposal of Expropriated Lands:

It sometimes happens that the expropriated authority no longer needs all or part of the lands which it had previously expropriated. When this happens at any time before compensation is paid in full, the expropriated authority is mandated to notify each owner of the abandoned land. Such owners have an election to take back the land or interest in the land and claim consequential damages on the one hand, or require the Expropriating Authority to retain the land, in which case the owner has the right to full compensation for such lands.

In other situations where the expropriated lands are already in the possession of the Expropriating Authority and it is found to be no longer required, (presumably where compensation has already been paid) the expropriated owners have right of first refusal to repurchase the lands on the terms of the last offer received by the Expropriating Authority.

Conclusion:

The system of compensation established by the *Expropriations Act* is, generally speaking, fair and reasonable. However, obtaining fair and reasonable compensation is not automatic, but is dependent on marshalling and presenting evidence from professional advisors. It is also dependent on competent representation by legal counsel well versed in compensation concepts, evidence and law. Competent legal counsel will assist in establishing the right team of professionals to ensure that your rights are protected to the full extent that the law allows.