

WHAT IS A “TAKING”?: TWO PERSPECTIVES

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ANNUAL CONFERENCE




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OVERVIEW

- The Statutory Language in the *Expropriation Act*
 - Selected Case Law
 - *De Facto* Expropriations – The Common Law
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EXPROPRIATION ACT - JURISDICTION

Application of Act

2(1) This Act applies to any expropriation authorized by the law of Alberta and prevails over any contrary provisions that may be found in the law, except the statutes or parts of statutes enumerated in the Schedule.

Jurisdiction of Boards

27(1) Except as provided in subsection (2) or in section 29(3), the Land Compensation Board has jurisdiction with respect to expropriations under this Act.

EXPROPRIATION ACT - DEFINITIONS

1 In this Act,

- (g) “expropriation” means the taking of land without the consent of the owner by an expropriating authority in the exercise of its statutory powers;
 - (h) “land” means land as defined in the authorizing Act and if not so defined, means any estate or interest in land;
 - (k) “owner” means
 - (i) a person registered in the land titles office as the owner of an estate in fee simple in land,
 - (ii) a person who is shown by the records of the land titles office as having a particular estate or an interest in or on land,
 - (iii) any other person who is in possession or occupation of the land,
 - (iv) any other person who is known by the expropriating authority to have an interest in the land
- ...

EXPROPRIATION ACT – FORMAL REQUIREMENTS

FIRST: The expropriating authority files and serves a notice of intention to expropriate (“NOITE”) on:

- every person shown in the records of the land title office as having an interest in the land; and,
- every other person known to the expropriating authority to have an interest in land [EA, s. 8].

NEXT: Persons served with a NOITE have the right to file an objection [EA, s. 10].

NEXT: Any objections proceed to a hearing before an inquiry officer, who determines if the proposed taking is “fair, sound and reasonably necessary” for the expropriating authority’s objectives [EA, s. 15]

NEXT: After the inquiry officer reports (or if no objections are filed), the approving authority decides whether to approve the proposed expropriation or not, or approve it with modifications [EA, s. 18].

If the approving authority approves the expropriation, it issues a certificate of approval. The expropriating authority then registers the certificate of approval in the land titles office [EA, s. 18].

EXPROPRIATION ACT – FORMAL REQUIREMENTS

If the approving authority does not approve the expropriation, or the expropriating authority does not register certificate of approval in the land titles office within 120 days of registering the NOITE (and no extensions have been granted), then the expropriation is deemed abandoned and the NOITE lapses [EA, s. 20].

What does registration of the certificate of approval mean?

Effect of registration

- 19(1) The expropriating authority may register the certificate of approval in the land titles office and, subject to the *Highways Development and Protection Act* and the *Municipal Government Act*, registration vests in the expropriating authority the title to the land described in the certificate as to the interest specified in the certificate.
- (2) The certificate of approval shall contain a description of the land being expropriated that is satisfactory to the Registrar of Land Titles or shall be accompanied with a plan of survey of the land.

***EXPROPRIATION ACT* – FORMAL REQUIREMENTS**

Effect of expropriation

- 61 (1) The right to compensation and the compensation finally awarded for any estate or interest acquired or taken under this Act in Crown or other land by an expropriating authority stands in the stead of the estate or interest so acquired or taken and a claim to or an encumbrance on the estate or interest is converted, as against the expropriating authority, into a claim for compensation or a portion of the compensation.
- (2) When the estate or interest has been expropriated in the manner provided by this Act, the estate or interest becomes the property of the expropriating authority free and clear of any and all claims and encumbrances in respect of the previous estate or interest.

EXPROPRIATION ACT – THE COMPENSATION FRAMEWORK

Principles of compensation

42(1) When land is expropriated, the expropriating authority shall pay the owner the compensation as is determined in accordance with this Act.

(2) When land is expropriated, the compensation payable to the owner must be based on

- (a) the market value of the land,
- (b) the damages attributable to disturbance,
- (c) the value to the owner of any element of special economic advantage to the owner arising out of or incidental to the owner's occupation of the land to the extent that no other provision is made for its inclusion, and
- (d) damages for injurious affection.

EXPROPRIATION ACT – THE COMPENSATION FRAMEWORK

Abandonment of expropriation

24 (1) An expropriating authority may abandon its intention to expropriate, either wholly or partially, at any time before registration of the certificate of approval in the land titles office.

...

(3) If an expropriation has been abandoned, the expropriating authority shall pay to the owner any actual loss sustained by the owner and the reasonable legal, appraisal and other costs incurred by the owner up to the time of abandonment, as a consequence of the initiation of the expropriation proceedings.

(4) Compensation payable under this section, including costs, must be fixed by the Board.

SELECTED CASE LAW

Downey v. Red Deer (City) (1976), 11 LCR 345 (Alta. LCB):

“Under s. 18 [now s. 19] it is the registration of the certificate of approval which completes the taking of title to the lands being expropriated and results in the vesting of title to those lands in the expropriating authority. Prior to the registration of the certificate of approval no taking has occurred ... The Board finds that no date prior to the registration of the certificate of approval is, within the scheme and provisions of the Act, appropriate as the effective date for valuation of the lands being expropriated.”

SELECTED CASE LAW

Minute Muffler Installations Ltd. v. Alberta (1984), 30 L.C.R. 125 (Alta. C.A.)

