# Relocation in Canadian Expropriation Law

by Eric R. Finn

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As a matter of public policy, various institutional entities have been granted the mandate to acquire property without the consent of the owner. When an institution chooses to exercise this mandate and expropriates the interest of an owner, depending on the jurisdiction, the owner, pursuant to the appropriate govering legislation, may be vested with certain rights. The extent of such rights will largely depend on the philosophical and political nature of the juridisdiction involved.

In most democratic countries, when an owner is deprived of his property rights, legislation has been enacted to provide the owner with a "bundle" of rights generally intended to replace the "bundle" of property rights that have been acquired by the expropriating authority, and to make the owner whole.

One issue, as to the level any jurisdiction may succeed in making the owner whole, is the manner and extent to which that jurisdiction may choose to ensure that an owner who has been deprived of physical accommodation is able to acquire a replacement facility, so as to relocate.

In the United States, federal regulations prescribe positive obligations on an expropriating authority to physically assist an owner in relocating. For example, before displacing a homeowner there is a positive obligation to ensure that there is a replacement residence available.[1]

In Canada, the approach is strictly one of providing dollars to compensate the owner, rather than imposing on the expropriating authority a positive duty to assist in the relocation[2]. Although not specifically referred to as compensation for relocation, generally four concepts have been developed to assist the owner with relocation, in a monetary sense:

- The home-for-a-home concept when dealing with residences,
- "Equivalent reinstatement" when dealing with unusual uses,
- Disturbance damages arising out of the relocation, and
- Additional compensation to reflect the value of improvements not reflected in the market value of the property, to deal with unusual improvements.

Before dealing with each of these concepts, a brief historical analysis is useful to illustrate the basis for the Canadian philosophical approach to relocation, adopted at both the federal and provincial levels, that monetary assistance is to be provided rather than physical assistance.

## *Historical Analysis*

In the development of expropriation law in Canada, it is generally understood that the statutory schemes of compensation used at the federal level and in most provinces are modeled on the Ontario scheme enacted in 1968. Before the enactement of the Ontario Expropriations Act, there had been, however, a great deal of commentary by both the Ontario Law Reform Commission[3] and a Royal Commission looking into civil rights in the province.[4] The latter had dealt primarily with procedural matters to ensure that an expropriation statute protected the rights of individuals who were about to lose their property rights. The former dealt with compensation issues and is of more relevance for present purposes.

One issue that the Law Reform Commission had to deal with was the expropriation of large areas of blighted land in municipalities for urban redevelopment. The City of Toronto had already been involved in such an undertaking and the Law Reform Commission retained a professor to conduct a study of the displaced residents of the area to obtain their views on the approach taken by the municipality and the compensation received. The study came to two general conclusions:

- Market values in areas which become subject to urban renewal programmes may well become depressed, with the result that the compensation paid will not be sufficient to purchase comparable housing elsewhere; and
- The market value of housing on the periphery of the renewal area may rise relatively to the market value of other alternative housing, as a substantial number of expropriated owners will wish to stay in the same general neighborhood and become potential purchasers of the housing for sale on the periphery.[5]

The governement dealt with the effect on market value of the proposed scheme by enacting legislation stating that no effect on the market value by the development scheme was to be taken into account in determining the value of the expropriated property.[6] The issue of the relocation of displaced residents was a more difficult one. The existing legislation did not provide a means for compensating the owner who was required to move from a residential community where market values were depressed to an area where the cost of equivalent accommodation exceeded the compensa-

tion that the expropriating authority was required to pay.

The Law Reform Commission did refer to one instance where legislation had been enacted to assist displaced homeowners in a redevelopment scheme. Faced with a large redevelopment in the city of St. John's, the government of Newfoundland, in 1964, enacted the Family Homes Expropriation Act[7], which provided that "the principle of assessment shall be that the owner of the family home shall receive such compensation as will at current costs and prices put him in a position to acquire by purchase or construction a home reasonably equivalent to that which is being expropriated."[8]

This provision resulted in the expropriating authority paying nearly double the amount of compensation it would have paid had the legislation not been enacted. Instead of the estimate of $2,000,000 for compensation the total paid amounted to $3,700,000.

