EXPROPRIATION OF FARMLAND IN ALBERTA

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THE EXPROPRIATION PROCESS

Definitions (*Expropriation Act*, R.S.A. 2000, Ch. E-13) ("*Expropriation Act*")

> **"Expropriation" means the taking of land without the consent of the owner by an Expropriating Authority in the exercise of its statutory powers" (s.1(g))**
>
> **"Land" means land as defined in the Authorizing Act and if not so defined means any estate or interest in land (s. 1(h))**
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> **"Authorizing Act" means the Act authorizing an expropriation by an expropriating authority (s. 1(a))**
>
> **"Expropriating Authority" means the Crown or any person empowered to acquire land by expropriation (s. 1(f))**
>
> **"Owner" means**
> - **A person registered in the land titles office as the owner of an estate in fee simple in land,**
> - **A person who is shown by the records of the land titles office as having a particular estate or interest in or on land,**
> - **Any other person who is in possession or occupation of the land,**
> - **Any other person who is known by the expropriating authority to have an interest in the land, or**
> - **In the case of Crown land, a person shown on the records of the department administering the land as having an estate or interest in land;(s. 1(k))**

As can be seen by the definitions above, expropriation is the forceful taking of property rights by an authority through a strict legislated process. While other *Acts* such as the ***Municipal Government Act*** [1] give expropriating authorities the power to expropriate, it is the ***Expropriation Act*** and its Regulations that set the process. Our Courts have characterized the power to expropriate as the ultimate power provided to governments and others and have therefore decreed

[1] ***Municipal Government Act,*** R.S.A. 2000, c.M-26

that the procedures outlined in the ***Expropriation Act*** must be strictly followed or the expropriation is a nullity.[2]

The formal process starts (aside of internal resolutions and municipal bylaw requirements) with service of a Notice of Intention to Expropriate.[3] That document must also be advertised twice not less than 7 days nor more than 14 days apart in a newspaper of general circulation in the area in which the land is located.[4]

A land owner has 21 days from receipt of the Notice of Intention to Expropriate to serve an Objection to the expropriation on the Expropriating Authority.[5] The Expropriating Authority must then forthwith notify the Minister of Justice who appoints an Inquiry Officer within 5 days of receiving notice of an Objection.[6]

The Inquiry Officer must hold an Inquiry to determine whether the proposed taking is "fair, sound and reasonably necessary" in order for the Expropriating Authority to achieve its stated objective.[7] Some Ontario cases have stated that the phrase "fair, sound and reasonably necessary" and "reasonably defensible" are equivalent. Expropriating Authorities often try to make the same argument here. I'm not aware of that argument yet meeting with any success in Alberta. While Inquiries are in theory public hearings, they are not publicized in any way other than to the participants and often take place in law office conference rooms. An Inquiry Officer is required to make copies of the Inquiry report available to those who ask but there is no central filing venue for such reports and thus they are not widely circulated.[8]

The Inquiry Officer's report must be completed and forwarded to the approving authority (generally the expropriating authority) within 30 days of his or her appointment[9], however the Deputy Minister does have the power to adjourn the Inquiry and such adjournments occur regularly[10]. In such cases the Minister extends the time for the report. There is no appeal from

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[2] ***Dell Holdings*** v. ***Toronto Area Transit Operating Authority***, [1997] 1 S.C.R. 32
[3] ***Expropriation Act***, R.S.A. 2000, c.M-26, |***Expropriation Act***| s.8
[4] ***Supra*** note 3 at s. 8(4) (Note: "not less than 7 days apart" means eight or more, a concept that has escaped more than one expropriating authority placing advertisements in weekly papers(***Interpretation Act***, R.S.A. 200, c I-8, s. 22(4)))
[5] ***Supra*** note 3 at s. 10(1)
[6] ***Supra*** note 3 at s. 15(2)
[7] ***Supra*** note 3 at s. 6(2)
[8] ***Supra*** note 3 at s. 16(2)
[9] ***Supra*** note 3 at s. 16(1)
[10] ***Supra*** note 3 at s.23

the decision of an Inquiry Officer[11] however, such decisions are only recommendations and can be ignored by the approving authority. [12]

Once the report of the Inquiry Officer has been issued a Certificate of Approval from the Expropriating Authority is filed with Land Titles within 30 days and a Notice of Expropriation served upon the Owner. [13]

