EXPROPRIATION – INITIAL PERSPECTIVE

Summary

The Expropriation Process in Point Form:

- A Municipality or other expropriating authority decides it requires land privately held. Initial discussions do not result in a negotiated purchase, and the decision is made to expropriate the required lands.

- The expropriating authority serves a **Notice of Application for Approval to Expropriate** upon each registered owner of the lands to be expropriated.

- A registered owner who receives a Notice of Application for Approval to Expropriate may request a **Hearing of Necessity** within 30 days of receiving this Notice. This hearing will not occur if not requested.

- If a hearing is requested and proceeds, Reasons will be given by the Inquiry Officer. These are not binding on the approving or expropriating authority.

- After considering the reasons from the Hearing of Necessity, the approving authority prepares a **Certificate of Approval of Expropriation** and provides written reasons for its decision.

- The expropriating authority files a **Plan of Expropriation** on title to the expropriated land. This officially transfers ownership of the land to the expropriating authority and must take place within three months of the granting of the Certificate of Approval of Expropriation.

- The expropriating authority may serve the owner (including all parties with an interest in the expropriated land, known to the authority) and must serve the registered owner, within 30 days of the registration of the plan, with a **Notice of Expropriation**, **Notice of Election** and **Notice of Possession**.

- The expropriating authority may take possession of the expropriated property three months after serving the Notice of Possession, unless the owner applies to the Court to resist possession being taken.

- Within three months after the filing of the Plan of Expropriation, the expropriating authority must serve an **offer of compensation** on the owner; the offer must be based upon an appraisal report, which must also be served on the owner. This amount can be accepted without prejudice to the owner's rights to claim more.

- The determination of compensation proceeds by either **negotiation and/or arbitration**; either side may serve a Notice of Negotiation, or where both the owner and the Authority have agreed to dispense with negotiations, a Notice of Arbitration; the owner prepares a **Statement of Claim** and the expropriating authority responds by means of a **Reply**.

- Document production and oral discoveries takes place to prepare for the Hearing.

- Hearing before the Ontario Municipal Board.

In addition to the process outlined in the legislation, a number of practical considerations will be important for a land owner. This paper touches upon certain common considerations. These include pre-expropriation negotiations, Section 30 Agreements, the advantages and disadvantages of a Hearing of Necessity, when to retain an appraiser or other experts, the categories of compensation that an owner is entitled to, and a discussion on costs and interest.

EXPROPRIATION – INITIAL PERSPECTIVE

Introduction – The Process of Expropriation

An owner faced with a pending expropriation of his or her land may be instantly, and usually reluctantly, exposed to a unique and specialized process. By equipping him or herself with a general understanding of the mechanisms which drive an expropriation, the owner will be better prepared to address the issues arising from the expropriation.

Knowledge of the process is essential to effective decision-making. As many decisions are tactical and time-limited owners will usually require the assistance of the array of experts throughout the process, including appraisers, planners, accountants, and lawyers. An experienced expert can save time, and costly mistakes.

The following is an overview of the expropriation process from the perspective of a land owner, including references to the guiding mechanism, the *Expropriations Act*[1] ("the Act.").

Expropriation – What is it?

In Ontario, "expropriate" has, to date, been specifically confined by tribunals and courts to instances where an interest in land has been taken or deemed to be taken, by the expropriating authority in accordance with its statutory mandate.[2] In the Act, the

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1 *Expropriations Act,* R.S.O. 1990, c. E.26, as amended (the "Act").

2 See *A & L Investments* v. *Ontario (Minister of Housing)* (1997), 62 L.C.R. 241 (Ont. C. A.). However, see Compensation section for an example of a successful injurious affection claim in which the claimants were not the owners at the time of the expropriation (*Aquino v. Canada (Ministry of Environment)).* Courts have also made findings of "deemed expropriation" in instances where government has defeated an owner's entire interest in land without a formal expropriation, see e.g. *British Columbia* v. *Tener,* [1985] 1 S.C.R. 533.

definition of "expropriate" includes "the taking of land without consent of the owner by an expropriating authority in the exercise of its statutory powers . . ." (ss. 1(1)). The power to expropriate is confined to legislation which specifically provides for it. The "expropriating authority" is defined in the Act as the Crown or any person empowered by statute to expropriate land (ss. 1(1)). This definition allows the legislature to empower governmental or quasi-governmental bodies with power to expropriate. Bodies with the power to expropriate include municipalities, branches of federal and provincial governments, schools, universities and, in certain instances, utility companies.