The Law Reform Commission concluded that a problem existed but that it was really beyond its mandate to recommend relocation assistance programs. It did go on, however, to make some recommendations relating to the issue:

- In addition to providing fair compensation for property expropriated and damages for disturbance as recommended in this Report, the legislation should require expropriating authorities to ensure that financial relocation programmes are available to meet the special needs of persons being dispossessed in urban renewal projects;
- Such financial relocation programs should be available to persons dispossessed by other types of expropriation where like problems arise.[9]

The government of the day decided not to adopt these recommendations but chose to deal with this problem by enacting a provision that became known as the home-for-a-home provision. Section 15 of the present Ontario Expropriations Act reads as follows:

> Upon application therefore, the board shall, by order, after fixing the market value of lands used for residential purposes of the owner under Subsection 14 (1), award such additional amount of compensation as, in the opinion of the Board, is necessary to enable the owner to relocate his or her residence in accommodation that is at least equivalent to the accommodation expropriated.[10]

The section would be subject to such interpretation, as set out below, but clearly the Ontario legislature had decided that there was a need to provide the owners of residences (and by definition that includes tenants) with sufficient funds to enable them to relocate in equivalent accommodation even if it did mean that the owner was, in fact, receiving a premium over and above the actual market value of the residence taken. There was a perceived need to provide individuals with housing and, rather than rely on specific housing assistance programs, the compensation provisions of the Expropriations Act were to be used to provide such assistance.

To understand the home-for-a-home concept, as well as the other provisions for relocation compensation found in the present legislation, it is necessary to examine the entire scheme of compensation that the legislation has provided. As indicated, most Canadian jurisdictions followed the scheme provided for in the Ontario legislation. Section 13 of the Ontario Expropriations Act provides for compensation to be paid under four headings.

(a) the market value of the land;
(b) the damages attributable to disturbance;
(c) damages for injurious affection; and
(d) any special difficulties in relocation.[11]

Each of these four headings has been defined; thus, for example, market value is defined in Section 14 and, as we have seen, Section 15 provides for an

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additional payment for market value when a residence is acquired. Section 14 (2) also provides that where the land is devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the market value shall be deemed to be the cost of equivalent reinstatement.

For purposes of compensation for relocation 13 (2) (b) disturbance damages and (d) special difficulties in relocating are important. As indicated, these references are from the Ontario statute but similar provisions can be found in other jurisdictions.

With that historical analysis and brief overview, we can now look at the specific provisions that provide compensation for individuals who are forced to relocate.

### *Home-for-a-Home*

Section 15 has given rise to a number of issues and this can be dealt with as follows:

Who is entitled to the compensation?

The section provides that "the owner" is entitled to the compensation. In the Ontario act, "owner" is a defined term and includes a mortgagee, tenant, execution creditor or others entitled to a limited estate.[12] Thus, not only the registered owner may be entitled to additional compensation, and there have been cases where tenants or mobile home owners have received the benefit of the section.[13]

Also, as can be seen the term "owner" is not limited to the owners in redevelopment situation and, although the legislation was first enacted to deal with those situations, cases have held that the application of the section is not limited in such a way.[14] In 1974, R.B. Robinson, in his report on the Expropriations Act for the Ministry of the Attorney General, recognized that there was no limitation in the Ontario statute and, citing what he believed to be the intent of the provision and the New Brunswick legislation, recommended that the award of additional compensation to be limited to cases of "special hardship." [15] The suggested amendment has never been implemented.

What is the meaning of the "lands used for residential purposes"?

As already indicated, the type of residence is of no concern in the application of the section. It includes the most humble abode to a luxury custom-built structure. A suite in an apartment or a duplex constitutes a residence, as does a mobile home.

