

EXPROPRIATION: BEWARE OF STRANGERS BEARING GIFTS!



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It comes like a bolt out of the blue; the municipality intends to purchase your property so that they can widen the highway. Often times they intend to seize just part of your property: that front yard you so carefully nurtured to provide a fragile buffer between your home and the busy street, is destined to become another traffic lane. Many owners have received this type of letter, more will receive similar letters in the future, if not from the municipality, then the province, federal government, or any organisation with expropriation powers such as a water authority, power utility, crown corporation. Sometimes the purpose of the exercise may not be clear, other than the fact that your property, or part of it, is required for the public good.

During our early days in business in the 1970s some provinces, such as Nova Scotia, did not inform owners that they had taken title to their property... the unfortunate owner only discovered such was the case when they enquired why they were no longer getting a property tax bill! Often times, municipalities such as the City of Halifax, did not advise the owner that they required the property, or part of it, content to leave it to the appraisal firm to break the news when they arrived on site to conduct their inspection. Legally this is still the case in many provinces in Atlantic Canada; the acquiring authority does not have to inform you for several months after they have filed the expropriation document (Nova Scotia 90 days, Prince Edward Island 60 days). Thankfully in practice, that at least has changed, but the unfortunate reality is that property owners rarely have legal grounds to prevent the authority from purchasing their property. In other countries, property owners have to be notified that their property is to be expropriated and have the right to object that the acquisition is not really required for the road widening, or other scheme that is its *raison d'être*, or that the scheme itself is not required to serve the public good. But this avenue is rarely available in Canada. In this Region, proposed expropriations under the Federal and New Brunswick Expropriation Acts are the exception that prove the rule. Each require the acquiring authority to notify the property owner *before* they expropriate and provide a public enquiry to hear objections. If your property is located in Nova Scotia, Newfoundland or Prince Edward Island you have no say in the matter at all! Even if subsequent events disprove the “valid public use” test, owners have no right to recover their property: the ill-fated Mirabel Airport in Quebec is an example... the original owners, or their descendants, were eventually offered 300 hectares of the 38,800 hectares originally expropriated but only after a long, bitter and very public fight. So what do you do when you receive “the letter”, particularly if it does not mention “expropriation” and is instead a civilised attempt to negotiate compensation before the municipality seizes your property by force?

We live in an age when many have lost faith in our institutions, the civil service, politicians and the private sector. That trust has been eroded over the past two decades by greed, politicians who no longer adhere to acceptable forms of behaviour, the shrill cacophony of social media seamlessly blending fact with fiction, and an emancipated Fourth Estate no longer able to defend the “little guy”. The adage “you can’t fight city hall” too often engenders a feeling of helplessness, particularly if the acquisition involves your family home, the sanctuary you hold inviolate; or your

business, a livelihood born of blood, sweat and tears. Cheer up, not all is bad, the press and electronic media may no longer have the heft they once did, but you do have the protection of an excellent and independent judicial system. Why is that important? The letter you received from the acquiring authority may not have mentioned “expropriation”, and the words “judicial system” may raise the spectre of long and expensive litigation in which you, the little guy, are pitted against an acquiring authority with much deeper pockets. But bear with us. Even if your property has not yet been expropriated the negotiations will be framed by the Expropriation Act because the acquiring authority has to rely on it if they cannot reach a settlement with you by negotiation.

Now, it has to be said, the Expropriation Acts do not represent the legal community’s finest hour. The Nova Scotia and New Brunswick Expropriation Acts, both appear to have been written in a hurry by somebody suffering from a hangover. The Newfoundland and Prince Edward Island Expropriation Acts have a distinct feudal flavour, drafted in the days when peasants lived in huts of mud and wattle, addressed their betters with a touch of forelock, eyes downcast and a mumbled “zur” (or that, at least, appears to have been the assumption of the persons drafting them). In fact the PEI Act doesn’t even attempt to lay out the framework for compensation, happily delegating it to the court system in the pious hope that the judge will have a clue what it is all about! Only the Federal Expropriation Act can claim lucidity, and even it overlooks the fact that businesses also occupy real estate and are adversely impacted if it is whipped away from under their feet. But, and this is the good news, none of this really matters very much because there are some good Expropriation Acts elsewhere. The body of case law and appraisal practice generated by them have established well proven methodologies for identifying and calculating compensation. *The courts have embraced the principle that, since expropriation is the exercise of police power by the state (or its surrogate), the benefit of the doubt lies with the unfortunate property owner, and they have not been shy in ensuring that the latter will not suffer financial loss as a result, short of plundering the public purse.*

