Threatened Expropriation and Blight: Valuation Issues

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Introduction

As urban areas in the Province of Ontario come of age, they confront the reality of an aging infrastructure, aging improvements and areas that suffer from functional, locational or economic underutilization. At times, these realities result in important and central locations in urban centres requiring redevelopment or regeneration in order to prevent further underutilization, deterioration and blight. Significant urban revitalization projects have taken place including such notable undertakings as the Yonge-Dundas Regeneration Project in Toronto,[1] the Richmond Landing Project in Windsor,[2] and the Ataritiri Project in Toronto. In order to achieve the goals of these redevelopments, municipalities have resorted to their power to expropriate.

In many instances, expropriations in urban centres, as well as the processes leading up to these expropriations, have affected land values by the imposition of land use restrictions and the announcement of such public redevelopments. Accordingly, prior to the actual expropriation of lands, areas can be confronted with a lack of private redevelopment and construction, as well as a deferral of maintenance and improvement to existing structures. These realities, in turn, result in urban underutilization or blight which can affect land values prior to the actual expropriation.

This paper will examine the effects of blight caused by the developments or schemes,[3] relating to expropriations and explore how the *Expropriations Act*[4] addresses pre-

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[1] See discussion in *Toronto (City) Official Plan Amendment No. 92* (Joint Board Proceeding), [1998] O.M.B. No. 745 (O.M.B.), affirmed, *sub nom Marvin Hertzman Holding Inc.* v. *Toronto (City)* (1998), 165 D.L.R. (4th) 529 (Ont. Div. Ct.).

[2] See discussion in *Sleiman* v. *Windsor* (2002), 78 L.C.R. 247 (O.M.B.).

[3] For the purpose of this paper the terms "Scheme" and "Development" will be used interchangeably in reference to the developments and undertaking of which expropriations are an element.

expropriation blight and underutilization in determining market value, injurious affection and disturbance damages. This discussion will also explore more extreme examples of urban blight and deterioration caused by the announcement of public undertakings that entail expropriation by looking at certain cases from the United States on this topic.

The Meanings of Blight

In a municipal/planning/expropriation context, blight has taken on several meanings, depending on the court or jurisdiction in which it is defined. References to "blight" or "planning blight" have been as broadly defined as any adverse effect caused by planning or a development.[5] The majority of references to "blight", however, relate to the deterioration and underutilization of an urban area. A more extreme and specific definition of "blight" is often seen in American jurisprudence, where "blight" refers to urban decay, abandonment and a complete loss of utility for a given area.

For the purpose of this discussion, reference to "blight" will generally refer to underutilization and physical, social and economic deterioration of an urban area.

In understanding blight in an expropriation context, an important distinction must be drawn between "historical blight" and "urban renewal blight". This distinction was clearly articulated by the Alberta Land Compensation Board in the decision of *McNeill* v. *City of Calgary*,[6] where the Board defined "urban renewal blight" as follows (at 76):

> "This term is used to describe the effect that the imposition of urban renewal schemes have on lands that are subject thereto in the form of disincentives to maintaining existing

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[4] *Expropriations Act*, R.S.O. 1990, c.E. 26 (the "*Expropriations Act*").

[5] See discussion in *British Columbia Hydro & Power Authority* v. *McHattie* (1989), 42 L.C.R. 129 (B.C. Co. Ct.) and *Director of Buildings & Lands* v. *Shun Fung IronWorks Ltd.*, [1995] 2 A. C. 111 at 138 (J.C.P.C.), in reference to "blight provisions".

[6] *McNeill* v. *City of Calgary* (1981), 24 L.C.R. 69 (Alta. L.C.B.).

> properties and redevelopment thereof and the exclusion of free real estate market conditions from the area affected. In the negative sense it is used to describe the acceleration in depreciation of properties located in the area. In the positive sense urban renewal tends to accelerate or enhance the value of properties outside the scheme but in geographic proximity thereto".

The Land Compensation Board in *McNeill* went on to define historical blight as follows (at 78):

> "The Board uses this term in the sense of blight which occurs in an area as a result of the effluxion of time and changing land uses in the area in question and in the downtown area as a whole. This is the type of blight which occurs entirely separate and apart from any actions or activity of the municipal Government in question and indeed is the type of blight which is the precursor of and reason for considering some type of urban renewal scheme".