The farm residence has given rise to a number of cases with the issue being how much land represents the "residence" and how does one go about replacing such a residence. The courts have generally determined the issue by defining the residence as including all lands used for residential purposes.[16] Thus, the land, the residence, the landscaping, barn, fencing, tennis court and a three-acre grape vineyard developed and maintained by the owner's family as a recreational and family activity, have been held to be part of the residential amenities.[17]

Another issue is whether the residence has to be the principal residence. The Alberta act limits the allowance to the principal residence, which would lead one to the conclusion that in other jurisdictions a seasonal residence could still be a residence for purposes of the allowance.

Intention to relocate

In the United States, federal regulations require the expropriating authority to positively assist the owner to relocate into equivalent accommodation. Because the Canadian scheme is driven by compensation, none of the home-for-a-home provisions require an intention to relocate. It is assumed that the owner will have to relocate, and the additional compensation awarded can be put to whatever use the owner deems appropriate.

Equivalent Accommodation

To be equivalent, the accommodation used for purposes of measuring the amount of the additional compensation need to be identical. It need only possess similar amenities.[18] Many times, the board or court hearing the claim for compensation is required to find the most appropriate comparable property. Thus, a condominium located in proximity to the main business district and to a number of churches was found to be equivalent to an expropriated single family home.[19] Where the expropriated property consisted of an older house of five acres, an equivalent residence was found to be a new smaller house on 17 acres where only six acres were useful. [20]

Recently, the Ontario Municipal Board had to deal with an expropriation involving mobile homes and trailers. The claimants argued that the only reasonable equivalent that supplied the appropriate mix of ownership and leasehold was a condominium townhouse. The authority took the position that the ownership of a mobile home was the ownership of a chattel, the relationship with the land was one of leasehold and, therefore, the most appropriate equivalent would be a rental accommodation such as an apartment with an equivalent of bedrooms as the mobile home.

The board agreed with the position of the authority in addition to the market value of the mobile home awarded an amount to cover the difference between the rent for the land expropriated and the rent for an equivalent apartment.[21]

Equivalency also applies not only to the functional utility but also to the location of an actual or possible substitute residence.[22]

Calculation of Compensation

As can be seen from the wording of the section, the first step that must be carried out is to determine the value of the property expropriated. The date for determining the value of the expropriated property is defined in the act. An issue that has been dealt with is what date should be used for valuing the equivalent property. In one case, the additional amount was determined as of the date of the hearing. [23] Arguably, where the owner does in fact relocate, the appropriate date for determining the value of the relocation property should be the date of the relocation.

The Expropriations Act also provides for disturbance damages and moving costs and an issue that has arisen as to whether an owner is entitled to both such disturbance damages and the additional compensation under section 15. In *Bean et al. v. City of Waterloo*[24], the Ontario Court of Appeal held that the owner was entitled to both; however, in *Farmer et al. v. Grand River Conservation Authority*[25], the Ontario Divisional Court set off the 5 percent allowance for moving costs. Subsequently, in an unreported case of

*Greenslade v. The Minister of the Environment*, the Divisional Court corrected its earlier decision and held that an owner was entitled to both forms of compensation.[26]

### *Equivalent Reinstatement*

The Ontario Expropriations Act includes a non-residential form of home-for-a-home at Section 14 (2). That section provides that:

> Where the land expropriated is devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, and the owner genuinely intends to relocate in similar premises, the market value shall be deemed to be the reasonable cost of equivalent reinstatement.[27]

Two points are of significance with regard to this section. First, unlike the residential allowance, an intention to relocate is required. The compensation is specifically provided for the additional costs of relocating and is not merely an allowance provided to the owner for use as deemed appropriate.

Second, the words restrict any allowance to the situation where the land has no general demand or market for the purpose for which it is being used.