Expropriation

So what is “Expropriation” and why should you care? Expropriation is the seizure of your property, or a part of it, by the government, or a body authorised by them, for public use or benefit. The bad news, as we have already mentioned, is that you cannot object to it unless you live in New Brunswick or the property is being acquired under the Federal Expropriation Act... the good news is that you are entitled to be fairly compensated for your loss. The initial approach from the acquiring authority advising you that they want to purchase part or all of your property will rarely mention the word “expropriation”. Whilst this may be an attempt to spare your feelings by appearing to be non-threatening you should be cautious. We no longer have a strong media but, as mentioned, we do have an excellent court system... and they are on your side. While you will probably never need to go to court you should avail yourself of the protection afforded by our judicial system. Your rights to fair and proper compensation are codified in the relevant Expropriation Act (sort of) but you will not be so protected unless (1) your property has been officially expropriated or (2) the acquiring authority has agreed in writing to proceed as though you had been expropriated i.e. that they will afford you all of the compensation you would have been entitled to under the Expropriation Act had your property been expropriated. So make sure that the acquiring authority is prepared to offer you all of the rights and privileges afforded by the Expropriation Act and get that commitment in writing. If they will not provide it, refuse to negotiate until they expropriate your property.

Professional Assistance

Each province in Atlantic Canada has its own Expropriation Act and each municipality, or other body with expropriation powers, is governed by that Act. The federal government also has its own Expropriation Act. The federal and some provincial Expropriation Acts acknowledge that the negotiations are unevenly balanced because the property owner faces an acquiring authority with much deeper pockets and resources. The Federal Act unambiguously provides that the property owner is entitled to professional advice at the Fed’s cost; the Atlantic provinces are more parsimonious, sometimes offering it if the property owner wins in court (Nova Scotia, New Brunswick, Newfoundland), or not considering it worthy of mention (Prince Edward Island). Nova Scotia limits the amount they will pay in legal costs and appraisal fees, something they are now allowed to do in their Act, so the unfortunate property owner may have to pick up part of the cost.

Negotiations

The acquiring authority may employ their own staff to negotiate, or contract it out to a firm such as ourselves (we also negotiate on behalf of property owners). Our article “Land Agency... a respectable profession” in our Fall 2019 Newsletter details our approach when we are representing the acquiring authority: you should expect nothing less. If you find that you are not comfortable negotiating, insist that the acquiring authority pay for your professional

representation. Whether the Act specifically allows for it or not, it has been our experience that acquiring authorities want to reach agreement without the adverse publicity engendered by a formal expropriation, much less the agony and expense of a court action. They recognise that some property owners need professional assistance and that this may facilitate an agreement.

If the acquiring authority is attempting to negotiate compensation *before* they formally expropriate, particularly if your property comprises woodland or agricultural land, the acquiring authority may attempt to negotiate without commissioning an appraisal, using instead their knowledge of property values. There is nothing wrong with them so doing provided they are open and transparent about their compensation calculations and are able to validate them by reference to other property sales. However you can require that the acquiring authority provide you with a formal appraisal (they have to anyway if they formally expropriate) and you should insist on this if your property has buildings on it, is in an urban area, or if only part of your property is being acquired and the remainder is likely to be adversely impacted. Many Expropriation Acts (Federal, Nova Scotia, New Brunswick) require that the formal offer after expropriation *has* to be accompanied by an appraisal. The formal appraisal should meet, at a minimum, the Canadian Uniform Standards of Professional Appraisal Practice (CUSPAP) www.aicanada.ca/about-aic/cuspap/. **Do not accept any appraisal tendered by the acquiring authority at face value.** Verify that the author is experienced in expropriation work and can competently identify and accurately calculate the various Heads of Claim. At a minimum they should be an Accredited Appraiser of the Appraisal Institute of Canada or a Member of the Royal Institution of Chartered Surveyors (Valuation) but neither qualification guarantees that they are experienced and knowledgeable in expropriation. Do not assume that the acquiring authority has already done the research and chosen their appraiser on the basis of merit; the Federal Government and some provinces do so, but other provinces and many municipalities, simply select their appraiser on the basis of cost. Some acquiring authorities will instruct the appraiser to limit the types of compensation (Heads of Claim) they consider in the appraisal and although the omissions may be listed in the appraisal report their significance can easily be overlooked. *One Maritime Province, for example, instructs their appraiser to ignore Injurious Affection and Special Economic Advantage, items which often constitute the bulk of the loss suffered by the property owner.*

Heads of Claim – A Hitch Hiker’s Guide

A governing spirit of expropriation, or the negotiations which preclude it, should be that the property owner (and tenant if the property is rented) will not suffer *financial* loss as the result of losing all, or part, of their property. You will not be compensated for *emotional* loss arising, for example, from the upheaval in your life. If you are a property owner the types of loss and accompanying compensation will fall under some, or all, of the following Heads of Claim:

Market Value of the interest the authority has acquired in your property. This is the amount of money you would have obtained for the expropriated interest if it had been sold in the open market by a willing seller to a willing buyer.