It is important to appreciate the distinction between urban renewal blight and historical blight, as urban renewal blight becomes a factor in the valuation process in the context of expropriations, whereas historical blight reflects the existing state of the surrounding area without regard to the expropriation or the development thereunder. In analyzing this issue, one must be mindful of the reality that often blight in an expropriation context is a hybrid of both urban renewal blight and historical blight. It is imperative to properly identify and separate these two similar market forces in order to accurately identify the "scheme" or "development" that must be taken into account in expropriation proceedings.[7]

[7] See analysis in *McNeill* v. *Calgary*, *supra* note 6.

Blight and the Determination of Market Value

The determination of market value in accordance with the *Expropriations Act* is to determine the value of property without consideration to the expropriation or the development for which the expropriation is taking place and its effects on the market value of the expropriated property. This exclusion of the scheme is set out in sub-section 14(4)(b) of the *Expropriations Act* which reads as follows:

> "14 (4) – In determining the market value of land, no account shall be taken of,
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> (b) – any increase or decrease in the value of land resulting from the development or imminence of development in respect of which the expropriation is made or from any expropriation or imminent prospect of expropriation"

This principle was explained by the Privy Counsel in *Pointe Gourde Quarrying and Transport Co.* v. *Sub-Intendent of Crown Lands,*[8] where Lord MacDermott stated (at 572): "It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition".

This principle has been extended, both by statute and, historically, the common law, to apply to any increase or decrease in value caused by a development or scheme for which the expropriation takes place. Examples of scheme-related activities that would depress the value of land include:

(1) Land use restrictions imposed in advance of an actual land acquisition;

(2) The announcement of the expropriation having the effect of freezing private development, restoration or renovation of properties in and around the lands to be acquired; and

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[8] *Pointe Gourde Quarrying and Transport Co.* v. *Sub-Intendent of Crown Lands*, [1947] A.C. 565 (J.C.P.C. on appeal from Trinidad and Tobago).

(3) The effects of pre-expropriation voluntary acquisitions by the expropriating authority or related entities;

All of these activities have the potential for causing blight, deterioration or underutilization of an area in which an expropriation is to occur. This blight, caused by the underlying development, is associated with the reduction in market value for properties to be acquired and should, therefore, be screened out of any analysis for the determination of market value.

As the effects of the scheme are to be screened out of the determination of market value, a critical issue in the valuation process will be identification of the scheme and what factors affecting market value are associated therewith. In accordance with sub-section 14(4)(b), a scheme is triggered by the "imminence of development". The Ontario Municipal Board and the courts in Ontario have followed the general principle that the "imminence of development" is triggered at the time of the publication or announcement of the authority's intention to expropriate, so long as the intention holds a degree of certainty. As the Ontario Municipal Board stated in the decision of *Torvalley Development Ltd.* v. *M.T.R.C.A.*[9] in its discussion of the scheme (at 87):

> "The board has no difficulty finding therefore, that even though the first statement of acquisition intent is clearly made public approximately 28 years prior to the expropriation, that intent is continued and has been supported by ongoing statements of the Respondent in published documents. That clearly brings it within the wording of "imminent prospect of expropriation" in the Act and is therefore not to be taken into account in determining the market value....
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> That, in turn, affects a variety of other issues such as the willingness of the public authorities to process the application for official plan and zoning amendment and the approach to the granting of the necessary fill permit. It

[9] *Torvalley Development Ltd.* v. *M.T.R.C.A.* (1988), 40 L.C.R. 81 (O.M.B.), aff'd (1989), 42 L.C.R. 101 (Ont. Div. Ct.).

> follows that these issues must be examined in light of there being no prospect of expropriation".

The Ontario Municipal Board in the recent decision of *Gadzala* v. *T.C.R.A. and City of Toronto,*[10] found that a scheme to acquire lands on the Etobicoke Motel Strip had been in place since the adoption of the Toronto Waterfront Plan in 1967 even though the expropriations only took place in 1996 and 1998. This finding was made where the Board identified (at 20), "...that it was the clear intention of the public authorities to initiate a significant Scheme for the Motel Strip that included massive filling along the shores of the Lake, the capture of privately held lands, the creation of a public recreation area and the creation of a scenic drive".