A Notice of Possession must be served within 30 days of the Certificate of Approval and must give an owner at least 90 days notice[14]. Actual possession can be no sooner than 30 days after proposed payment is tendered.[15]

A Notice of Proposed Payment must be served upon the Owner within 90 days of the certificate of Approval.[16] Payment and an independent third party appraisal of market value of the lands and severance must follow immediately.[17]

An owner can accept the proposed payment without prejudice to his or her right to claim a greater amount.[18] That claim is made either to the Land Compensation Board or through the Court of Queen's Bench at the owner's option when the Expropriating Authority is the province.[19] In all other cases it is initiated by an Application for Determination of Compensation filed with the Land Compensation Board and served upon the Expropriating Authority.[20]

Once this point is reached there are no specific timelines for prosecuting the claim except that the Queen's Bench Rules of Court apply in relation to Discoveries.[21]

One can make interlocutory applications before the Land Compensation Board.[22] The Board is authorized to conduct hearings by its own rules and procedures.[23] The Board is not bound by the

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[11] ***Supra*** note 3 at s. 17
[12] ***Supra*** note 3 at s. 18
[13] ***Supra*** note 3 at s. 18(2)
[14] ***Supra*** note 3 at s. 64
[15] ***Supra*** note 3 at s. 64(4)(b)
[16] ***Supra*** note 3 at s. 31(2)
[17] ***Supra*** note 3 at s. 31(4)
[18] ***Supra*** note 3 at s. 31(5)
[19] ***Supra*** note 3 at s. 29(3)
[20] ***Supra*** note 3 at s. 34
[21] ***Expropriation Act, The Board Procedure Regulations, Alta Reg 15/75*** s. 15
[22] ***Supra*** note 21 at s. 10
[23] ***Supra*** note 3 at s.28(1)

rules of evidence[24] and has all the powers of a commissioner appointed under the ***Public Inquiries Act***.[25]

COMPENSATION PRINCIPLES

The overriding principle of compensation in expropriations is that an owner must be made whole.[26] The landowner should not be "out of pocket" at the end of the process.[27]

An expropriated landowner is entitled to market value for the land[28], damages attributable to disturbance[29], the value of any element of special economic advantage arising out of or incidental to the owner's occupation of the land[30], damages for injurious affection[31] and in the case of partial takings, incidental damages[32].

Market value is defined as what a willing seller and willing purchaser would arrive at on a particular day[33]. While the date for valuation has not been specifically defined under the ***Expropriation Act*** it is routinely set as the date title changes into the hands of the expropriating authority. This concept of market value is particularly vexing for landowners who want <u>their</u> price since they are not willing sellers.

In the case of partial takings the method of valuation is to value the entire parcel and reach a per/acre or other unit price. The market value of the portion taken is then calculated by multiplying the units by the unit value.[34] In the event that a larger parcel from which a part is expropriated is not homogenous then the larger parcel will be notionally divided, the divisions valued separately and the value of the expropriated part will be calculated based on its location within the varied larger parcel.[35]

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[24] ***Supra*** note 3 at s.28(6)
[25] ***Public Inquiries Act***, R.S.A. 2000, c.P-39 s.28(4) [***Public Inquiries Act***]
[26] ***Supra*** note 1
[27] ***Supra*** note 25 ***Amdue Holdings Ltd.*** v. ***Calgary (City)***, [1980] 20 L.C.R. 7 (ABCA)
[28] ***Supra*** note 3 at s.42(2)(a)
[29] ***Supra*** note 3 at s.42(2)(b)
[30] ***Supra*** note 3 at s.42(2)(c)
[31] ***Supra*** note 3 at s.42(2)(d)
[32] ***Supra*** note 3 at s.56
[33] ***Supra*** note 3 at s.41
[34] ***HMQ*** v. ***Bonaventure***, [1980] 22 L.C.R. 164
[35] ***Kerr*** v. ***Minister of Transportation***, [1981] 22 L.C.R. 179

Some important valuation principles are enunciated in Section 45 of the ***Expropriation Act***.

