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Real Estate

Expropriation and Compensation – The British Columbia Framework

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OVERVIEW

Governments must often invoke their powers of expropriation to carry out public projects, which may be confined to fairly specific sites and locations, such as hospital projects and school projects. Often, though, government projects are large in scope and extent, and involve substantial swaths of land. Perhaps the most recent example in British Columbia involves the announcement of a vastly expanded transit network. One newspaper article, under the heading *Public Transportation – Infrastructure for the Ages*, trumpeted the announcement as *B.C.'s $14 Billion Transit Bonanza*. British Columbia's new transit plan will involve the addition of three major new transit lines and other improvements by 2030.

It will be apparent that at least one component of the budget for government projects – whether involving schools, hospitals, roads, power lines, government facilities or transit lines – must be for the cost of land acquisition. The land acquisition may involve a normal purchase of the land from a willing seller. However, frequently that is not the case, as the particular land may not be listed for sale. Accordingly, the government must seek to negotiate the purchase or invoke its powers of expropriation to acquire the land. While it might be thought that the government would always immediately proceed to expropriation, that is not necessarily the case. Instead, the government may employ seasoned negotiators in an effort to acquire the land without controversy on a negotiated basis. The government is mindful that, in some cases, the project for which the land is required may, in fact, add value to surrounding lands, and owners may be prepared to contribute land, at little or no cost, to achieve those benefits. At any rate, from an owner's perspective, if approached for a government land acquisition, there is always the reality that, absent a voluntary transfer, the owner faces expropriation of the required land, in return for compensation.

If the Government of Canada is involved, the expropriation will typically, though not always, proceed under the *Expropriation Act* (Canada). If the provincial government is involved, then the expropriation (or transfer in place of expropriation) will typically, though not always, proceed under the comparable provincial statute, i.e., the *Expropriation Act* (British Columbia), in conjunction with the legislation that authorizes the expropriation. The *Expropriation Act* (British Columbia) itself does not provide the source of the expropriation power; rather, that source must typically be found in some other legislation. For example, expropriation of land for purposes of the construction of the Millennium Line transit project was authorized by the *British Columbia Transit Act*, while the procedure and timelines to be followed, as well as the compensation to be paid, fell to be determined under the *Expropriation Act* (British Columbia) (and regulations). However, there are many instances, both federal and provincial, where a statute contains both the expropriation power and addresses the procedure and compensation aspects, so it is hard to generalize.

It is a fundamental legal principle in Canada that there must be no expropriation without compensation, unless there is clear and specific legislation to the contrary. It is fair to say that such legislation is highly unusual, and the courts will strain to find against a legislative intent to expropriate without compensation. Of course, there are borderline cases, e.g., does the "down-zoning" of property from permitted residential or commercial uses to "public park only" uses, which clearly would result in a reduction of value of the land in question, amount to an expropriation? In most cases, though, the question of entitlement to some compensation is not an issue, and questions tend to revolve primarily around the amount of compensation that is to be paid.

CONT'D ON PAGE 2

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CONT'D FROM PAGE 1

EXPERIENCE WITH GOVERNMENT EXPROPRIATIONS IN BRITISH COLUMBIA

Not all provincial government agencies follow a similar approach when it comes to dealing with landowners. Some ministries and their legal staff may take a relatively one-sided, adversarial approach respecting compulsory acquisitions that might strike a landowner as high-handed. Other ministries or agencies may endeavour to negotiate a solution that accommodates a landowner to the extent possible consistent with the government's objectives, while still resulting in acquisition of the required lands at the least cost to taxpayers. The government may also seek to satisfy its obligation by means other than cash, yet of equivalent value to an owner. There can be benefits to both the government agency and to the owner where there is mutual goodwill shown in such a process.

Since land acquisitions are part and parcel of the government's normal business, the government's legal representatives and negotiators tend to be very experienced and are familiar with applicable expropriation law and procedures, and with associated litigation that may ensue. It is, therefore, important for an owner to seek out counsel with experience in expropriation law, which is somewhat specialized. Indeed, a large volume of case law has developed in the field of expropriation law, resulting in a separate series of law reports and, in British Columbia (until its recent abolition), a specialized administrative tribunal called the Expropriation Compensation Board (the ECB) to deal with compensation matters.