These restrictive words have been given an equally restrictive interpretation by the courts to the extent that the provision only applies to the land upon which is located an institutional use such as a church or legion hall.[28] In the commercial context, an allowance was made where a house, which was renovated for use as an office and a residence by an elderly sollicitor, was expropriated[29] and denied where the land was used for a garage and depot of a bus line because the depot was capable of being used by other commercial vehicles.[30]

### *Disturbance Damages*

Section 18 (1) of the Ontario Expropriations Act defines disturbance damages as "such reasonable costs as are the natural and reasonable consequences of the expropriation." The definition is broad enough to include a multitude of items of inconvenience and the legal reports are full of examples that are too numerous to mention here. Specifically, with regard to the relocation, the section goes on to indicate that disturbance damages include, where the premises taken include the owner's residence, 5 percent of the market value as an allowance to compensate for inconvenience and the cost of finding another residence.

Where the premises taken do not include the owner's residence, disturbance damages include the cost of finding replacement premises. Whether the premises taken include a residence or not, the owner is entitled to moving costs and the costs, such as survey and legal expenses, incurred in acquiring replacement premises.[31]

As already indicated the 5 percent allowance is in addition to any allowance provided for pursuant to the home-for-a-home concept. However, there has been a debate whether the allowance is mandatory. In an early decision, it was held that the owner had to prove that the "inconvenience" and "cost" of finding another residence[32] but, more recently, it has been determined that the allowance is mandatory and is in addition to any other disturbance damages that the owner may be able to establish.[33] However, while the 5 percent allowance may be mandatory, it is still necessary to prove that any additional claims for disturbance damages are in addition to the items covered by the allowance.[34]

### *Improvements not reflected in the Market Value*

The Ontario Expropriations Act recognizes a particular category of disturbance damages to account for those instances where the improvements expropriated are not completely accounted for in the determination of market value. Section 18 (1) (a) (ii) provides that, where the premises taken include the owner's residence, the expropriating authority shall pay the owner "an allowance for improvements the value of which is not reflected in the market value of land."

A decision of the Supreme Court of Canada has confirmed that this provision covers a situation where an owner may have incurred considerable expense in improving the residence, but is unable to recover the costs of such improvements in the market value.[35] In that case, the owner had spent $26,000 on an addition to the residence three years before the expropriation. The market value only reflected $10,000 for the addition but the owner was awarded $16,000 under this provision. The Supreme Court referred to the Report of the Ontario Law Reform Commission using examples of ramps for the disabled and bomb shelters, referred to therein, concluded that the word "value" in relation to the improvements meant the worth of the improvements to the owner.

> The word "value" following the word "improvement" refers to the worth of the improvements to the person who erected it for her enjoyment and had no relation at all to market value. The citizen fearful of air raids found value to himself in the bomb shelter, the disabled person found value to him in the ramps. It is the rank injustice of depriving such persons of the value of their improvements by confining them to the market value, which the legislation seeks to avoid.[36]

Examples where an allowance has been awarded under this section include the cost of a sewage connection,[37] landscaping,[38] and historical improvements.[39] In addition, where the residence of the owner included a hairdressing business, an allowance for improvements to the business was awarded.[40]

### *Summary*

When an expropriating authority imposes itself upon a landowner, most jurisdictions provide a scheme of legislation, for making the owner whole, which includes obligations in addition to the requirement to pay market value, and where a residence or other improvement is involved, such obligations are intended to ensure that the owner can relocate. Some jurisdictions impose a positive obligation on the authority to assist the owner with the relocation. As can be seen from the foregoing, the Canadian approach is to provide the owner with sufficient compensation to permit the relocation.

The tools that have been referred to—the home-for-a-home concept, equivalent reinstatement and disturbance damages—are intended to give the owner sufficient funds to obtain replacement accommodation equivalent to that which has been expropriated. In

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some instances, such as where the intent to relocate is not required, an approach that deals with the relocation through compensation, when compared to schemes, which require the positive assistance of the authority to ensure relocation, might be seen as over-compensation. When considered with all aspects of compensation, however, the approach is such that the legislative intent of making the expropriated owner whole is achieved. ❑

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33. *King v. City of St. Catharines (1978) 16 L.C.R. 173; but see also Reed et al. v. Regional Municipality of Halton (1993) 50 L.C.R. 90.*
34. *Fontinato v. Grand River Conservation Authority (1983) 28 L.C.R. 112.*
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