- no account can be taken of the use of the expropriated lands after the expropriation
- no account can be taken of any sale or other disposition of the lands after commencement of expropriation proceedings
- no account can be taken of any increase or decrease in the value of land resulting from the development or imminence of the development for which the land is taken
- no account can be taken of any increase or decrease in value resulting from a land use bylaw or classification for the development for which the land is taken

However, unlike in many other provinces, any increase in the value of an owner's lands remaining after the expropriation may not be taken into account in the valuation process [36]. The reverse is called injurious affection and is compensable as a damage to an owner.[37]

Other categories of damages to which expropriated landowners are entitled are disturbance damages (those incurred as the reasonable and natural consequence of the expropriation)[38] and incidental damages[39]. Incidental damages are applicable to partial takings and are those which result from the taking or the construction or use of the works for which the lands are acquired. There is actually not much to distinguish these types of damages and the Board and the Courts have not generally placed too much emphasis on the category used so long as one can show the damages to be real and reasonably incurred.[40] Most damages arising from expropriations are pecuniary in nature, however, our Alberta ***Expropriation Act*** has been designed slightly differently than those of other provinces and our Board and Courts have awarded landowners non-pecuniary damages in the case of partial takings.[41] Damages are particular to each individual case and are so numerous and varied to the extent that no two cases are alike.

Damages can be incurred by a landowner prior to the formal commencement of an expropriation, in other words, before the Notice of Intention to Expropriate is served on an owner.[42] Once it is

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[36] ***Supra*** note 3 at s.55
[37] ***Supra*** note 3 at s.56
[38] ***Supra*** note 3 at s.50
[39] ***Supra*** note 3 at s.56
[40] *Kenneth J. Boyd, Expropriation in Canada*, (Aurora: Canada Law Book Inc., 1988) at 147.
[41] ***Brese*** v. ***City of Edmonton***, 2006 ABCA 27; *Donald P. Mallon, Incidental Damages – A Uniquely Albertan Approach* (2004 A.E.A. conference)
[42] ***Dell Holdings*** v. ***Toronto Area Transit Operating Authority,*** supra; ***Mount Lawn Industries Ltd.*** v. ***Edmonton (City)***, [1999] 69 L.C.R. 50 (ALCB).

made apparent to an owner that his or her land is to be acquired for a purpose for which it may be expropriated the expropriation process is said to have begun.

The ***Expropriation Act*** provides for payment of interest on sums due for market value and severance from the date of acquisition of title until payment and on damages from the award until payment.[43] We commonly claim and are awarded an additional amount to present value the damages from the date they are incurred to the date of the award. This is not legislated but has been part of LCB awards since the 1990's and has not been overturned by the Court of Appeal.[44]

Penalty interest is also mandated should the proposed payment for market value and severance ultimately be shown to be less than 80% of the amount awarded.[45] Should the expropriating authority delay notification of the proposed payment beyond the prescribed time, then penalty interest is also applicable.[46] It is therefore possible and indeed it has been the case that for a period of time an Expropriating Authority must pay triple interest.[47]

There are some special provisions in our ***Expropriation Act*** that ensure landowners are made whole. For instance, for owners who lose their residence, there is an additional amount due that would allow such an owner to relocate in accommodation "at least equivalent" to the expropriated residence.[48] This is commonly referred to as the home for home provision and it potentially provides for the replacement new of an expropriated home. The provision also allows for inflation but the key word used is "reasonable". The "reasonable" factor is prevalent throughout the *Act* and is a recurring theme in the cases. In other words, a landowner will be made whole so long as the landowner acts "reasonably". Unfortunately, what plainly looks reasonable in hindsight is sometimes difficult for landowners and others to envision in real time.

Also, when a residence is taken the owner is entitled to the greater of:

- an allowance of 5% of the market value of the residential portion of the taken lands;
- or the actual costs of and compensation for inconvenience and finding another residence IF the residence was not for sale at the time of the expropriation; and

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[43] ***Supra*** note 3 at s. 66
[44] ***Supra*** note 42`
[45] ***Supra*** note 3 at s. 66(4)
[46] ***Supra*** note 3 at s. 66(3)
[47] ***Paterson Park Ltd.*** v. ***Grand Centre (Town)***, [1983] 28 L.C.R. 288 (ALCB)
[48] ***Supra*** note 3 at s. 47

- relocation costs.[49]

Special use structures are those built for schools, hospitals, municipal institutions or religious or charitable institutions. The owners of such structures are entitled to the cost of reasonable replacement lands and the costs to build, move to and re-establish replacement premises.[50]

The argument often made by expropriating authorities in relation to the "home for home" and "special use structures" provisions is that owners have bettered themselves and therefore the authority ought not foot the entire bill. In some cases, for example where building codes have changed and one cannot build in the same manner as the expropriated building, such betterment is allowed as a matter of course.[51] And the phrase "at least equivalent" does not mean "equal or less". However, the Land Compensation Board is somewhat sensitive to this argument thus the emphasis on reasonableness.