The Notice of Application for Approval to Expropriate and Hearing of Necessity

The initial formal documentation an owner will receive is a Notice of Application for Approval to Expropriate Land. This Notice has the effect of triggering the Act. Usually, an owner will have been advised of a pending expropriation at a much earlier date, or at least heard rumours of such a plan. However, there is nothing formal or binding upon the expropriating authority, until the Notice of Application has been provided to the registered owners.

The expropriating authority is required to serve each of the registered owners with a Notice of Application for Approval to Expropriate by Section 6(1) of the Act. A registered owner is defined as an owner of land whose interest in the land is defined and whose name is specified in an instrument in the proper land registry or sheriff's office, and includes a person shown as a tenant of the land on the last revised assessment roll. The expropriating authority will also have to publish the notice once a week for three consecutive weeks in a newspaper which circulates in the area where the lands are situated.

Therefore there are approximately three ways that a land owner will become aware of an expropriation. The first is to be served with the Notice of Application for Approval to Expropriate. The second is to read of the expropriation through the newspaper, if there has been some difficulty in service of the Notice. Thirdly, the owner will be contacted

prior to receiving the Notice by the expropriating authority to attempt to negotiate the acquisition of the property. Usually, the land owners become aware of the expropriation by the attempted negotiations.

An owner should obtain legal and appraisal advice prior to settling with an expropriating authority, to ensure that the owner has obtained not only the appropriate market value compensation for the land, but also to ensure that the parties have negotiated an appropriate compensation under any of the other categories to which the owner is entitled. For example, businesses that are displaced as a result of an expropriation may be entitled to relocation costs.

The negotiation can also be structured to allow the owner the security of the protection of the Act while allowing the expropriating authority to proceed without having to follow all of the formal requirements of the Act. This can be done through a 'Section 30' agreement. Such an agreement can also benefit the owner by structuring the acquisition to have tax or other benefits. Further, under a Section 30 agreement the parties can resolve certain issues while preserving the right to arbitrate other aspects of a claim.

Through such an agreement, an owner would consent to the acquisition of the land by the authority but reserve the owner's rights under the Act. By this method, the parties negotiate what the initial payment will be and negotiate if there is to be any impingement upon the rights provided by the Act, or any expansion of those rights.

By allowing the parties to subsequently proceed before the Board for the final determination of compensation, both parties are protected if the negotiations end in a stalemate. The expropriating authority is permitted to proceed with its planned project and the land owner is protected in accordance with the Act, and can move on with his or her life more quickly.

If such an agreement, or negotiated settlement is not reached, a possible next step in the formal process is referred to as the 'Hearing of Necessity'. A registered owner who

receives a Notice of Application for Approval to Expropriate has the option of requesting a Hearing of Necessity, according to Section 6(2) of the Act. An Inquiry Officer will be appointed by the Attorney General to preside over the hearing. At the hearing, the Officer considers whether the taking of the lands or any part of the lands from an owner, is 'fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority'.[3]

It should be noted that the 'objective' of the expropriating authority is to be treated as an unalterable fact.[4] However, the decision as to whether the taking of those lands and furtherance of the objectives, is the matter at issue.[5]

There are advantages and disadvantages to proceeding with a Hearing of Necessity. Each individual owner's circumstances will have to be analyzed to determine whether a Hearing of Necessity is appropriate or necessary. One of the disadvantages to be weighed is the cost that is imposed upon the owner to proceed with the Hearing of Necessity.

Within the Act, the costs which can be awarded at a Hearing of Necessity to any party, are limited to $200.00, as set out in Section 7(10). This limitation on the costs substantially differs from the more subjective and permissive costs allowances provided to the owner to obtain expert assistance during the remainder of the expropriation process. The Hearing of Necessity is the only stage of the expropriation process where the costs are restricted to less than what is 'reasonable'.

A second disadvantage is that although the approving authority, who is often the same as the expropriating authority,[6] must consider the report of the Inquiry Officer in deciding

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3 Section 7(5) of Act.