In line with the government's mandate to achieve cost efficiencies wherever possible, several strategies may be employed for land acquisitions. For example, depending on the type of project involved, the government may seek to acquire less than a full ownership interest in the land in question. The government may instead seek to acquire a statutory right of way (a type of easement), leaving the landowner with rights ultimately to build above or below the three-dimensional right of way area required for the project. Arguably, depending on the terms of the right of way arrangement, there are benefits to both the government and the landowner from this approach. From the government's perspective, the compensation payable may be less, perhaps significantly less, than if it acquired a full ownership interest. From the owner's perspective, the detrimental impact on the remaining land and its development potential may be significantly reduced, in that the owner might still be able to build above or below the right of way area in question. As well, the government is well aware that, on occasion, its project can be statistically shown to enhance, rather than detract from, the value of the remaining land, and the government has a roster of experienced appraisal professionals who will be prepared to attest to that in appropriate cases, to keep costs reasonable and avoid a windfall to the landowner.

PRINCIPLES OF EXPROPRIATION LAW IN BRITISH COLUMBIA

The starting point is recognition of the fact that, on occasion, the greater public good requires that the government must be able to compel the acquisition of lands owned by a private landowner, even against that owner's will, and on an expeditious basis. However, almost invariably and certainly in the most typical cases, reasonable compensation must be paid. The guiding principle here is that the landowner should be fully indemnified for his loss, including reasonable associated costs, i.e., should be made economically whole. In British Columbia, the *Expropriation Act* (British Columbia) adopts the concept of market value as the basic measure of compensation and also provides safeguards with respect to certain types of projects, permitting a landowner to question the need for the particular expropriation or its extent by requiring a public inquiry. In many of the more common project types, namely projects involving so-called "linear developments" (including highways, railways, and certain public utility facilities), those rights to require a public inquiry are not available, presumably for reasons of expediency and to allow the government to achieve its project goals within required timelines, as well as, perhaps, because some particular projects have already undergone a public "vetting" process. This represents one example of the attempt of the statute to balance the need for the government to act expeditiously in the overriding public interest, and private landowners' rights not to be arbitrarily forced to sell.

CONT'D ON PAGE 3

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CONT'D FROM PAGE 2

Safeguards in the *Expropriation Act* (British Columbia) set out how market value must be established and compensation paid and these have been further developed in a significant body of case law. The *Expropriation Act* (British Columbia) endeavours to balance the public interest of the government being able to proceed expeditiously with needed projects, and the landowners' rights to fair compensation, and also allows the government to proceed with the expropriation upon making an advance payment of what it considers to be the compensation payable. Therefore, the expropriation may proceed before the actual compensation payable is finally determined, but the adequacy of the proposed payment may be challenged by the landowner, and settled or litigated later.

There are many factors, often quite unique, that must be addressed in any particular expropriation. For example, an expropriation may involve the whole of a particular parcel of land or, perhaps more often than not, only a partial acquisition of land. Depending on the configuration of the land that is left, its utility for future use, and other factors (e.g., impact of the taking on access), a unique analysis is required to establish the compensation that ought to be paid. It is frequently necessary for both the government and the landowner to involve appraisal experts to determine the amount of the compensation. Because a significant amount of expropriation for government projects has been undertaken, some fairly specialized expertise has been developed by certain appraisal firms who may be called upon to advise on such questions. Counsel with experience in expropriation matters will tend to be familiar with these appraisal firms, as well as with related legal questions involving, for example, the establishment and protection of legal privilege for the appraisal information in the context of settling or litigating the appropriate compensation. The importance of this bears emphasizing, in that landowners may be surprised to learn the extent of the difference in compensation that the appraisers for the government and the appraisers for the landowner occasionally conclude should be paid for any particular expropriation. Quite frequently, not only are the compensation numbers far apart, but the methodologies employed by the appraisal firms differ substantially. There is considerable art, as well as science, involved in arriving at these appraisal conclusions.

Within the last few years, the British Columbia government, in an effort to streamline government processes, determined that the continued existence of the ECB was no longer warranted. Legislation was adopted requiring all new expropriation and compensation matters to be dealt with by the Supreme Court of British Columbia (the BCSC), rather than the ECB. Previously, appeals from an initial compensation award by the ECB would lie to the British Columbia Court of Appeal, and that continues to be the case with awards made by the BCSC. The discontinuance of the ECB did not change the substantive law relating to expropriation and compensation in British Columbia.

CONCLUSION

The *Expropriation Act* (British Columbia) provides strict procedures, not only for the government authority carrying out the expropriation, but also for owners who wish to contest the expropriation or the amount of compensation offered to them. A landowner is well advised to be aware of, and strictly honour, all applicable limitation periods and time limits to protect its interest in connection with any actual or threatened expropriation.

For further information on this matter, please contact George Mucalov at 604-631-3392 or any member of our Real Estate Group.

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