And speaking of reasonableness, an owner is entitled to his or her professional costs incurred for[52] assessing[53] and determining the compensation payable by the expropriating authority.[54] This means full indemnification of legal, appraisal and other professional costs so long as those costs are reasonable or "unless special circumstances exist to justify the reduction or denial of costs". Cost of an Inquiry are to be taxed by the Queen's Bench taxing officer.[55] Taxation of costs of a compensation hearing are within the jurisdiction of the Land Compensation Board[56] or in the event of a Queen's Bench trial, the Court or taxing officer.[57]

Appeals are by right and are made directly to the Court of Appeal.[58] Costs of an appeal by an expropriating authority are the responsibility of the authority on the same basis as the original hearing.[59] Costs of an appeal by an owner are in the discretion of the Court.[60]

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[49] ***Supra*** note 3 at s. 50
[50] ***Supra*** note 3 at s. 46
[51] ***Minute Muffler Installations Ltd.*** v. ***R.***, [1981] 23 L.C.R. 213 (ALCB)
[52] ***Supra*** note 3 at s. 15(10)
[53] ***Supra*** note 3 at s. 35
[54] ***Supra*** note 3 at s.39
[55] ***Edmonton (City)*** v. ***Prowse Chowne LLP***, (QB Action 0503 04477 unreported)
[56] ***Supra*** note 3 at s.39
[57] ***Supra*** note 3 at s. 29(3)
[58] ***Supra*** note 3 at s. 37
[59] ***Supra*** note 3 at s. 39(4)
[60] ***Supra*** note 3 at s. 39(4)

In most instances Expropriating Authorities are not keen to advance costs on an interim basis and as we know, farmers are notoriously asset rich and cash poor. The result of this is the expropriation practitioner can often expect to finance the action on behalf of the owner. Interest has been awarded on costs awards but so far, the rates awarded by the Land Compensation Board have not approached those rates normally charged by solicitors on outstanding accounts.

FARM SPECIFIC CONSIDERATIONS

Just like their urban compatriots, the biggest hurdle for farmers to overcome in the event of an expropriation is the emotional one. The vast majority of folks believe their home is their castle – unassailable. They don't realize what we were taught in first year law school, namely that people don't actually own the land but rather they have rights in respect of the land granted to them by the state and that the state reserves unto itself the right to forcibly reacquire those rights.

The difference between farmers and city dwellers is the connection that farmers have to their lands. Often in this province rural landowners are third or even fourth generation farmers. The land is their home but also their business and an integral part of their lives. This means the emotional hurdle that is the consequence of an expropriation for them is higher. And once they get over the fact that the state can actually take their land it pains them to learn that the length of their ownership or the extent of their connection to the land is not a key to higher land values. Financial restitution is our remedy, but the fact that they will be at least as well off financially after the expropriation as before is of little consolation to most expropriated farmers.

In the case of the taking of an entire farm or a farm residence, the home for home provisions are applicable. It has been argued and sometimes accepted that home for home means "farm for farm".[61] In other words, the outbuildings, corrals, fences etc. must all be replaced. It is difficult to replace such items with similar used versions so the farmer should be entitled to new facilities in the appropriate circumstances. This also makes sense from the disturbance damages point of view. A farm is a business and many of the damages incurred by farmers are in the nature of business damages. [62] To make the business whole the infrastructure must be replaced.