If for example, the municipality is acquiring your home, its Market Value will be equal to the price you could expect if you were to sell it through a real estate agent. If only part of your property is being expropriated, the acquiring authority has to pay you the Market Value of the portion expropriated plus “Injurious Affection” i.e. any loss in value to your remaining property. If you lose your front yard for a street widening project for example, you will be entitled to the value of any improvements such as lawns, flower beds, bushes, etc. ... but not the emotional value you have invested in nurturing them. If fences and steps have to be demolished the acquiring authority has to replace them. Sometimes the loss of a front yard is so extreme it renders the home unsuitable for continued owner occupation; it may be uninhabitable or suitable only for transient accommodation such as short term rental. If you occupy the residence as a family home you should be able to require that the entire property be purchased. The “Home for a Home” provision may then be relevant.

You will not get any extra compensation however if your property has a “special” value to the expropriating authority, over and above its Market Value, for example if they use rock from your property as fill for their new highway.

Home for a Home – if you own and occupy the property as your family home and it is going to be expropriated in its entirety, or if it will be so adversely impacted by a partial taking, such as the loss of a front yard, that it is no longer suitable for a family home, you may be entitled to additional compensation if the Market Value of the property is inadequate to purchase a similar home in the neighbourhood. In this event your compensation will be based on the Market Value of the most similar homes for sale in the neighbourhood. What happens if there are none for sale? Whilst the compensation does not require that you remain in the neighbourhood it does get a little tricky if you do not have that choice. Some Expropriation Acts require that compensation be sufficient to purchase a lot and build an identical dwelling in the same neighbourhood.

Disturbance – If you are forced to move out of your home there will be moving expenses, as well as items such as drapes for the new home. The acquiring authority is required to compensate you for these items. If it is not practical to estimate these costs some Expropriation Acts (Federal and Nova Scotia) provide an allowance instead of up to 15% of the Market Value. The New Brunswick Expropriation Act allows, in addition to moving expenses, 5% of the market value of the residential portion expropriated, to compensate for the cost and inconvenience of finding another residence. The other Acts do not place any value on the unfortunate property owner’s time.

If you operate a business in your property you will suffer a variety of losses. If the business has to relocate it will incur a number of costs: new stationery, informing customers, staff overtime packing and unpacking, new signage, etc. as well as the cost of the move itself. Whether the business moves or not, profits will usually be adversely impacted by the road widening scheme and/or the relocation. Trade once lost to competitors may take years to recapture, may even be lost forever. Whilst all of the foregoing is compensable some Acts provide that compensation for loss of goodwill can be deferred until after the business has been relocated.

Injurious Affection - Where only a portion of the property is acquired, a common situation with road widening schemes, the balance of the land may be reduced in value because (1) the remaining property is less useful since it is smaller, a more awkward shape or is severed in two and/or (2) the construction or use of the road on the land acquired adversely impacts the value of the remaining property. For example, it may no longer be possible to park a vehicle on the land remaining because it is now too small or of the wrong configuration. A residential property without parking is less valuable than a house with a driveway. The construction of the widened highway may render access to the property more difficult if traffic increases. The increased noise and loss of privacy resulting from the highway being closer to the home will reduce its value. Or take a farm cut in two by a new highway. The farmland on the other side of the new road, particularly if it is limited access highway, will be considerably less valuable because it is no longer as accessible from the farm buildings. Farm fields impacted by the new highway may no longer be of optimum size and shape; drainage may be adversely affected too.

In our experience Injurious Affection usually represents the vast majority of the loss sustained by the property owner, especially in residential properties impacted by road widening.

Special Economic Advantage - If the property is owner occupied i.e. not rented, the 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. For example, if you or a member of your family, is disabled and the home has been adapted to meet their requirements with ramps, grab bars, wider doorways and hallways, stair lifts etc. you will be able to claim for the cost of these improvements. The same conditions apply with commercial property that has been adapted to suite 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.

Special Purpose Properties - Some properties do not normally sell on the open market; churches, schools, hospitals, religious and charitable institutions are examples. If the property being acquired falls into this category and the owner has to relocate, they can base their compensation claim on the reasonable cost of creating a similar property (technically known as “the cost of equivalent reinstatement”). Even though the buildings on the property they are vacating are old, the claim for compensation can be based on the cost of building a new, otherwise identical structure, plus the cost of acquiring a replacement site.... though the Federal and New Brunswick Acts attempt to claw back some of the compensation if the owner has improved their financial position.

Professional Fees – As indicated earlier only the Federal Act provides that the acquiring authority pay the legal, appraisal and other costs reasonably incurred in ascertaining a claim for compensation from the get go. They will be a negotiable item in Nova Scotia and New Brunswick and perhaps the other two Atlantic Provinces.

Betterment

Where only part of the property is being acquired, the remaining property may increase in value as a result of the scheme for which the property was purchased. For example, land may be purchased for a highway intersection, with the result that the land remaining after the acquisition increases in value because it has development potential for a service station, hotel, shopping centre or other commercial use. This increase in value, known as “Betterment”, has to be offset against the compensation. Depending on the Expropriation Act, Betterment may be offset against the (1) total compensation [Newfoundland and Prince Edward Island] or (2) the land remaining after the expropriation [Federal, Nova Scotia, New Brunswick].