In other cases, however, the Board has held that even though a development may have been announced, it did not become "imminent" until a later date.[11] In all cases before the Board the finding of "imminence" is a finding of fact, which must be determined by the Board based on the evidence before it and the circumstances in each particular case.

Another important finding of fact that must be made in regard to sub-section 14(4)(b) is the determination of the scope of the scheme. This determination is necessary in order to find a causal link between the development and certain factors affecting the value of the lands to be expropriated. Although, in most circumstances, the Board will regard the scheme to be the planning regime or development relating to the land acquisition, at times the Board may find that the planning regime and development affecting the lands to be expropriated, is part of a larger undertaking, which cannot be considered the scheme.[12] A critical element of a claim for compensation which relies on sub-section 14(4)(b) of the *Expropriations Act* is to properly characterize the scheme as causing the loss in value. If an expropriating authority can demonstrate that the planning or market forces that caused

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[10] *Gadzala et. al.* v. *T.C.R.A. and City of Toronto,* O.M.B.# LC 990018 and LC 990021, Decision No. 1591, issued October 4, 2004.

[11] See e.g. *Dempsey Estate* v. *Metropolitan Toronto* (1977), 14 L.C.R. 55 (L.C.B.).

[12] See e.g. *Salvation Army, Canada East* v. *Ministry of Government Services* (1983) 29 L.C.R. 193 (O.M.B.), rev'd (1984), 31 L.C.R. 129 (Ont. Div. Ct.), aff'd (1986), 34 L.C.R. 193 (Ont. C.A.).

the blight or devaluing influence is not part of the "development" the Claimant will be unable to have the effects of the blight screened out of the determination of market value.

In the decision of *Bozel* v. *City of Hamilton*,[13] the Land Compensation Board determined a claim for compensation arising out of an urban renewal scheme in downtown Hamilton. In this case, the determination was made that the redevelopment plan received Ontario Municipal Board approval in 1967, even though the expropriation of the property did not take place until 1974.[14] The appraiser for the Claimant made the determination that comparable properties around the subject suffered from planning blight since the initiation of the urban renewal scheme and, therefore, screened out such comparable sales. The appraiser for the Respondent did not agree with this position. The Board recognized that the urban renewal had the potential to influence value and was unable to accept the Respondent's evidence, which did not recognize this fact.[15] In discussing the effects of the urban renewal on market value, the Board stated (at 21):

> "Obviously some properties that would have been improved under normal maintenance programmes suffered from deferred maintenance. The subject property may well have so suffered because of the market realization that the eventual use of this property would be for a land assembly for some form of redevelopment.
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> Whether the urban renewal had the effect of lowering the value of the subject property or enhancing the value of the subject property would be extremely difficult to determine. One could argue that because of the City Centre improvement there had been an enhancement in value of the total area. At the same time one could take the position that by the extension of the urban renewal to include the subject property and its eventual acquisition by expropriation

[13] *Bozel* v. *City of Hamilton* (1978), 15 L.C.R. 16 (L.C.B.).

[14] *Ibid.* at 16.

[15] *Ibid.* at 17 and 20.

> that in fact the market was totally destroyed and that there were no-free market systems affecting the subject property".

After recognizing that the urban renewal affected value pursuant to sub-section 14(4)(b), the Board in *Bozel* indicated that it would be of assistance if the appraisers could make a determination of value before the public notice or discussion of the scheme was known and then provide an adjustment factor for the elapsed time period. Although the Board conceded that this might not result in a more reliable determination of market value, it would at least provide some "check" as to the total effect of the scheme and whether an enhancement or reduction of market value existed in the subject area.[16] The Board in this decision recognized that certain schemes in an urban area can have dual effects on market value and, therefore, be difficult to screen out. This process becomes complicated further, if one is to attempt to separate "historical blight" in an area from "urban renewal blight".

It is proposed that in order to assess the net effect the "development" has on property values and to separate existing blight or adverse influences from those caused by the development one should assess areas similarly situated to the subject which were not impacted by the scheme immediately prior to the announcement of the commencement of the scheme. The value of the subject and the unaffected properties should then be determined at the valuation date and compared to assess the net impact of the scheme. Although this may not provide a conclusive determination of value or act as an accurate adjustment, it will serve as an indication of the general impact on property values caused by the scheme. It will also act as a barometer in determining the existence of a "scheme" affecting property values.