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[61] ***Friesen (Attorney of) v. Alberta (Minister of Infrastructure)*** (2004) CarswellAlta 1898 (LCB Order No. 427)

[62] ***Supra*** note 3 at s. 53

The following are just a few typical compensable damages suffered by expropriated farmers:

- replacement of facilities,
- lost crops
- increased travel to fields, to town, to inspect livestock, with feed etc.
- shelter belts and the temporary and permanent replacement thereof
- drilling, building replacement water sources
- temporary relocation costs
- temporary liquidation costs
- auction expenses
- management time
- fixed costs no longer supported by a capital land base
- costs to rework and to become efficient on replacement lands
- increased maintenance costs
- construction supervision costs
- economic loss on forced sale of assets
- loss of calf crop and other temporary and permanent losses of livestock

With respect to market value, an owner may be entitled to a notional subdivision of the residential part of the farm and the consequential higher land value such subdivision would bring.[63]

There are also some farm specific tax issues arising from expropriations. Canada Revenue Agency generally considers all expropriation compensation, excepting penalty interest, as proceeds of a capital disposition.[64] Penalty interest is considered a tax free windfall.[65] Expropriated landowners who are active farmers have two years from the date of final determination of compensation to replace the lands and nullify any capital gain.[66] Tax is not generally thought of as a compensable item, however, this is not an issue that has been extensively litigated in relation to expropriations.[67]

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[63] ***Koebernick*** v. ***Edmonton (City)***, [2000] 71 L.C.R. 219 (ALCB)
[64] CRA, Interpretation Bulletin No. IT 271R., "Expropriations – Time and Proceeds of Disposition" (May 16, 1980)
[65] ***Bellingham v. R.*** [1996]58 L.C.R. 19 (FCA)
[66] ***Supra*** note 63
[67] *Donald P. Mallon, Tax – A Compensation Issue* (2001 A.E.A Conference)

CURRENT CASE LAW

The most important expropriation case in recent times is the Supreme Court of Canada decision ***Dell Holdings*** v. ***Toronto Area Transit Operating Authority.***[68] Any interpretation of an expropriation statute should start there.

Practioners who take on expropriation cases must obviously make themselves familiar with the ***Expropriation Act*** and its Regulations. That legislation was part of a justice reform movement that saw many new expropriation statutes enacted across the country in the early 1970's and those Acts have been the subject of much judicial and quasi-judicial interpretation since.

There are a number of resources for the expropriation practitioner. The leading texts are *Expropriation in Canada* (Aurora: Canada Law Book Inc., 1988) written by Alberta's first Land Compensation Board Chair, Kenneth J. Boyd, *The Law of Expropriation and Compensation in Canada* (2nd Ed.) (Carswell 1992) by the now retired Professor Eric E. Todd and *New Law of Expropriation* (Carswell) by Coates and Waque.

The *Land Compensation Reports* (Canada Law Book) "L.C.R.'s" is a source of reported cases across the country. It is available in electronic form and in paper form as well. Note, however, that the electronic version does not go back to the beginning of the report series.

The Alberta Land Compensation Board website has a searchable library of all its cases. This database was the result of collaboration between the Land Compensation Board and the Alberta Expropriation Association. (www.surfacerights.gov.ab.ca)

The Alberta Expropriation Association also has a website that lists its members and summarizes the many excellent papers that have been presented at its conferences. Those conferences are held annually. (www.landcompensation.com)

The Expropriation Law Centre is a B.C. based website that provides an assortment of papers, listings of Alberta and B.C. professionals and a searchable library of cases. (www.expropriationlaw.ca)

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[68] ***Supra*** *note 2*

Prowse Chowne LLP has a web page dedicated to expropriation in Alberta with an expropriation timeline chart, some papers on assorted expropriation subjects and selected Inquiry and Land Compensation Board cases. (www.prowsechowne.com)

One of those cases is ***Marks*** v. ***Westlock (Town).*** [69] It is illustrative of many of the procedural and compensation issues discussed in this paper. Attached hereto for reference are copies of the Notice of Intention to Expropriate, Notice of Objection, Report of the Inquiry Officer, Notice of Expropriation, Notice of Possession, Notice of Proposed Payment, Application for Determination of Compensation and the decisions of the Land Compensation Board and the Court of Appeal in the *Marks* case.

Whether acting for an Owner or an Expropriating Authority counsel must have an open mind and be prepared, within reason, to thoroughly examine all potential damages claims. Those claims can be many and varied and it behooves counsel, particularly those acting for farmers, to become knowledgeable of the affected farm lands and farm operations and indeed to become familiar with the farmer and the farmer's family in order to investigate the full range of damages. It is only through such an approach that we can fulfill our duty of ensuring the Owner of expropriated farmlands is made whole.

February 24, 2007

[69] ***Marks*** v. ***Westlock (Town)***, [2006] 90 L.C.R. 18 (ABCA.) and [2005] 89 L.C.R. 70 (ABCA.)