- A fee simple property was expropriated, however the expropriating authority had not given notice to the tenant as required by the *Expropriation Act*.
- The LCB dismissed the claim for compensation, finding there can be no expropriation unless the formalities in the *Expropriation Act* are complied with.
- The Court of Appeal rejected this conclusion - “We hesitate to agree with this proposition. Those formalities are there for the benefit of the citizen, not a malefacting Government.”
- The Court of Appeal nonetheless dismissed the claim for compensation:
“However, we need not deal with the issue because, in view of the term of the lease, the appellant had already ceased to have an interest in the lands before the supposed *de facto* expropriation occurred, and any subsequent disruption came as a consequence of the termination of the lease, which in turn came as a consequence of the expropriation of the fee simple. We therefore agree with dismissal of the claim by the Land Compensation Board, but on the ground that no loss was suffered.”

SELECTED CASE LAW

Dell Holdings Ltd. v. Toronto Area Transit Authority (SCC 1997)

“It is the taking of the land which triggers and gives rise to the right of compensation. An owner whose land is caught up in a zoning or planning process but not expropriated must simply accept in the public interest any loss that accrues from delay.”

“The courts have long determined that the actual act of expropriation of any property is part of a continuing process. In *McAnulty Realty, supra*, at p. 283, Duff J. noted that the term ‘expropriation’ is not used in the restrictive sense of signifying merely the transfer of title but in the sense of the *process of taking the property* for the purpose for which it is required.”

SELECTED CASE LAW

Thoreson v. Alberta (ABCA, 2006)

Citing *Dell Holdings*

“[C]ompensation for expropriation is not found in an imaginary haggling over the price to be paid for land in a deal between two private individuals, nor the negotiation of a normal bargain in the marketplace, but in the fulfillment by the state of its obligation to repair the injury caused to particular individuals for the public good, and to minimize the loss, inconvenience and disturbance to the life of its citizens to as great an extent as possible.”

DE FACTO EXPROPRIATIONS – THE COMMON LAW

- As a general rule, where compensation or injurious affection is authorized by statute, the right to compensation must be found in the statute:

“Compensation claims are purely statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken or for damage on the ground that his land is “injuriously affected”, unless he can establish a statutory right.”

- Lord Parmoor, *Rockingham Sisters of Charity v. R.*, [1922] 2 A.C. 315 (P.C.).

- BUT, what if the lands were not expropriated by statute, or even purported to be expropriated, but the owner has, for example, lost all effective use of the lands?
- The common law recognizes that there can be a ‘taking’ of an interest - a *de facto* expropriation – outside the statutory framework.
- This ‘taking’ can give rise to a common law right to compensation.

DE FACTO EXPROPRIATIONS – THE COMMON LAW

Canada's SCC has repeatedly endorsed the principle of law stated by Lord Atkinson in *A.G. v. De Keyser's Royal Hotel*, [1920] A.C. 508 at 542 (H.L.), "unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation." *British Columbia v. Tener*, [1985] 1 S.C.R. 533 (S.C.C.) at para. 12; *Manitoba Fisheries v. R.*, [1978] 3 A.C.W.S. 183 (S.C.C.) at para. 36.

Facts of *De Keyser's Royal Hotel*:

- Owner of a hotel claimed compensation for the use of his hotel during wartime by the military
- The House of Lords found that the applicable statute should be construed in favour of compensation.

***DE FACTO* EXPROPRIATIONS – THE COMMON LAW**

British Columbia v. Tener, [1985] 1 S.C.R. 533 (S.C.C.)

Facts: Respondents were registered owners of certain mineral claims on lands now located within Park. Conditions governing exploitation of minerals in park gradually became more onerous and, for several years prior to the action, respondents were denied the permit necessary to explore or work the claims. Respondents finally advised by letter that no new exploration or development work would be permitted under current park policy and were asked to itemize a quit claim price. Action commenced by way of stated case.

Trial found no compensation payable. Court of Appeal found compensation payable under the Lands Clauses Act. Crown Appealed.

***DE FACTO* EXPROPRIATIONS – THE COMMON LAW**

- **Decision:** Appeal denied.
- **Reasons:** Per Estey, J.: Expropriation was through the Park Act and Compensation was to be found in the Ministry of Highways and Public Works Act.
- The denial of access to the lands under the Park Act is what constituted the taking (at para. 20).
- The SCC found the Crown's denial of access to the lands amounted to a recovery by the Crown of the owner's rights and held that "...this acquisition by the Crown constitutes a taking from which compensation must flow." *Tener* at paras. 12 & 20.

DE FACTO EXPROPRIATIONS – THE COMMON LAW

Canadian Pacific Railway v. Vancouver (City), 2006 SCC 5

- “For a *de facto* taking requiring compensation at common law, two requirements must be met: (1) an acquisition of a beneficial interest in the property of flowing from it, and (2) removal of all reasonable uses of the property”.
- In this case the SCC concluded that Vancouver’s adoption of a by-law which designated a former rail right-of-way as a public thoroughfare for transportation and “greenways” did not constitute a *de facto* taking, even though the effect of the bylaw was to freeze the redevelopment potential of the corridor and confine CPR to uneconomic uses of the land.

SUMMARY

- Questions?
- Comments?
- Concerns?