4 The objective must be stated clearly in Notice of Application.

5 John W. Modren, *An Introduction to the Expropriations Act 1968-69 (Ontario)* (Toronto: Canada Law Book, 1969), at 9.

6 Section 5(1) of Act.

whether to approve the expropriation, the approving authority may not decide to follow the recommendations of the Inquiry Officer. The Report of the Inquiry Officer is not binding. The Act provides that the approving authority may either approve or not approve the proposed expropriation with such modification as the approving authority considers appropriate, as set out in Section 8(1).

On the other hand, a Hearing of Necessity may be worthwhile effort for an owner who wishes to increase or reduce the physical scope of the proposed expropriation, propose alternatives to the taking or avoid the taking altogether.

An example of modifying a taking took place in *Verdiroc et al. v. The City of Toronto* (unreported decision of Inquiry Officer Goldkind, released in August, 1998), the authority proposed to expropriate a number of small pieces of land and interests of various kinds, including permanent rights-of-way and strata fee takings, from the owners in order to accommodate a new subway station and bus loop. The property was located in a prime development area of the City of Toronto.

The owners did not contest the need for the project, but argued that the various small takings would, together, have such an adverse impact on the development potential and value of the remaining lands that fairness dictated that the entire parcel should be acquired. Further, the owners argued that if the authority were permitted to proceed with its proposed strata fee taking, their negotiating position with respect to the ultimate development of the property would be severely prejudiced. The Inquiry Officer agreed with the owners' position, and recommended that, to be fair and reasonable, the authority should acquire all of the owners' property.

In some situations, an appointed Joint Board may exercise the power of an Inquiry Officer. Pursuant to the *Consolidated Hearings Act,*[7] joint boards may be established to consider applications for environmental, planning and other approvals required for public

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[7] *Consolidated Hearings Act*, R.S.O. 1990, c. C.29, as amended.

undertakings. In *Re Yonge Street Regeneration Project*,[8] a Joint Board was constituted to hear the application by the City of Toronto for expropriations pursuant to the *Expropriations Act* and approvals under the *Planning Act*[9] for the City's plan to clean up and regenerate Yonge Street at Dundas Street.

The plan was approved on the basis that is represented good planning, benefited the public interest, and promoted the economic and social welfare of the area. Section 28 of the *Planning Act* created jurisdiction for the City to acquire the lands for community improvement and transfer some of those lands to a third party developer. Jurisdiction under this section was not confined to areas that were in a state of physical disrepair. The expropriations were found to be fair, sound and reasonably necessary.

An approving authority will certify its approval of the expropriation in the prescribed form (Certificate of Approval of Expropriation) (ss. 8(3)) and the authority must give written reasons for its decision. The reasons are served upon all of the parties within ninety days after the date upon which the report of the Inquiry Officer is received by the approving authority (ss. 8(2)). The Certificate of Approval of Expropriation is ultimately filed at the commencement of the hearing before the Board.

Plan of Expropriation and Notices of Expropriation, Election and Possession

Once an expropriation is approved, the expropriating authority must file a Plan of Expropriation within three months after the granting of the approval (s. 9). Upon registration of the Plan, the land vests in the expropriating authority. Once the Plan has been registered and no agreement with respect to compensation has been reached with the owner, the expropriating authority may serve the owner and must serve the registered

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8 *Toronto (City) Official Plan Amendment No. 92* (Joint Board Proceeding), [1998] O.M.B. No. 745 (O.M.B.), affirmed, *subsection nom Marvin Hertzman Holding Inc.* v. *Toronto (City)* (1998), 165 D.L.R. (4th) 529 (Ont. Div. Ct.) .), leave refused C.A., Ont. 30, 1998.

9 *Planning Act*, R.S.O. 1990, P. 13, as amended.

owner, within 30 days of the registration of the Plan, with a Notice of Expropriation (s. 10).

Typically, the authority serves Notices of Election and Possession along with the Notice of Expropriation. Within these forms the owner is afforded some flexibility in selecting the "valuation date" or the date by which compensation with respect to the property is determined. An owner must make a selection (typically on the Notice of Election) within 30 days after the owner was served with the Notice of Expropriation to have the compensation to which the owner is entitled assessed,

(a) where there has been an inquiry, as of the date the Notice of Hearing before the Inquiry Officer was served;

(b) as of the date of registration of the plan, or

(c) as of the date on which the owner was served with the Notice of Expropriation (ss. 10(2)).

