

# Expropriation by Municipalities

## **South East Ontario Municipal Law Seminar**

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# Overview – Expropriation Doesn't Have to be a Dirty Word

- Introduction
- Expropriation Process
- Compensation
- Examples
- *Vincorp Financial Ltd v The Corporation of the County of Oxford*

# Introduction

- ***Dell Holdings Ltd v Toronto Area Transit Operating Authority*, [1997] 1 SCR 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 favour of those whose rights have been affected.”



# Introduction

- Thus, landowners in Canada are to be treated fairly with the application of the following principles:
  - There is a presumption of full compensation for all losses caused by an expropriation
  - Ambiguities or gaps in expropriation legislation are to be resolved in favour of the landowner
  - The landowner is entitled to his or her reasonably incurred professional fees for prosecuting compensation claims.

# Introduction

- Expropriation is a legal, legitimate exercise of power. More importantly:
  - The owner may lose title, but they receive fair market value, and then some – owners are well compensated
  - The landowner enjoys significant protections – procedurally and financially (costs and interest)
  - The public good is more important than private property interests.

# Expropriation Process

- Section 6(1) of the *Municipal Act, 2001* provides that the power of a municipality to acquire land includes the power to expropriate in accordance with the *Expropriations Act*.

# Expropriation Process

Once a decision is made to expropriate, the expropriating authority must apply for approval to begin the expropriating process from the “approving authority”

- Where a municipality or local board thereof, other than an elected school board, expropriates land for municipal purposes, the approving authority shall be the council of the municipality **(Section 5(1))**.

# Expropriation Process

Upon applying for approval, a Notice of Intention for approval to expropriate is then served by the expropriating authority on each “registered owner” and published in the local newspaper for 3 consecutive weeks (**Section 6(1)**).

- Note definitions of “owner” and “registered owner” in Section 1.

# Expropriation Process

Owners then have 30 days after service (for a registered owner) or publication (for other owners) of the notice to request an inquiry into whether the taking of their land is “fair, sound, and reasonably necessary” in the achievement of the expropriating authority’s objectives (**Section 6(2)**).

- Where no inquiry sought, approving authority may approve
- Special situations where in the public interest this process is bypassed. This is rare (**Section 6(3)**).

# Expropriation Process

Where an inquiry is sought, a hearing officer is appointed and an inquiry, also called a “hearing of necessity” is held (**Section 7**).

- After the hearing, a hearing officer issues a report.
- The approving authority must consider the report of the inquiry officer when deciding whether or not to approve the expropriation

# Expropriation Process

- NOTE:
  - The hearing is only held if requested
  - An inquiry officer, appointed by the Attorney General, will notify the expropriating authority, the property owner and the owner's representative, of the date and place of the hearing
  - Hearing only deals with the necessity of the expropriating authority to acquire the land. It DOES NOT deal with compensation

# Expropriation Process

The approving authority gives written reasons for its decision and certifies its approval in the prescribed form (**Section 8**).

- Even where inquiry officer recommends against expropriation, approving authority may still decide to proceed with the expropriation
- Approving authority may also decide not to proceed, or it may approve the expropriation with modifications



# Expropriation Process

Upon approval of the expropriation, the expropriating authority will register a plan of expropriation on title to the affected lands within 3 months after the granting of approval (**Section 9(1)**).

- **Once registered, title to the expropriated land “vests” in the expropriating authority, but this does not give the expropriating authority an immediate right to possession.**

# Expropriation Process

The expropriating authority must serve the registered owner, and may serve the owner, within 30 days after the date of registration of the plan, with

- A Notice of Expropriation, which provides notice that the lands have been expropriated
- A Notice of Possession indicating the date on which the expropriating authority requires possession of the lands, and
- A Notice of Election, which permits the owner to select one of three dates upon which compensation for the lands expropriated will be based.

