



## **Real Estate — Special Topics Expropriation from the Property Owner's Perspective**

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## REAL ESTATE – SPECIAL TOPICS

### EXPROPRIATION FROM THE PROPERTY OWNER'S PERSPECTIVE

#### A. INTRODUCTION

The development of transportation infrastructure in the Lower Mainland depends on expropriation of private property. Practitioners should have a basic understanding of the process to answer typical questions clients ask when faced with the loss of property rights:

- How does the process work?
- What can I do to challenge it?
- Can I settle my claim?
- How do I pursue a compensation claim?
- What losses will I be compensated for?
- What legal and appraisal costs and interest will I recover or have to pay?

The author's goal is to equip practitioners who are not expropriation experts with answers to these basic questions.

#### B. HOW DOES THE PROCESS WORK?

The major steps in an expropriation and answers to these basic questions are set out below. Unless otherwise noted, all statutory references are to the *Expropriation Act*, R.S.B.C. 1996, c.125.

##### **Right to Expropriate and Approval of Expropriation**

An expropriation authority (eg. Translink, BC Hydro, MOTH, a municipal council or regional district) must have a statutory right to expropriate. This right will be set out specifically in the

statute creating and governing the authority. Under s.4 the right to expropriate cannot be challenged.

Under s.4 an approving authority (eg. a minister, municipal council, regional district board, etc.) must approve a proposed expropriation before it can proceed. Section 5 provides that in extraordinary situations the Lieutenant Governor in Council can dispense with the need for approval and the right to challenge an expropriation in an emergency or to avoid undue delay. Otherwise, the expropriation proceeds in the normal manner as set out below.

### **Expropriation Notice**

The process typically starts when a property owner (registered owner, tenant, etc.) is served with an expropriation notice under s.6. If the Lieutenant Governor has dispensed with approval of the expropriation, the owner will instead receive a notice of this under s. 5.

The expropriation notice must identify the expropriation authority, the land to be taken, the interest in land to be taken (eg. fee simple, statutory right of way), and the time period of the taking (eg. whether it is to be used as a temporary staging ground during construction).

The notice (or any amendments to it) must be filed with the land titles office who must under s.7 record it and refrain from registering any other instrument that affects the property to be taken, other than those specified under s.7(2)(a) (eg. court orders and other statutory instruments).

### **Entry for Limited Purposes**

Under s.9 an expropriating authority may enter on private property during daylight hours after making reasonable efforts to notify the owner or tenant to survey, inspect, appraise or otherwise surmise the property to be expropriated. This includes clearing brush or cutting trees to clear survey lines. Compensation must be paid for any damage caused if notice of a claim is given to the expropriating authority within 6 months.

### **Section 3 Agreement**

Under s.3 an owner can enter into an agreement with the expropriating authority to transfer property subject to the provisions of the Act without the need for the full expropriation process.

This usually occurs when the owner agrees with the expropriation and the only issue is compensation. The expropriating authority often provides the owner with a form of s.3 agreement to review early in negotiations. The owner must ensure that it complies with s.3 to provide rights under that provision including reservation of the right to have the Court ultimately determine compensation, the right to legal and appraisal fees and the right to ordinary and special interest as the Act provides. A private sale to the authority outside of s.3 is generally not advisable because it does not provide these basic rights. There is also some question whether a private sale or even a s.3 agreement provides the benefit of preferred income tax treatment for replacement of capital property disposed of through expropriation or special zoning treatment under the *Community Charter* on a partial taking causing a non-conforming use.

### **Challenging an Expropriation**

As earlier noted, the statutory right to expropriate cannot be challenged. The expropriation itself may, in limited circumstances, be challenged through the “inquiry” process. Under s.10(1), this is not available for the vast majority of expropriations because linear developments (highway, railways, hydro or other electric transmission or distribution line, pipeline, sewer, water or drainage line or main) cannot be challenged.

For those remaining (eg. a municipal expropriation of property for a library), the process starts with delivery of a request for inquiry to the minister under s.10. At the instance of the expropriating authority, the request can be denied under s.11 if it is frivolous, vexatious, not in good faith or based solely on a claim for compensation, or if the owner otherwise had an opportunity to challenge the expropriation at a previous hearing. Otherwise the minister appoints an inquiry officer under s.12 who sets date and place for hearing of inquiry.

Notably, the expropriating authority may under s.13, if it anticipates a request for inquiry, apply for this before serving expropriation notice and include date time and place for this in the notice itself.

During the inquiry, the expropriating authority may alter the expropriation by adding or deleting land before conclusion of the inquiry under s.16. Following the inquiry, under s.17 the inquiry officer must file a written report of findings with the approving authority and all participants. Approving authority must consider the report and approve, approve with modifications or reject the expropriation under s.17. Under s.18 the approving authority must in turn approve, reject or

approve with modifications the expropriation. If approved with modifications, the modified expropriation must be filed in the land titles office and all affected owners served. Else if cancelled the land titles registrar must cancel the notice of expropriation.