Once a scheme has been identified, one must look at all the impacts that the scheme would have on factors affecting the value of an expropriated property. In instances of urban blight or underutilization caused by a scheme, the following factors may be impacted:

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[16] *Ibid.* at 22.

(1) The potential highest and best use for the expropriated property, as a result of land use restrictions and planning constraints;

(2) The potential highest and best use for the expropriated property, as a result of market forces and private sector demand impacted by the announcement of the development;

(3) The market demand for the expropriated property and the surrounding area, as a result of the announcement of the development;

(4) The actual income of the expropriated property (if one is to employ the "income approach to valuation");

(5) The physical condition of the expropriated property and its neighbouring properties as a result of deferred maintenance caused by the announcement of the intention to acquire;

(6) The vacancy in the area surrounding the expropriated property, caused by the market having knowledge of the development and the impending expropriation; and

(7) The sales price of neighbouring (and potentially comparable) properties similarly affected by the development (for the same reasons as those noted above).

In assessing the factors set out above, one must also be mindful of the potential benefits an urban renewal scheme may have on the value of a property to be expropriated, and on comparable sales used to determine the value of the expropriated property. In certain instances, the properties slated for acquisition may not enjoy the benefit of the urban scheme; however, neighbouring properties may enjoy an appreciation in value, as a result of the development. This must be taken into account in order to ensure that the value of properties to be acquired is not inflated as a result of the scheme. The announcement of a scheme may also have the effect of halting "historical blight" in the area surrounding the subject property.

The provisions of the *Expropriations Act* provide a mechanism to screen out the effects of any "blight" caused by a threatened expropriation and the scheme thereunder. In evaluating the net effect of "blight" or underutilization caused by a development, one must first identify the actual development and the date on which it began. After making this determination, one must identify the positive and negative effects on value caused by the development and, in doing, so look at both the primary impact of the development (land use regulations and planning concerns) as well as secondary effects (market activities based on the primary considerations and knowledge of the pending acquisition). Lastly, when assessing value must separate the "historical blight" from the blight caused by the actual development.[17]

Blight and Injurious Affection

In the instance of an area suffering from blight as a result of an expropriation and the development thereunder, the remaining lands of a Claimant may be impacted by blight or underutilization caused by a scheme. In such an instance, the recovery of this loss of value would have to be pursued in an injurious affection claim, brought pursuant to Sections 1, 13, and 21 of the *Expropriations Act.* An injurious affection claim, however, would be impeded and, in many instances prohibited, as a result of the principle that, unlike market value, the impact of the development is not to be considered when injurious affection is assessed.[18]

In instances where one is to determine injurious affection using the "before and after" method, pursuant to Section 14(3) of the *Expropriations Act*, one is to ensure that there is no screening out of the development in the "before scenario". This was articulated by the Ontario Municipal Board in the decision of *Salvation Army, Canada East* v. *Ontario*,[19] when this arbitration was sent back to the Ontario Municipal Board (at 309):

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[17] *McNeill* v. *City of Calgary*, *supra* note 6 at 79

[18] *Salvation Army* v. *Ministry of Government Services*, *supra* note 12 at 203 (Court of Appeal Decision).

[19] *Salvation Army, Canada East* v. *Ontario* (1991), 44 L.C.R. 302 (O.M.B.).

> "It appears to the board that, on a partial taking, the use together of S. 14(3) and (4)(b) will not be, in future, quite as simple as it had been understood in the past, prior to the appeal decisions in this case. This is especially true where large-scale planning programmes like the Parkway Belt Plans are involved. Subsequent to the usual "before and after" valuations and before drawing a final conclusion on the combined figure representing market value and injurious affection, a further step now appears to be required in order to assure that the resultant amount of injurious affection, when segregated from the rest, includes only a reduction in value for the retained portion caused by the acquisition, construction and/or the use of the works. Since, by its terms, Section 14(3) can only apply where the land taken is of a size, shape or nature denuding it of a separate value distinct from the remainder, there will be no shortage of difficulties".