# Expropriation Process

After service of the notice of expropriation on the owner in possession of the lands expropriated, the expropriating authority may enter the expropriated lands (with the owners consent or with an order from the Ontario Municipal Board) in order to view the lands for the purpose of preparing an appraisal report (**Section 10(3)**)

# Expropriation Process

Once an appraisal report has been prepared, the expropriating authority will provide a copy of the report to each registered owner, along with an offer of compensation for the owners interest in the lands expropriated if no agreement as to compensation has been made with the owner, within 3 months of the registration of the plan of expropriation on title and before possession is taken. **(Section 25(1)).**

# Expropriation Process

Once an offer has been served, the owner must decide whether to select one of two options:

- 1) Accept the offer in full and final settlement of any and all claims under the *Expropriations Act*
- 2) Accept the offer as compensation for the market value of the lands expropriated “without prejudice,” in other words, while preserving the right to claim additional compensation from the expropriating authority

# Expropriation Process

- If the owner accepts the expropriating authority's offer “without prejudice”, there are two ways of asserting a claim for additional compensation **(Section 26)**:
  - 1) Through negotiation, either formally at the Board of Negotiation or informally **(Section 27)**, and
  - 2) Through arbitration before the Ontario Municipal Board **(Section 29)**.
    - negotiation must be pursued first, unless the parties agree to proceed to arbitration.

# Compensation

- WHO CAN ASSERT A CLAIM?
  - Many “owners” of a single property might be affected by an expropriation – the person to whom the property belongs, the tenants of the land, the mortgagees and possibly others.
  - Each has a right to assert a claim for compensation in respect of their separate interests

# Compensation – Market Value

- Defined as “the amount that the land might be expected to realize if sold in the open market by a willing seller or willing buyer” **(Section 14(1))**.
- The valuation of market value is made at the “valuation date” (usually the date of expropriation)

# Compensation – Market Value

- In determining market value, the *Expropriations Act* provides that no account shall be taken of **(Section 14(4))**:
  - A) The special use to which the expropriating authority will put the land;
  - B) Any increase or decrease in the value of the land resulting from the expropriation of the development itself, or the imminent prospect thereof
  - C) Any increased value resulting from the illegal use of a property

# Compensation – Damages Attributable to Disturbance

- The *Expropriations Act* provides that the expropriating authority must pay to an owner “such reasonable costs as are the natural and reasonable consequences of the expropriation” (**Section 18(1)**).
- Thus, owners may be entitled to damages, costs, and expenses directly attributable to the expropriation, provided they are not too remote and the owner has taken all reasonable action to ensure the damages are mitigated

# Compensation – Damages Attributable to Disturbance

- The following expenses shall be paid by the expropriating authority, provided that they are the natural and reasonable consequence of the expropriation (**Section 18**):
  - A) The reasonable relocation costs, including moving expenses, and the legal, survey and other costs incurred in acquiring other premises;
  - B) Where an owner's residence has been expropriated, an allowance of 5% of the market value to compensate for the inconvenience and cost of finding another residence, and an allowance for the value of improvements which are not reflected in the market value of the land



# Compensation – Damages Attributable to Disturbance

- C) Where the owner's residence has not been expropriated, the costs of finding premises to replace those expropriated, provided that the lands were not being offered for sale on the date of expropriation, and
- D) Business losses resulting from the relocation of a business made necessary by the expropriation

# Compensation – Damages for Injurious Affection

- Where only a portion of a property has been expropriated, owners may also be entitled to compensation for injurious affection, which is the reduction in market value caused to the owners remaining land as a result of the taking (**Section 22**).

# Compensation - Other

- If the matter is arbitrated at the OMB, the expropriated party is entitled to their expert and legal costs provided the award is at least 85% of the offer
- In addition, interest is payable at a rate of 6% simple interest on outstanding compensation from the date of the offer to the date of award.