The expropriating authority may abandon the expropriation or part of it under s.19 after the inquiry, or whether one is held or not. The authority must then pay the owner damages incurred through initiation of the process and reasonable legal appraisal and other costs incurred up to that point. The amount is either agreed or determined by the Court.

### **Advance Payment**

Whether under a s.3 agreement or a full expropriation, the expropriation authority must under s.20(1) deliver to the owner within 30 days after approval of the expropriation an advance payment cheque as an estimate of compensation payable for all losses other than business loss. Delivery to one joint owner is effective as delivery on both, the first as an “agent” of the second. Where different ownership interests exist (a landlord and a tenant) both should and generally do receive separate advance payments. The authority can and sometimes does make the advance payment to a mortgagee. If the owner hasn’t received the advance payment in a timely way, it is important to check to see if it has gone, for example, to the mortgagee, to ensure the time limit for filing an action for compensation (described below) is not inadvertently missed.

The payment must be accompanied and supported by an appraisal prepared by an accredited appraiser. Of late, these appraisals often estimate only the loss for the straight taking of land or a interest in land (eg. fee simple of a right of way), leaving until later determination of loss of value in the remaining land under a partial taking. There is some question whether this complies with s.3. The package with the cheque and appraisal normally also includes the notice of approval of expropriation.

If asked, the owner must assist the authority in determining compensation under s.3 by providing information required by the appraiser. The authority can apply to Court for a determination of who is a owner and the extent of that owner’s interest under s.10(4), on notice to those affected.

Under s. 10(10), cashing the advance payment cheque does not compromise the owner’s rights under the Act in any way. The owner may claim additional compensation on application to Court as

set out later. Under s. 10(12) the authority may increase the advance payment anytime before 10 days before the compensation hearing begins. However the owner is not guaranteed to receive at least the amount of the advance payment, which the authority may seek to reduce in the compensation claim.

### **Vesting and Possession**

Under s.23 the expropriation authority must, within 30 days of making the advance payment, file in the land titles office and serve the owner a vesting notice. On filing, a fee simple taking vests in the authority free and clear of all charges other than those specified in s.23(2) including:

- original government grant conditions and restrictions
- registered mineral charges

Under s.23(3) an interest less than fee simple (eg. a right of way) vests in the authority with priority over all existing charges.

Under s.23(6), on vesting the authority is (unless agreed otherwise with the owner) entitled to immediate entry on and possession of the property and under s.23(8) a Court order for possession if required. Under s.22 the authority is entitled to an injunction to prevent harmful activity by the owner on the land.

### **Court Proceeding to Determine Compensation**

Previously, claims for compensation beyond the amount paid in the advance payment were brought before the Expropriation Compensation Board, with leave required to appeal from the Board's decision to the Court of Appeal. Effective March 2005, claims are now heard by the B.C. Supreme Court with an appeal as of right to Court of Appeal under the normal rules.

### ***Time Limit to File Claim in Court***

Under s.25 an owner who does not commence an application in B.C. Supreme Court for a determination under s.26 of compensation within 1 year after advance payment is made is deemed to have accepted that payment in full satisfaction of compensation for the expropriation. If there is

any doubt about the date the payment is received, it is prudent to commence the action 1 year after the date on the advance payment cheque.

### ***Process***

Claims filed with the Board while still in existence must be transferred to the B.C. Supreme Court Registry under B.C. Reg. 100/2005, *Compensation Action Procedure Rule*. New claims must be commenced by filing a writ and statement of claim. The Rules of Court apply.

### **Basis of Compensation**

Section 30 requires the Court to determine and award compensation exceeding the amount paid by advance payment or otherwise by the authority under the Act. There are 3 basic elements of compensation:

Section 31 sets out the “basic formula” for compensation, which includes:

- the *market value of land or rights in land taken* (eg. fee simple or statutory right of way);
- *reasonable damages for disturbance* (eg. relocation costs, business loss and other similar costs during construction which are not related either to loss of market value or injurious affection), and
- *injurious affection* (reduction in value of remaining property, where there is a partial taking). As noted below, pure injurious affection (loss suffered by a neighbouring property owner whose land is not taken by the expropriation) is generally not compensable.

### ***Market Value***

Section 32 defines “market value” as the amount that a willing buyer would have paid to a willing seller for the rights taken on the date of expropriation. The market value of fee simple land is determined by normal appraisal principles. The market value of a leasehold interest is generally the difference between contract and economic rent at the expropriation date (“rental advantage”). Tenants are also entitled to disturbance damages. A body of law has developed over the years on valuing rights of way and easements and their impact on the value of the remaining land (see for

example *Holdom et al v. B.C. Transit*, (2005) 85 L.C.R. 198 (B.C.E.C.B.). This is a common issue for transit-related takings which typically use rights of way for guideways.

### ***Exclusions from Market Value***

Under s.33, market value must not account for, among other things, anticipated or actual increases in land value attributable to the purpose of the expropriation (eg. the presence of a transit system or new public library), the development itself, or zoning changes associated with the development.