Even though one is not to consider the effects of the scheme in valuing the remaining lands, one is to consider the effects of the acquisition, construction and/or use of the works for the injurious affection claim. This was articulated by the Ontario Municipal Board in the decision of *Parks* v. *Ministry of Transportation*,[20] where the Board addressed factors to consider in relation to injurious affection calculations as follows (at 179):

> "... the board agrees with counsel for the claimants submissions that the jurisprudence definitely requires a consideration of the "before-and-after" scenarios without any screening out of the development for the injurious affection calculation, in that s. 14(14)(b) [s.i.c.] only applies to the market value of lands taken. As a result, an appropriate consideration of the "before" situation would require a consideration of the various official plan documents as they address the highway. The "after" scenarios would require a

[20] *Parks* v. *Ministry of Transportation* (1995), 56 L.C.R. 166 (O.M.B.), aff'd (1997), 62 L.C.R. 252 (Ont. Div. Ct.).

> consideration of the effects of the acquisition, construction and use of the highway on the remaining lands".

As seen from the passage above, which was affirmed by the Divisional Court, owners of remaining lands can claim compensation from the injurious affection that they suffer as a result of the taking itself. Accordingly, if the remaining lands of a Claimant suffer from "blight" as a result of the acquisition, construction and/or use of the works, a claim for injurious affection can be advanced.

Another limitation to the scope of an injurious affection claim is provided in the definition of injurious affection in sub-section 1(1) of the *Expropriations Act*, which reads as follows:

> "injurious affection" means,
> (a) where a statutory authority acquires part of the land of an owner,
> i. the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and
> ii. such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable if the construction or use were not under the authority of a statute,..."

The definition of injurious affection, therefore, requires that in order for a claim for the reduced market value of the remaining lands to be advanced, the reduction in value must be caused by the actual taking which occurred on the Claimant's former property. If the claim for injurious affection relates to personal or business damages of the Claimant, then the injurious affection must still have been caused by the actual taking, but it does not necessarily have to relate to the taking on the Claimant's lands.[21] This is a point

[21] *Wilson* v. *London (City)* (1997), 63 L.C.R. 294 (O.M.B.), varied (1990), 73 L.C.R. 255 (Ont. Div. Ct.).

requiring greater expansion than is permitted in this analysis, but the above comments provide a superficial view.

In order to advance a claim for injurious affection caused by blight to remaining lands, care must be taken to ensure that the cause of the blight is related to the acquisition, construction or use of the work for which lands are expropriated and that the claim falls within the scope of the definition of "injurious affection" in section 1 of the *Expropriations Act*.

Disturbance Damages

As a result of the Supreme Court of Canada's decision in *Dell Holdings Ltd.* v. *Toronto Area Transit Operating Authority,*[22] the scope of claims for disturbance damages has only barred damages incurred which are too remote and are not the natural and reasonable consequence of the expropriation.[23] The scope of disturbance damages, therefore, should encompass pre-expropriation damages, which are the result of the scheme for which the expropriation takes place. These damages include damages resulting from delays suffered by the expropriated property, which are the result of the scheme.[24]

In many instances, blight caused by a pending expropriation or scheme can create damages to a property or a business thereon, prior to the time in which it is expropriated. These damages, caused by blight, can include damages suffered by the property as a result of a loss of income from tenants who relocate as a result of the pending expropriation and the existence of blight in the area. Blight, caused by the announcement of an expropriation, can also result in business losses of claimants, as a result of their properties being in a less commercially viable area, as a result of blight caused by the pending expropriation. Damages could also take the form of reimbursement for costs expended by a claimant to mitigate the damages caused by blight in an area.

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[22] *Dell Holdings Ltd.* v. *Toronto Area Transit Operating Authority* (1997), 60 L.C.R. 81 (S.C.C.).

[23] *Ibid.* at 92-93.

[24] *Ibid.* at 93-94.

A claimant can also suffer damages in the form of loss of opportunity to develop or delay to the development of a property caused by the scheme or blight arising therefrom. In the decision of *Gadzala* v. *T.R.C.A. and Toronto*, the Ontario Municipal Board recently made a finding that the subject properties of the Claimants suffered a loss of $4,000,000.00, based on delay between 1986 and 1997. This award was calculated by the determining the "out of pocket" expenses that the Claimants were forced to incur as a result of not being able to sell their lands because of the delay.[25] The existence of blight caused by a scheme can increase such out of pocket expenses and limit revenue generated by existing properties during the time they are affected by the scheme.