# *Expropriation is Not A “Bonus”*

- *Vincorp Financial Ltd v The Corporation of the County of Oxford, 2014 ONSC 2580 affirmed by 2014 ONCA 876*

# *Vincorp Financial Ltd v Oxford*

- Case arose from the County of Oxford's bid to have a new Toyota Plant located within its boundaries. The plant required a 1000 acre site.
- In order to meet the requirement, Oxford identified a potential site and was able to negotiate the purchase of 27 of the 28 properties within its boundaries.
- Having been unable to negotiate the purchase of the remaining 91.5 acre site, the municipality expropriated the land and immediately transferred title to Toyota for the exact purchase price offered to the prior owner in compensation for having expropriated the land.

# *Vincorp Financial Ltd v Oxford*

- 1) Could Oxford lawfully expropriate the lands for the purposes set out in Oxford By-Law No 4545-2005, including in order to transfer the lands to Toyota for the proposed development of the Toyota plant?
- 2) Did the expropriation and later sale of the lands by Oxford, or any step in that transaction or series of transactions, confer a “bonus” on Toyota contrary to the provisions of subsection 106(1) of the *Municipal Act*?
- 3) If a bonus was conferred and/ or if the expropriation of the lands was unlawful, are the plaintiffs entitled to a remedy of damages against Oxford?



# Could Oxford lawfully expropriate the lands for the purposes outlined?

- Vincorp argued: from the outset, the sole purpose for expropriating the lands was to transfer the lands to Toyota at the “expropriation price,” which was less than fair market value. As this was contrary to section 106(1) of the *Municipal Act*, this purpose/ objective was unlawful.

# Could Oxford lawfully expropriate the lands for the purposes outlined?

- HELD: A municipality can expropriate lands and in turn sell them to a third party so long as the expropriation is in pursuit of the public interest
- Here, it was clear that Oxford expropriated the lands for a valid public purpose (promoting economic development) and with approval

# Did the expropriation and later sale confer a “bonus” contrary to 106(1)?

- Section 106 (1) of the *Municipal Act* provides that despite any Act, a municipality shall not assist directly or indirectly any manufacturing business or other industrial or commercial enterprise through the granting of bonuses for that purpose.
- Section 106(2)(c) states specifically that, without limiting subsection (1), the municipality shall not grant assistance by leasing or **selling any property of the municipality at below fair market value.**

# Oxford Argument

- The expropriation of the lands and the transfer of the property to Toyota are two separate transactions that must be considered individually. Each transaction must comply with the specific statutory provisions that govern the transaction.
- Section 106 deals with the transfer of land and not its expropriation. The plaintiffs cannot use the alleged breach of section 106 to argue that the expropriation was unlawful.
- Additionally, Oxford argued that the jurisprudence interpreting section 106 demonstrates that the sale of the lands to Toyota did not offend section 106.

# Court Agreed with Oxford

- The court of appeal in *Friends of Lansdowne v Ottawa (City)* states that the restriction imposed by section 106 should be construed narrowly and requires a “contextual approach” to the contract in question
- *Friends* adopted the legal principle that only an “obvious undue advantage” is prohibited by section 106.

# Court Agreed with Oxford

- The plaintiffs approach would require the court to reject this contextual approach and apply a strict interpretation of the term “bonus.”
- The plaintiffs position that there was a bonus would lead to an absurd result. It would require the court to ignore the agreement as a whole and specifically ignore the value of the significant benefits the Toyota plant brought to the community.

# Court Agreed With Oxford

- Plaintiffs were concerned that if the decision favours Oxford, there would be nothing in the future to stop a municipality from expropriating land from A and transferring it to B at the expropriation price, so long as B's use of the land will, for example, employ more people or generate higher tax revenue.
- Court disagreed. Oxford's success in this case DOES NOT sanction or encourage widespread expropriation in this manner. There remains a safeguard in section 106: an obviously undue advantage cannot be conferred on any manufacturing business or other industrial or commercial enterprise.

# Other examples

- Disagreeable neighbours.
- Groundwater rights.