An owner who does not make a selection within the prescribed time is deemed to have elected to have the compensation assessed as of the date of registration of the plan. Once a Notice of Possession is served on the registered owner, the date for possession must be at least three months after the date of service of the Notice of Possession. Prior to making an election pursuant to subsection 10(2) of the Act, an owner may wish to seek expert advice. Such advice becomes more important when a significant amount of time exists between the various election dates or in a rapidly changing real estate market.

When to Retain an Appraiser

An appraiser will be retained on behalf of the expropriating authority very early in the proceedings. The owner will get the authority's appraisal report as it must be served along with Section 25 offer, as discussed below. In comparison, there is no obligation on

an owner to even obtain an appraisal report. However, it is usually prudent for an owner to retain an appraiser to inspect the property at the time of expropriation and prior to completing an election.

The owner and his or her appraiser can then await receipt of the report prepared by the appraiser for the authority and benefit from a review of the authority's appraisal report prior to the finalization of the owner's appraisal report. However, an owner may wish his appraiser to remain "untainted" and simply ask them to prepare a report entirely independently. This is usually recommended. If an owner is to rely on an appraisal of an arbitration, the appraisal must be served on the authority 15 days prior to the hearing (s. 28), or earlier if required by the Ontario Municipal Board.

An owner who retains an appraiser too early (i.e. before the provisions of the Act are triggered) **may** be exposed to costs. An owner who wishes to negotiate with an authority prior to the registration of an expropriation plan should ensure that the authority agrees to pay the owner's reasonable legal, appraisal and other costs associated with the negotiations. Such protection is not fully provided by the Act until the formal expropriation process is commenced by the authority.

The Act provides that once an expropriating authority has served a Notice of Expropriation on the owner in possession of the lands expropriated, the authority may enter on the expropriated lands with the owner's consent to "view for appraisal" (ss. 10(3)). According to *Re Le Goyeau Holdings Ltd. and Windsor (City)* (1994), 52 L.C.R. 317 (O.M.B.), the power to permit entry on land for the purposes of "viewing for appraisal" includes the power to permit testing for environmental contamination, including electromagnetic surveying, shallow soil sampling, deep well drilling and interior inspection of buildings, where such testing is necessary to facilitate a proper appraisal of the market value of the land.

Compensation – What an Owner is Entitled to

An owner may be compensated under four broad categories (s. 13):

(1) the market value of the land;

(2) the damages attributable to disturbance;

(3) damages for injurious affection; and

(4) any special difficulties in relocation.

There is a degree of overlap in these categories of compensation, and some losses may appear to be difficult to categorize. These heads of compensation are, however, intended to make the owner "whole", on an objective basis. Case law and experience before the OMB will allow counsel to assist the parties in formulating the appropriate claims.

Market value is defined in subsection 14(1) of the Act as "the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer."

Disturbance damages vary depending upon whether the claimant is an owner or a tenant, and the use which was made of the property. Disturbance damages may include business losses, business replacement costs, relocation costs, and storage and equipment expenses, for example.

Damages for injurious affection are compensable when a portion of an owner's land is expropriated (a "partial taking") and damages are occasioned to the lands retained by the owner as a result of the expropriation. Examples of the types of damages contemplated include damages for loss of access to the property, or the "land locking" of the remaining lands, loss of exposure and visibility from the highway, loss of trees and landscaping. Damages may also be obtained for injurious affection when no land is taken.

The final category of damages, "special difficulties in relocation," provides for awards of damages that recognize the uniqueness of the land expropriated or particular market conditions, and affords compensation to owners who are unable to find, or experience substantial difficulty in locating a replacement property with similar attributes.

The characterization of an owner's damages is something which is best left to those who are experienced in the assessment and calculation of these items. Experts play a vital role in assisting in the formulation and strengthening of an owner's case. For example, effective planning evidence is significant in building and supporting an appraiser's determination of highest and best use and interpretation of market value, and accounting evidence is imperative in establishing and presenting business loss claims. A lawyer retained by an owner will build and co-ordinate the owner's case, working together with various experts to strategize and negotiate, culminating in a negotiated settlement or ultimately with a hearing before the Board.

