

OVERVIEW OF EXPROPRIATION ACTS ON COMPENSATION MATTERS IN CANADA:

EXPERIENCES AND RECOMMENDATIONS



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► INTRODUCTION

Expropriation, the government's power to take private property for public use, is an essential tool for infrastructure development in Canada. With some 40 years of experience in infrastructure real estate, I have encountered various expropriation acts across the country. This article provides an overview of these acts with respect to compensation. It also shares my insights, discusses trends in expropriation law, and suggests potential improvements in Canadian expropriation legislation.

► KEY TERMS AND CONCEPTS IN EXPROPRIATION

Total buyouts and partial takings

Expropriation can involve either a total buyout, where the entire property is acquired, or a partial taking, where only a portion of the property is acquired. Both scenarios present unique challenges and require careful consideration of various factors when dealing with infrastructure real estate projects.

Larger Parcel in expropriation

The concept of the Larger Parcel is integral to expropriation appraisals, serving as the foundation for determining fair compensation when a portion of a property is expropriated. It encompasses the entire property owned by the individual prior to any expropriation and requires thorough understanding of the property from both legal and appraisal perspectives. The key question to ask is this: Is the portion of the property expropriated from one individual property or is it part of a larger assembled property (the Larger Parcel)?

Three tests for the Larger Parcel:

- 1. Unity of Title (Ownership):**
 - This test evaluates whether the property is under single ownership. It considers if the parcels in question are owned by the same individual or entity. This is a crucial factor in determining if they can be considered a single Larger Parcel.
- 2. Unity of Contiguity (Adjoining or Separated):**
 - This test examines if the property parcels are physically connected or function as a single economic unit. Parcels which are contiguous or which operate together as a cohesive unit are more likely to be considered part of a single parcel.
- 3. Unity of Use (Under One Highest and Best Use):**
 - This test assesses if the parcels are used together to achieve the highest and best use. If the parcels serve a unified purpose that maximizes their economic value, they are considered under a single highest and best use, thereby forming a single Larger Parcel.

These tests help define the Larger Parcel and inform compensation decisions for expropriation, ensuring comprehensive and fair valuations. While these tests are not explicitly detailed in expropriation legislation, guidance can be derived from comments in some expropriation acts in sections related to injurious affection. For example, MB s.30(2), ON s.21, and NS s.3 (h)(i) often provide context, such as: *"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 lands are acquired retains lands **contiguous** to those acquired or retains lands of which the **use** is enhanced by **unified ownership** with those acquired."* (Emphasis added.)

Legal and appraisal implications

Understanding the three tests for the Larger Parcel is crucial from both legal and appraisal perspectives.

- 1. Legal perspective:** Legally, these tests help define the scope of what constitutes the Larger Parcel, guiding decisions regarding compensation for expropriation. They ensure that the entire property, as understood within the legal framework, is considered when determining compensation, thereby protecting the owner's rights.
- 2. Appraisal perspective:** From an appraisal standpoint, these tests ensure a comprehensive valuation that considers all relevant aspects of the property. By thoroughly evaluating the unity of title, contiguity, and use, appraisers can provide a fair and accurate assessment of the property's value, leading to equitable compensation for the owner.

In conclusion, the concept of the Larger Parcel and its associated tests play a critical role in expropriation appraisals, helping to ensure that property owners receive fair and comprehensive compensation for their expropriated lands.

Value of part taken

Part taken: The specific portion of the property required for public use is the part taken. This term, sometimes referred to as 'the taking' or 'the requirement,' is part of the Larger Parcel. Although some government agencies avoid using 'the taking,' it is an accurate term since the agency uses expropriation acts to acquire property rights, subject to compensation. Some examples of where market value is defined include MB s.27(1), NS s.27(2), BC s.32, AB s.41 and ON s.14(1). Typically, in Canada, the owner is paid for the part taken. However, there could be an exception to this under s.44 (1.1) of the *BC Expropriation Act*.