Under s.44 a claim must be reduced by the value of any special benefit from the development resulting from the expropriation enjoyed exclusively by the landowner (eg. beyond any general benefit enjoyed by all landowners).

### ***Disturbance Damages***

Section 34 provides for payment of:

- reasonable costs, expenses and financial losses directly attributable to the disturbance caused by the expropriation to the owner, and
- reasonable costs of relocating on other land including reasonable moving, legal and survey costs necessarily incurred in acquiring a similar interest or estate in other land

The owner and expropriation authority can agree with the Court's consent to determine disturbance damages up to 6 months after expropriation when the cost is incurred. Where a business is relocated, business losses cannot unless otherwise agreed be determined sooner than 6 months after the relocation or 1 year after expropriation.

Under s.33(4), if the Court determines that business relocation is not feasible, the owner is entitled to damages for the value of the goodwill.

### ***Leases***

Section 34 provides that a lease is deemed to be frustrated if the entire estate or interest in land is expropriated, or part of the estate or interest is expropriated leaving the remaining estate unfit for the purpose of the lease. Where part of the leasehold is taken without frustration of the lease, the



tenant is entitled to abatement of rent accordingly. This provision prevails over a lease provision where there is inconsistently. It is advisable to ensure that a proposed rent abatement pending a compensation hearing suits the expropriating authority or is made subject to final determination by the Court.

Lessees under leases longer than one year are entitled to disturbance damages depending on the length of the lease term and unexpired term, renewal rights and prospects of renewal, the nature of the business carried out under the lease and the extent of the lessee's investment in the land that cannot be reasonably recovered.

### ***Security Interests***

Section 37 requires that compensation be determined and paid where land subject to a security interest is expropriated. BC Reg 451/87 (as amended by BC Reg 96/2005, Expropriation Act General Regulation) sets out the formula for this.

### ***Injurious Affection on Partial Takings***

Section 40 provides the owner of land only part of which is taken to:

- the market value of the interest expropriated;
- the reduction in market value of the remaining land (injurious affection), and
- reasonable personal and business losses

Section 40(3) sets out a “before and after” formula for market value of land taken and injurious affection (eg. the market value after expropriation is deducted from market value before expropriation) with the caveat that compensation must at minimum equal the proportionate loss of land at its pre-expropriation market value, with an adjustment as required to reflect a less-than-fee simple taking (eg. a right of way).

### ***Pure Injurious Affection***

Section 41 provides that common law rights to compensation for pure injurious affection (where no land is taken) survive repeal of the 1979 *Expropriation Act*. Section 41(4) ostensibly insulates the BC

Transportation and Financing Authority and Ministry of Transportation and Highways from liability for pure injurious affect.

Caselaw (see *Holdom*, supra) has subsequently confirmed that the common law right to compensation for pure injurious affection is available only in very limited cases where:

- (1) the damage results from an act rendered lawful by statutory powers of the person performing such act;
- (2) the damage is such as would have been actionable under the common law, but for the statutory powers. Generally this requires severe and permanent blockage of access or visibility, or both, not merely a temporary or relatively minor impediment;
- (3) the damage must be an injury to the land itself and not a personal injury or an injury to business or trade. This impedes most pure injurious affection claims by business owners adjacent to a public transit taking whose land has not been taken, and
- (4) the damage must be occasioned by the construction of the public work, not by its user.

Section 42(1) bars such claims if not made in writing to the Court with particulars within one year of the damage being sustained or becoming known to the claimant.

### ***Substituted Land***

Under s.43, the expropriating authority and owner may agree to satisfy a claim wholly or partly with other land or an interest in other land.

### ***Legal and Appraisal Costs***

Under s.45, the expropriation authority is *prima facie liable* to pay legal costs necessarily incurred by an owner to assert a claim for compensation. Under s.45(4), these costs *must* be paid if a compensation award is greater than 115% of the advance payment. For old claims, counsel must consult the regulations to determine which cost tariff applies. For new claims, the *Compensation Action Procedure Rules*, Rule 16 provides that costs be paid under the B.C. Supreme Court Rules Tariff

(Appendix B). For older claims, counsel must consult the regulations to determine which costs regime applies.

### ***Advance Costs Payment***

Section 48 allows a claimant to send a written claim for interim costs to the expropriating authority who must either pay the costs or refer the account to a Court registrar for review. The expropriating authority must pay any balance of costs ultimately found owing and may recover by action any overpayment from the owner.

### ***Basic Interest***

Under s.46 the expropriating authority must pay interest on any compensation award exceeding the advance payment. The portion attributable to market value is payable from the date the owner gives up possession, and on all other claims, from the date the loss or damage was incurred or the Court considers reasonable. Interest is paid annually, and is not compounded.

### ***Additional Interest***

Additional interest of 5% must be paid where the advance payment is less than 90% of the compensation award, from the date of that payment to the date the compensation award is made.

### ***Penalty Interest***

Under s.47 the Court may award penalty interest to the owner (up to double normal interest) or the expropriation authority (by holding back interest otherwise due) where there has been an unreasonable delay in proceedings.

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