Damages are characterized under several sections of the Act, depending on the type of compensation, and the type of interest in land. A review of recent cases in the area demonstrates the types of issues that arise. For example, subsection 18(1) provides for disturbance damages for an owner "other than a tenant." This subsection stipulates that the authority shall pay "in respect of disturbance, such reasonable costs as are the natural and reasonable consequences of the expropriation . . .".

A significant case in the interpretation of such disturbance claims which are the "natural and reasonable consequences of the expropriation" is *Toronto Area Transit Operating Authority v. Dell Holdings Limited* [1997] 2 S.C.R. 32. In the *Dell Holdings* case, the City of Mississauga withheld the required approvals for the development of the claimant's land until the expropriating authority decided which portion of the claimant's land to expropriate for construction of a new GO Transit station.

The claimant sought disturbance damages for business losses it sustained as a consequence of the expropriating authority's delay of some two years in determining its site requirements and deferring the acquisition of a portion of its property. The Supreme Court of Canada rejected the expropriating authority's argument that the damages claimed were not a "natural and reasonable consequence of the expropriation" simply because the alleged losses were sustained before the actual acquisition of the land. The court held that the actual act of expropriation was part of a continuing process of a continuing process of "expropriation", and awarded the claimant damages for its business losses sustained while development of its lands was frozen due to the expropriating authority's delay.

Section 19 of the Act provides that where a business is located on the land expropriated, the expropriating authority shall pay compensation for business loss resulting from the relocation of the business or a loss of goodwill in the business. In *Vucinic v. Amherstburg (Town*) (1997), 64 L.C.R. 223 (O.M.B.), the claimant operated a local hostelry comprising a restaurant-bar, a motel and marina facilities. The authority expropriated an adjacent property with an historical building in order to preserve the structure.

The claimant had acquired the adjacent property with the intention of expanding its motel facility from 17 units to approximately 35 units onto that parcel. Once the building was preserved, the land returned to the claimant, but not without delaying their expansion plans for some 7 to 8 years. The Board rejected the authority's argument that the expansion of the claimant's facility would not have been economically feasible since the motel had only occasionally experienced over 80% occupancy. Based on the fact that the claimant had demonstrated a solid record of business achievement in the past, and the probability that the expansion of the facility would have been successful, the Board awarded the claimant compensation for business losses it sustained as a consequence of the delayed expansion.

Residential and commercial tenants of an expropriated property also have the ability to claim compensation for disturbance damages, loss of leasehold advantage and business loss. In instances where a property owner and a tenant are both advancing claims for compensation, it is advisable that the owner and tenant are represented by separate counsel, as conflicts between the two claims may arise.

With respect to injurious affection, Section 22 of the Act provides that a claim for compensation for injurious affection must be made by the person suffering the damage or loss "within one year after the damage was sustained or after it became known to the person." Accordingly, it is imperative that an owner who wishes to pursue a claim for injurious affection notify the expropriating authority of the claim within the appropriate time period. A lawyer retained by an owner regarding an expropriation will immediately confirm the details regarding an injurious affection claim with the owner. The lawyer will then prepare a "Section 22 Notice," which particularizes an owner's claim for injurious affection. The Section 22 Notice is served on the expropriating authority.

612118 Ontario Ltd. v. Ontario (Ministry of Transportation) (1997), 61 L.C.R. 123 (O.M.B.), [reversed in part (1998), 64 L.C.R. 5 (Ont. Div. Ct.)] involved an expropriation by the Ministry of Transportation of a portion of the claimant's gravel pit. The claimant was compensated for part of the total costs of preparing a new site plan for its gravel pit operation but claimed injurious affection for the cost of constructing a berm.

The Board held that the claim for injurious affection was statute barred. Documentation, including invoices for the construction of the berm, was not provided to the Ministry by the claimant until approximately 18 months after the costs were incurred.

The Divisional Court overturned the Board's ruling in part because the Ministry knew that its actions would require the construction of the berm. The Ministry was aware of the claim, which was again asserted at discovery with an undertaking to provide documentation; however, the Ministry made no move to ensure compliance with the undertaking. The claim for injurious affection was referred back to the Board to

determine the actual cost of constructing the berm and the portion of that cost attributable to the expropriation of a portion of the gravel pit. The ruling of the Divisional Court in this case is an example of the Court's reluctance to deny any rights of an expropriated owner as a result of procedural defects.