Injurious affection

Injurious affection: Injurious affection refers to the reduction in value of remaining lands resulting from an expropriation or partial taking and can be found in Acts such as MB s.30(1), NS s.30(1), ON s.21, and AB s.56. This concept is critical in ensuring that property owners are fairly compensated not just for the land taken but also for the negative impact on the remaining property of either the taking or the works for which the land was taken. Examples could include:

- **Landlocking:** When a parcel of land is left without access due to the expropriation of adjoining land.
- **Loss of parking:** Reduction or elimination of parking spaces, impacting the utility and value of the remaining property.
- **Loss of access:** Changes in access routes can make the remaining land less accessible, reducing its usability and value.
- **Change in shape:** Alterations in the shape of the remaining parcel can limit its development potential and overall functionality.
- **Loss of exposure and visibility:** Reduced visibility or exposure, particularly for commercial properties, can significantly diminish their value.

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Legal framework: In jurisdictions where Expropriation Acts are in place, statutory authorities are typically required to compensate landowners for losses or damages caused by injurious affection. This ensures that property owners are not left at a disadvantage due to the partial taking of their land.

Claims without taking: Interestingly, in some jurisdictions, a claim for injurious affection can be made even when there has been no actual taking of land. This highlights the broad scope of this concept in protecting property owners' rights and ensuring fair compensation for any negative impact on their property. Examples include *MB s.31(1)*, *BC s.41(2)*, *ON s.1(b)*, and *NB s.(1)(b)*. It is worth noting that AB does not allow for this under their legislation.

Understanding injurious affection is crucial for both legal and appraisal professionals involved in expropriation cases. It ensures comprehensive consideration of all factors affecting property value and guarantees fair compensation for affected property owners.

Disturbance damages

Definition and purpose: Disturbance damages are intended to compensate property owners and tenants for the inconvenience and disruption caused by an expropriation. This type of compensation covers a wide range of claims that may arise due to the expropriation process. According to the *Ontario Expropriations Act*, disturbance damages are defined as "such reasonable costs as are the natural and reasonable consequences of the expropriation."

Key components: The broad definition of disturbance damages typically includes some of the following items that are included for owners.

- **Allowance for inconvenience:** Some jurisdictions provide an allowance for inconvenience at 5% of market value when the expropriation includes the owner's residence. This recognizes the personal and emotional impact of expropriation on property owners.
- **Moving and relocation expenses:** This covers the costs associated with moving and relocating property owners, including the cost of temporary accommodations. It ensures that property owners are not financially burdened by the need to find a new place to live or operate their business.
- **Legal and survey costs:** The costs of legal and survey services required as part of the expropriation process are also covered. This includes fees for legal representation, document preparation, and property surveys.

Legislative framework: Different jurisdictions may have varying definitions and provisions for disturbance damages. The common goal is to ensure that property owners are fairly compensated for all reasonable costs incurred because of the expropriation.

Understanding disturbance damages is essential for both property owners and professionals involved in expropriation cases. It ensures that all parties are aware of the comprehensive nature of compensation available and helps in negotiating fair settlements that address the full impact of expropriation on property owners.

Benefits: general and special in expropriation

In the context of expropriation, distinguishing between general and special benefits is crucial for determining fair compensation. These benefits reflect the impact of public infrastructure projects and related improvements on property values.

General benefits refer to improvements that benefit the community at large and can indirectly increase property values. These benefits are typically associated with broader public infrastructure projects or community enhancements that positively impact the overall environment in which properties are located.

Examples include:

- **Construction of new parks or green spaces:** These enhancements improve the quality of life for the entire community, making the area more attractive and desirable.
- **Improved public transportation systems:** Enhanced transportation options can lead to increased accessibility and convenience, benefiting the broader population.
- **Enhanced public utilities and services:** Upgrades to utilities such as water, electricity, and sewage systems can improve living standards and attract new residents or businesses.