Even though claims for disturbance damages are allowed to encompass claims for "pre-expropriation damages" and those arising from delay, one must use care in establishing that such damages were caused by the expropriation or the scheme itself and not from other pre-existing factors. This consideration would be especially significant in the instance where disturbance damages are attributed to pre-expropriation blight. Before such damages would be allowed, it must be clearly established that the blight is caused by the scheme and is not what has been referred to as "historical blight" or factors that pre-dated the announcement of the scheme.

U.S. Cases Dealing with Blight

The law of expropriation or "eminent domain" and "condemnation" differs significantly between the United States and Canada. Two material differences in the law is that expropriation cases in the United States are frequently determined by a jury,[26] and property rights are protected by the fifth and fourteenth amendment of the United States

[25] *Gadzala* v. *TRCA and Toronto, supra* note 10 at 65.

[26] Although expropriation cases in many U.S. states are decided by a jury, there is no constitutional right to trial by jury in domain proceedings: see *United States* v. *W.G. Reynolds*, 90 S.Ct. 803 (U.S. 1970).

constitution.[27] Despite these distinctions in law between the United States and Canada, certain interesting cases have arisen in the United States relating to the extreme examples of "urban blight", which are worthy to note in this analysis.

In the decision of *Cleveland* v. *Carcione*,[28] the Court dealt with a property that had been affected by an urban renewal plan passed in 1957. At the time the plan was announced the property was "... solidly built up in a community of residential, commercial, retail and small shop, and manufacturing structures. ... The surrounding area was populated by families in the low and middle low income groups".[29] In accordance with the urban renewal plan, tenants on social assistance in the urban renewal area were notified to move out and the City pursued an initiative to begin demolishing buildings in the area as it acquired title to the land. In all, 545 of the 584 structures in the area had been razed. By 1962, when the owner's property was expropriated, the building was abandoned and suffered from a meager income stream. It was found that, at the time of the announcement of the urban renewal, the building was fully tenanted.

In arriving at its decision the Court of Appeal found that the City's initiatives to relocate tenants and demolish surrounding buildings had a negative psychological and economic impact on the Subject Property. The Court of Appeal also found that the jury was instructed to determine, "the fair market value of the appellant's property as it stood at the time of trial, virtually abandoned, vandalized and badly deteriorated in the midst of a wasteland".[30]

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[27] As stated by the Supreme Court in *United States* v. *W.G. Reynolds*, *supra* (at 805), "the Fifth Amendment provides that public property shall not be taken for public use without just compensation. 'just compensation' means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken. In enforcing the constitutional mandate, the Court at an early date adopted the concept of market value: the owner is entitled to the fair market value of the property at the time of the taking. [citations omitted].

[28] *Cleveland* v. *Carcione*, 190 N.E. 2d 52 (Ohio C.A. 1963).

[29] *Ibid.* at 53.

[30] *Ibid.* at 56.

The Court of Appeal decided that applying the normal rule of valuing the property at the time of the trial date would be unreasonable and unjust under the unusual facts and circumstances in the present case. The Apellate Court held (at 57):

> "Under the facts in this case and the law applicable thereto, we conclude that Mrs. Carcione was entitled to an evaluation of her property irrespective of any effect produced upon it by the action of the City in carrying out the St. Vincent Urban Renewal Project. Hence, the standard for measuring the compensation to be awarded her should have been the fair market value of it as it was immediately before the City of Cleveland took active steps to carry out the work of the project which to any extent depreciated the value of the property. As a consequence, we hold that the trial court was in error in instructing the jury that the standard by which compensation was to be measured was the fair market value of the property at the time of the trial".

The Appellate Court also found that the lower court erred in allowing the jury to view the property in its present state, after being affected by dilapidation and blight. The approach in this case has been followed in other decisions relating to the devaluation of properties caused by blight, which was found to have been caused by the expropriation.[31]

Another example of courts in the United States dealing with blight caused by the expropriation process took place in the decision of *Foster* v. *City of Detroit*,[32] where the United States District Court dealt with an expropriation claim in Detroit, in which an area was selected for "slum clearance and public housing" and the City began an initiative to acquire properties in the area for that purpose. It was argued that the properties of the plaintiffs were devalued as a result of the "slum clearance" undertaking. The City, however, argued that the properties were already in a state of blight and the devaluation

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[31] See e.g. *Appropriation of Property of Bunner,* 276 N.E. 2d 677 (Ohio Pro. Ct. 1971), where the Court found urban blight was caused by the announcement of an intention to construct interstate highway and how the laying of plans devalued the area in which the interstate was to be constructed.