The Board has considered claims for injurious affection where no land is expropriated. For example, in *Aquino v. Canada (Ministry of Environment)* (1990), 44 L.C.R. 47 (O.M.B.), the respondent's arguments included the allegation that the claimants were not the owners at the time of the expropriation. The Board held that subsection 22(1) of the Act clearly contemplated that construction of a public work might create a latent defect that would only be discovered by a subsequent owner. According to the Board, if a claim for injurious affection were limited to the owner of the land at the time of the construction, then the ultimate manifestation of the latent defect would attract no compensation and subsection 22(1) would be rendered meaningless with respect to latent defects.

Offer of Compensation and Furnishing Appraisal Reports

The expropriating authority is required to serve an offer of compensation on the owner within three months after the filing of the plan of expropriation and before taking possession of the expropriated land (ss. 25(1)). The offer must be based upon the determination of market value in an appraisal report, which must be served on the owner by the authority along with the offer. The offer of compensation does not have to include any damages for disturbance or injurious affection. The issue of whether, based on this section, the offer must precisely reflect the appraised market value as indicated in the appraisal report, has recently been considered by the Board.

In *747926 Ontario Ltd. v. Wellington (County) Board of Education* (1998), 64 L.C.R. 214 (O.M.B.), the expropriating body delivered an appraisal report containing a typographical error stating the value of the property as $1.5 million instead of $1.25 million. The authority offered the claimant the $1.25 million under the Section, and later delivered an

amended appraisal report correcting the error. The claimants accepted the authority's offer.

The claimants nonetheless moved for an order that the authority pay an additional $250,000. The issue was whether the authority was required to offer the amount stated in the appraisal report under Section 25 of the Act, or whether the authority could offer a different amount under the Section. The claimants' motion was refused: the authority had complied with its statutory obligations. Section 25 was intended to provide the expropriating authority, and not the appraiser, with control over the offer.

The offer of compensation under Section 25 can be accepted "without prejudice" to the owner's right to claim additional compensation under the Act. Consequently, acceptance of a Section 25 offer does not amount to a settlement or compromise an owner's rights. Acceptance of a Section 25 offer may, however, compromise an owner's rights to later challenge the legitimacy of the expropriation.[10] An owner should also ensure that the only offer accepted is the "without prejudice" offer under Section 25 of the Act and not an additional offer that amounts to a "with prejudice" settlement.

Negotiation and/or Arbitration

If the owner and the authority are unable to agree on compensation, the determination of compensation may proceed on the initiative of either the owner or the authority by a meeting before the Board of Negotiation (ss. 26(a)) or an arbitration before the Ontario Municipal Board (ss. 26(b)). A negotiation is a somewhat informal process before a negotiator, appointed by the Province. The findings of a negotiator are not binding on either of the parties, but are often insightful to the parties in arriving at a resolution.

The parties may proceed to an arbitration before the Ontario Municipal Board in instances where they agree to dispense with proceedings before the Board of Negotiation

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[10] See *Cartier* v. *Pasadena (Town)*, [2000] N.J. No. 372 (Nfld. S.C. – T.D.), aff'd [2001] N.J. No. 353 (S.C. –C.A.), leave to appeal refused [2002] S.C.C.A. No. 12 (S.C.C.).

or if the negotiation has been completed without a successful resolution. An arbitration before the Ontario Municipal Board is heard by one or more board members. The determination of the Ontario Municipal Board, following an arbitration, is binding upon the parties, subject to the specific rights of appeal to the courts.

The determination of compensation before the Ontario Municipal Board can be commenced by the authority, by issuing a Notice of Arbitration or the owner, by issuing a Notice of Arbitration and Statement of Claim. An owner must issue a Statement of Claim, to set out the foundation of the claim for compensation and explain the compensation sought. In response, the authority issues a Reply to the Statement of Claim, which sets out its position.

The Discovery Process

Following the preparation and service of the Notice of Arbitration and Statement of Claim and the Reply, the parties exchange documents and hold oral discoveries. This process is similar to that which occurs in civil litigation before the courts.[11] Accordingly, both the Claimant and the Respondent are obligated to provide copies of all relevant documents in their control or possession to the opposing side. This is followed by Examinations for Discovery where each party has the right to ask the opposing party questions on any issue relevant to the matter. Examinations for Discovery take place before an official reporter who transcribes the questions and answers. The discovery process is intended to allow parties to develop their case, while gaining an understanding on the case against them. This process also allows the parties to obtain evidence to use at the hearing before the Ontario Municipal Board.