While these improvements may not directly affect an individual property, they contribute to the overall attractiveness and desirability of the area, leading to an indirect increase in property values.

Special benefits refer to direct benefits to the remaining property that result from the expropriation or related infrastructure improvements. These benefits have a more immediate and tangible impact on the property's value. Examples include:

- **Enhanced accessibility:** New roadways or improved traffic flow can make a property more accessible, increasing its usability and attractiveness.
- **Direct infrastructure improvements:** Upgraded utilities or drainage systems directly improve the functionality and efficiency of a property.
- **Increased exposure or visibility:** Changes in surrounding land use or infrastructure that enhance the property's visibility can attract more customers or tenants, boosting its value.

Special benefits positively impact the property's value by improving its functionality, accessibility, or overall appeal. This is often referred to as Set-Off and can be found in various Acts such as *MB s.32*, *ON s.23*, *NB s.48*, and *NS s.32*, but typically the Set-Off is applied only against injurious affection; however, some jurisdictions, such as BC, permit a Set-Off against "the amount of compensation payable" and do not limit the

Set-Off to injurious affection. This indeed diverges from the more common approach of limiting Set-Off to only injurious affection.

Legal considerations

In the context of expropriation, it's essential to distinguish between general and special benefits to determine fair compensation.

- **General benefits:** Typically considered to benefit the wider community, these are not usually factored into individual compensation claims as their impact is diffuse and widespread. There is an exception to this under s.44 (1) of the *BC Expropriation Act*.
- **Special benefits:** Directly linked to the remaining property, these must be taken into account when assessing compensation for expropriation. Property owners are entitled to compensation that reflects any adverse effects on their property while considering the positive impacts of special benefits.

Understanding these concepts ensures that property owners receive appropriate compensation for any adverse effects on their property while also considering any positive impacts resulting from the expropriation and related improvements. By accurately distinguishing between general and special benefits, appraisers and legal professionals can ensure a fair and equitable compensation process for affected property owners.

Relocation: a comparative perspective

Relocation is a critical aspect of expropriation. In Canada, the process for a total buyout can vary significantly from what is done in the United States under the federal *Uniform Relocation Assistance and Real Property Acquisition Policies of 1970 Act (URA)*. Understanding these differences is essential for ensuring fair treatment and adequate support for displaced property owners.

In the event of a total buyout, both countries provide financial assistance such as payment of market value along with relocation costs. However, the *URA*, also provides for 'Advisory Services' where the displaced owners are assisted with housing alternatives with respect to the relocation. This type of service is not provided for under Canadian expropriation legislation.

A report was completed by the Ontario Law Reform Commission on the basis for compensation on expropriation in 1967. On page 11 of this report, it states: "Every attempt, moreover, should be made to cause a minimum of disturbance in the life of the citizen. Compensation should be such as to allow him to return his life to an even keel. **Not only should he be provided with the monetary worth of his loss, but the government should endeavour to provide for a smooth transition, by way of relocation assistance both financial or otherwise.**" (Emphasis added.)

Some government agencies assist owners with their respective relocations, but it is not mandatory, and, as such, many agencies do not provide this service, which is regrettable. When someone

must relocate from their home, it can be a very stressful experience for them, which needs to be recognized throughout the expropriation process.

Relocation assistance can significantly alleviate the stress and disruption caused by expropriation. The lack of mandatory advisory services in Canada contrasts with the more comprehensive approach taken under the *URA* in the United States. This difference highlights a key area where Canadian expropriation legislation could be improved to ensure a smoother and more supportive transition for displaced property owners.

In conclusion, incorporating mandatory relocation assistance, including advisory services, into Canadian expropriation legislation could help mitigate the negative impacts of displacement and support property owners in finding suitable new homes. This approach would align with the principles outlined by the Ontario Law Reform Commission and contribute to a more humane and equitable expropriation process.