[32] *Foster* v. *City of Detroit*, 254 F. Supp. 655 (U.S.D.C. 1966).

of these properties was not caused by the expropriation; rather, it was caused by a current nation wide trend of abandonment of older, decayed central core cities, caused by the exodus of city dwellers to sub-urban areas and the decision of the United States Supreme Court preventing state courts from enforcing private restrictive covenants which bar potential real estate purchasers on account of race, colour or creed.[33]

The Court found that the City's action contributed to the blight as follows (at 662):

> "...there is substantial evidence that the city actually encouraged and aggravated this deterioration after the commencement of the proceedings through the actions of various city officials. These actions include, informing plaintiffs that they would receive no compensation for improvements and that they were only to 'keep the roof on and the water running', requiring the signing of a "Waiver of Claim for Damages" as a condition precedent to the issuance of a building permit, actually completing the condemnation and clearance of several blocks in the area, requiring the razing of many vandalized buildings, and keeping the lis pendens in effect for five years after the Public Housing Administration had issued a stop order on the project, all the while telling those who inquired that the property would be condemned soon. There is also evidence that the lis pendens had the effect of impairing sales of property, thus reducing sales prices and values. Therefore, this court finds, as a matter of fact, that the protracted delay and the actions of the defendant, if they were not the only causes, substantially contributed to, hastened and aggravated the deterioration and decline in value of the area in general of the plaintiffs' property in particular."

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[33] *Ibid.* at 661-662.

The Court in this case found that it would be unjust to value the properties at the date of trial and therefore found that a "reverse condemnation"[34] had occurred by the pre-expropriation actions of the City, which entitled the Claimant to compensation at an earlier date.[35] In arriving at this decision, the Court relied on the decision of *Cleveland* v. *Carcione* to find that an earlier valuation date should be used. The Court, however, indicated that the Plaintiff could not claim damages for loss of rental income from the date of the reverse condemnation until the date of the actual condemnation, nine years thereafter.[36]

The Supreme Court of New York in the decision of *Buffalo* v. *George Irish Paper Company*,[37] dealt with the issue of the waterfront redevelopment project in Buffalo, which was initiated in 1954, but the properties were not acquired until 1962. In this case, the Court found that the City's actions before the actual expropriation created condemnation blight. This was expressed as follows (at 473):

> "Because of the effect of 'condemnation blight' caused by the 'cloud of condemnation' which hung over this property from 1961 onward and which, together with the affirmative acts of the City above noted, severally depressed the rental value of this property, defendant's appraiser, Mr. Marsh, did not use actual rents of the property in his income approach evaluation thereof, but used what he determined to be economic rents established from the rentals of comparable properties."

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[34] The term "reverse condemnation" has a similar meaning to the term "*de facto* expropriation", as used by Canadian Courts.

[35] *Ibid.* at 665-666.

[36] *Ibid.* at 667.

[37] *Buffalo* v. *George Irish Paper Company* 299 N.Y.S. (2d) 8 (NY 1969)

The Court affirmed the approach of the property owners' appraiser and found that it must evaluate the property as if it was not affected by the "cloud of condemnation" or "condemnation blight".[38]

Summary

As evidenced from the above discussion, schemes under which expropriations take place and the announcement of expropriations can result in blight or underutilization of areas that are to be affected by an expropriation. Under the *Expropriations Act*, property owners will be protected from the adverse effects of blight caused by the expropriation or the scheme thereunder in regard to the determination of the market value of their expropriated property expropriated and in regard to claims for disturbance damages incurred prior to the expropriation. Further, in limited instances, property owners will also be able to advance certain claims for injurious affection to the remaining portion of lands expropriated. In order to substantiate claims that result from blight arising from a threatened expropriation, an owner must clearly connect the blight or other adverse effects to the expropriation or the scheme and ensure that other factors creating blight are separated from the scheme-related blight.

[38] *Ibid.* at 475.