Typically, issues may arise during the discovery process regarding a party's entitlement to certain documentation. In *Wippman v. Windsor (City)* (1995), 57 L.C.R. 298 (O.M.B.), the authority filed expropriation plans with respect to 18 separate land

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[11] Rule 134 of the *Rules of Practice and Procedure* for Ontario Municipal Board.

holdings, comprising a total of 13 acres of land in the City of Windsor. The authority was assembling property for its proposed casino complex, and had negotiated settlements with all landowners with the exception of the claimants in the present claim.

The claimant sought production of the details of the terms under which all other properties were acquired, arguing that the information would be critical in determining the value of its property. The Board granted the claimant's motion in part, ordering production of the settlement details of the most comparable property acquired by the authority. In addition, the Board ordered production of a consolidated public record of the final amounts paid to other expropriated owners.

The Board based its order on the premise that information sought would assist the claimants to narrow and/or clarify the issues in preparation for a hearing. However, the Board was clear that its decision was not determined of the ultimate admissibility of the settlement agreements or the weight to be given to such information if admitted at hearing. The scope of information available at an Examination for Discovery can be very broad, as a party is permitted to ask any question on discovery, so long as it has a semblance of relevance to the issues in dispute.[12] The scope of questioning at discoveries is somewhat wider than that which may be permitted at a hearing or trial. The parties to a discovery are also given a wide latitude in selecting the representative whom they wish to examine on behalf of a corporation, municipality or branch of government.[13]

Hearing before the Ontario Municipal Board

An expropriation matter ultimately proceeds by means of a hearing before the Ontario Municipal Board. The procedures prior to and during the hearing are governed by the *Rules of Practice and Procedure* for the Ontario Municipal Board. Rules 122 to 143 govern the procedure for expropriation.

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12 See *Kay* v. *Poslans* (1989), O.R. (2d) 238 (H.C.J.).

13 *Windsor* v. *789881 Ontario Inc.* (2002), 77 L.C.R. 164 (O.M.B.).

A hearing date is set by the Board in several ways; the parties may sign and submit a Notice of Readiness for Hearing, or a party may bring a motion for a hearing date, provided the Notice of Motion is served at least thirty days after service of the Notice of Arbitration. Finally, a hearing date may be provided for in a Procedural Order of the Board, which typically establishes deadlines and addresses procedural issues, including written evidence, expert witnesses, and the issue of adjournments, for example.

Rule 141 provides that at the commencement of a hearing to determine compensation, the respondent must file a copy of the Certificate of Approval of Expropriation under the Act, the expropriation plan and proof of its registration in accordance with Section 9 of the Act, and an affidavit proving service of the Notice of Appointment for the hearing. Typically, preliminary filings may also include relevant title documentation, agreements, releases and the Procedural Order of the Board, for example.

The hearing before the Ontario Municipal Board is a formal process where the Claimant begins by leading evidence of its position. Such evidence normally includes factual evidence provided by the Claimant and other witnesses who can provide evidence in support of the claim. Expert evidence is usually called by the Claimant as well. This evidence can include appraisal evidence on the issue of compensation, planning evidence relating to the background of the property and highest and best use and accounting or expert business evidence in regard to claims for business loss and disturbance damages. A wide variety of other experts are called at hearings in order to support specific aspects of the claim.

After the Claimant has completed its case, the Respondent (the authority) has the opportunity to respond to the Claimant's case by asserting its position. Like the Claimant, the Respondent has the opportunity to call factual and expert witnesses to support its case. Following the Respondent's case, the Claimant has an opportunity to call evidence in reply to issues raised by the Respondent. After all evidence is called, the parties have the opportunity to make closing submissions on the facts and law in support of their case.

In most cases, the Ontario Municipal Board then reserves its decision and provides a formal decision with respect to compensation at a later date. This decision is accompanied by reasons for the decision.

Costs – Will an Authority Pay?

Costs are a paramount concern for many owners, and an understanding of the Act as it relates to costs will assist an owner in making decisions respecting an expropriation claim. The Act provides that where the amount to which an owner is entitled upon an expropriation is determined by the Board and if **the amount awarded by the Board is 85 per cent, or more, of the amount offered by the statutory authority**, the Board must make an order directing the authority to pay the owner's **reasonable legal, appraisal and other costs** actually incurred for the purpose of determining compensation (ss. 32(1)).