Market Value vs. Value to the Owner

Market Value: Market Value refers to the price for which a property would sell in the open market. This *objective* measure is the standard for compensation in many expropriation cases across Canada. It reflects the amount a willing buyer would pay to a willing seller in a competitive and open market, considering all legal and regulatory factors. This concept is widely adopted by the federal government, most provinces, and all territories. Market Value is determined by:

- comparable sales data;
- market conditions at the time of valuation; and
- the property's physical characteristics and legal attributes.

Value to the Owner: Value to the Owner recognizes the *subjective* value that a property holds for its owner, which may exceed its market value due to personal or business reasons. This concept emphasizes compensation that accounts for the unique attachment and investment an owner has in their property. The Value to the Owner concept is considered in jurisdictions such as Saskatchewan, Prince Edward Island, and Quebec.

However, provinces such as PEI are currently reviewing their expropriation compensation legislation for Value to the Owner. For instance, Justice Matheson remarked in the Supreme Court case *Haras Management et al. v. Gov. of P.E.I.*, 2017 PESC 14 that the province should consider revising the *Expropriation Act* to align with federal and provincial legislation in other jurisdictions regarding appropriate compensation upon expropriation.

Summary

Understanding the distinction between Market Value and Value to the Owner is crucial in expropriation cases. While Market Value

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provides an objective benchmark widely used across Canada, Value to the Owner offers a more personalized approach to compensation, recognizing the unique significance of a property to its owner.

► EXPERIENCES AND AREAS FOR IMPROVEMENT

Experiences with expropriation acts

Throughout my career, I have worked with various expropriation acts across Canada. These experiences have highlighted both the strengths and weaknesses of the current legislative framework. The ideal is to leave the owner 'whole.' This is not always possible, but, as the Supreme Court of Canada stated in *Irving Oil Ltd. v. R.*, [1946] S.C.R. 551, "the displaced owner should be left as nearly as possible in the same position financially as he was prior to the taking, provided that the damage, loss or expense for which the compensation was claimed was directly attributable to the taking of the lands."

Recommendations for improvement

By implementing the following recommendations, expropriation law and practice can be improved to ensure fairness, transparency, and support for affected property owners, leading to more effective and equitable outcomes.

1. Standardization of relocation practices:

- **Develop national guidelines:** Collaborate with federal and provincial authorities to develop standardized guidelines for relocation practices, drawing on the U.S. *URA* as a model.
- **Training and resources:** Provide training for real estate professionals and support staff to ensure they understand the above-mentioned guidelines and can implement them effectively.
- **Support services:** Establish comprehensive support services, including counseling, financial assistance, and relocation logistics to help displaced individuals and families.

2. Incorporation of the Market Value Standard:

- **Legislative amendments:** Advocate for amendments to expropriation laws to explicitly include Market Value as a standard for compensation.

- **Appraisal standards:** Develop and enforce standardized appraisal methodologies to ensure consistent and accurate Market Value assessments.

- **Communication:** Clearly communicate the Market Value standard to property owners and stakeholders to ensure transparency and understanding.

3. Transparent and inclusive processes:

- **Stakeholder engagement:** Create forums and platforms for regular engagement with property owners and affected communities to gather input and address concerns.
- **Hearing of Necessity:** Reintroduce the Hearing of Necessity in the Greater Toronto Area for those certain listed transit projects that were excluded to provide affected owners with a formal platform to voice their concerns before transit projects proceed.
- **Compensation practices:** Standardize compensation practices across Canada to ensure affected owners are always paid for the value of the part taken, fostering consistency and fairness.

Conclusion

In dealing with affected property owners and tenants, it is crucial to consider the Supreme Court of Canada decision in *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority*, [1997] 1 S.C.R. 32:

"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 favor of those whose rights have been affected."

By adhering to this principle, we can ensure that the power of expropriation is exercised with the utmost care and consideration, upholding the rights and dignity of affected property owners. This approach will lead to more equitable, compassionate, and effective property acquisition processes for public use. 🏠