The phrase "amount offered" has been interpreted as meaning the amount first offered by the expropriating authority pursuant to Section 25 of the Act.[14] In certain decisions, however, the Ontario Municipal Board interpreted the phrase "amount offered" in Section 32 to include amounts offered by the authority subsequent to the Section 25 offer.[15] These cases appear to depart from the usual interpretation of Section 32 of the Act.

If the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Board and the amount is less than 85 per cent of the amount offered by the statutory authority, the Board has the **discretion** to order the payment of costs by the authority (ss. 32(2)). All case law indicates that expropriated owner's costs have been paid by the authority, or at least the 'reasonable' portion of thereof.

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14 *Jakubowski* v. *Ontario (Minister of Transportation & Communications)* (1973), 6 L.C.R. 29 (Ont. L.C.B.), aff'd (1975), 9 L.C.R. 253 (Ont. Div. Ct.).

15 *Bellwood* v. *Clearview (Town)* (1994), 54 L.C.R. 185 (O.M.B.).

Section 32 allows the Board to refer the determination of the amount of costs recoverable by an owner in this situation to an Assessment Officer of the Superior Court of Justice.

This is the usual way in which the Board has the issue of costs determined after a hearing. The ultimate decision on costs is, therefore, determined by the same office that determines costs after a trial before the Superior Court of Justice. The Board has the power to direct the Assessment Officer on certain issues of costs. Such directions often take place following a lengthy hearing, where the Board Member has obtained special insight into certain issues that may relate to the determination of costs.

Unless a contrary direction is given by the Ontario Municipal Board, the Assessment Officer is to provide the Claimant (property owner) with all of the costs it has incurred in the claim so long as:

(a) The costs are determined to be reasonable, based on the amount of the cost claimed, the value added by the service for which the cost is claimed and the necessity of the cost; and
(b) The cost was for the purpose of determining the compensation payable and not for other tasks such as opposing the expropriation.

As the requirement under Section 32 of the Act is for the legal, appraisal, and other costs to be reasonable, it is incumbent on the owner to ensure that the costs are monitored and/or that the lawyer involved has experience in monitoring the other experts' costs, so as to minimize the impact of the assessment.

Interest

The Act provides that an owner of the lands expropriated is entitled to be paid interest on the portion of the market value of the owner's interest in the land and on the portion of any allowance for injurious affection to which the owner is entitled. It is calculated at the

rate of 6 per cent a year calculated from the date the owner ceases to reside on or make productive use of the lands (ss. 33(1)). Interest is not paid on awards for disturbance damages or business loss.[16]

Pursuant to subsections 33(2), (3) and (4) of the Act, the Board has the discretion to vary interest, as a result of delay attributable to either of the parties. This variation can range from the denial of interest for any period of time if the owner is responsible for delay, to interest being increased to a rate of 12% per year if it is found that the authority has unacceptably delayed the determination of compensation.

In *Boyd v. Ontario Ministry of Transportation (Ministry of Transportation)* [1995] O.M.B.D. No. 783, the claimant purchased vacant land for re-development. When the claimant learned of the Ministry's intention to expropriate the property, the land was still vacant. The Board found that the "productive use" of the property ceased when the expropriation was approved by the Ministry and all hope for re-development was lost. Interest was awarded prior to the actual expropriation despite the fact that the claimant was making no "physical use" of the lands at the time the expropriation was approved.

Conclusion

This overview hopefully demonstrates how a clear understanding of the expropriation process is key to effective decision-making on the part of a land owner. Although the Act guides the process, an owner must be aware of a number of practical considerations along the way. In addition, the case law has important implications for a land owner.

An owner's lawyer should guide the owner in interpreting the provisions of the Act and in providing and interpreting the relevant case law. In addition, appraisers, planners, accountants, and other experts will assist in the characterization and categorization of an owner's damages, and effectively and successfully present an owner's claim.

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16 *747926 Ontario Ltd*. v. *Upper Grand District School Board* (2001), 74 L.C.R. 241 (Ont. C.A.).

Being informed and using experienced experts is the only way for a land owner to ensure he or she is being compensated fully and/or fairly.

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