

# Expropriation and the

# Determining



## Overview

Expropriation is the taking of private property, or rights, by government for public purposes, and is subject to compensation. Compensation or due compensation, as described in some expropriation acts, can include market value, injurious affection, disturbance damages and other entitlements.

The rights of ownership are often referred to as the 'Bundle of Rights Theory'<sup>1</sup> and expropriation can affect these rights. For example, the interest to be expropriated may be in fee simple, or limited (easement/covenant), and may be temporary (working easement). As well, a part or all of the land may be expropriated.

It is important to note that unlike the United States, where property rights are protected under the constitution (Fifth Amendment), which provides for just compensation, this is not the case in Canada. In Canada, there is no right to compensation unless conferred by statute. As cited in *Sisters of Charity of Rockingham v. The King, 1922*,<sup>2</sup> "Compensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of the land taken, or for damage on the ground that his land is injuriously affected, unless he can establish a statutory right." It is also worth noting that in the United States, expropriation is referred to as condemnation.

In my experience, the majority of requirements/takings required for public purposes are negotiated by the various expropriating authorities on a voluntary basis, however, compensation is typically based on the principles as outlined in the applicable Expropriation Act.

# Partial Taking Appraisal

## Due Compensation in Canada

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The purpose of this article is to discuss the complexities associated with a partial taking appraisal that involves the expropriation of property rights; a unique type of appraisal assignment, which requires a clear understanding of appraisal principles and case law.

### Valuation Principles

Before moving on to some of the valuation issues involving expropriation for partial takings, it is important to review a few basic principles of real estate. The rights of ownership, as noted earlier, are often referred to as the 'Bundle of Rights Theory' and expropriation can affect the rights with a partial taking, since the owner could end up with fewer rights after the taking.

The highest and best use of a property can also be affected by an expropriation since it could have a potential impact on the land use. In some instances, the partial taking could result in a change of best use. The purpose of the highest and best use analysis is to provide a basis for evaluating real property, which takes into account factors such as physically possible, legally permissible, financially feasible, and maximally productive. In *Minute Muffler Installations Ltd. v. R (1981)*,<sup>3</sup> the Board set out four primary criteria, or tests, as referenced above to be applied in determining highest and best use.

The issue of highest and best use was also addressed in *Farlinger Developments Ltd. and Borough of East York (1976)*<sup>4</sup> which dealt with the relationship between zoning restrictions and the concept of highest and best use in an expropriation where Howland, J.A. stated the following guiding principles: "From these authorities, it would seem to be established that the highest and best use must be based on something more than a possibility of rezoning. There must be a probability or a reasonable expectation that such rezoning will take place. It is not enough that the lands have the capability of rezoning. In my opinion, probability connotes something higher than a 50% possibility." For additional information on this topic as it applies to partial takings, refer to an article entitled *Highest and Best Use and Partial Acquisitions*.<sup>5</sup>

Another important principle to consider with partial takings is the principle of consistent use. The underlying premise with this principle is that, when improved land is in a state of transition

to another highest and best use, it cannot be appraised with one use allocated to the land and another to the building or improvements. This is an important principle that will be addressed in more detail under the injurious affection section with respect to 'double recovery'.

Other principles such as contribution need to be considered in a partial taking. The principle of contribution is based on the value of a particular component being measured by its contributory value to the property, or by the amount its absence detracts from the whole. Since this principle applies to the two main ingredients that make up the value of real property, e.g., land and improvements, the utility of either component could be affected by a partial taking.

### Two Valuation Methods Used in Partial Takings

The two recognized valuation approaches recognized in Canada for partial takings are the before and after method and the summation or aggregate method as outlined in *The Law of Expropriation and Compensation in Canada*.<sup>6</sup>

The before and after method is simply the difference in value between the before and after conditions. As a result, in some circumstances, it may result in no payment for the part taken and, therefore, benefits the expropriating authority. For these reasons, the Canada and Alberta acts preclude the use of this method. However, some provincial legislation provides for the discretionary use of this method, but only where the part expropriated "is of a size or shape for which there is no general demand or market."

The summation or aggregate method is the value of the part taken, plus any damages, less special benefits. It is used in many jurisdictions and breaks out the values of the part taken, damages and special benefits. It favours the property owner, since the owner is always guaranteed the value of the part taken as a form of compensation.

Simply put, whenever a part of an owner's land is taken in Canada, the courts will want to see a just result in that the owner is always compensated for at least the part taken. The value of the part taken would have the same unit value as part of the larger parcel which is referenced below.





## Larger Parcel

Defining the larger parcel is the first step in a partial taking appraisal. It is defined as the subject property when considered together with contiguous or nearby property, the value of which is impacted by common ownership as outlined in 2008 CUSPAP (Standards), Definitions 2.36.

The purpose of establishing the larger parcel is that it sets the stage for establishing the value of the part taken, injurious affection and special benefits. In order to establish the larger parcel, three tests must be satisfied. The three tests<sup>7</sup> for the larger parcel are unity of title (ownership), unity of contiguity (adjoining or separated), and unity of use (under one highest and best use). The concept of the three tests is also referenced in some expropriation acts under the definition of injurious affection, which partially states “and for the purposes of this clause, part of the lands of an owner shall be deemed to have been acquired where the owner from who lands are acquired retain lands **contiguous** to those acquired or retain lands of which the **use** is enhanced by **unified ownership** with those acquired” (emphasis added).

It is important for the appraiser to understand the concept of the larger parcel, as this sets the foundation for the appraisal.

### Examples of case law dealing with the concept of the larger parcel:

- Helenslea Farming Lt. v. County of Parkland No. 31, 33 L.C.R. 133*
- Hallman v. City of Niagara Falls, 9 L.C.R. 157*
- Lorenz et al v. City of Lloydminster, 26L.C.R.157*
- CNR Co. v. Industrial Estates Ltd., 35L.C.R.220*
- 612118 Ontario Ltd. v. Ontario (Ministry of Transportation) 64L.C.R.5*
- Double Alpha Holdings Corp. v. Pacific Coast Energy (1988) 65L.C.R.99*

The Standards address the larger parcel under 12.27.2, which stipulates that a partial taking may require consideration of the larger parcel.

Additional information on the larger parcel concept can be referenced in an article published in the Appraisal Journal entitled *Expropriation and Condemnation: the Larger Parcel*.<sup>8</sup>

## Injurious Affection and Damages

The concept of injurious affection is based upon the reduction in the value of remaining lands resulting from an expropriation or taking. Alternatively, it is a loss in value to the remainder property as a result of a partial taking. Examples of injurious affection include landlocking, loss of parking, proximity to hydro transmission towers, loss of access, change in shape, loss of exposure and visibility. It is interesting to note that, in the United States, the term injurious affection is not used, as damages are considered to be either consequential or severance.

Typically expropriation acts require a statutory authority to compensate the owner of land for loss or damage caused by injurious affection, and that any advantage to the owner’s remaining land will be set-off against the damage. In some jurisdictions, a claim for injurious affection can be made even when there has been no taking.

### Examples of case law involving injurious affection:

- Parks v. Ontario (Ministry of Transportation) 56 L.C.R. 166*
- Airport Corporate Centre Inc. v. Ontario (1995) 55 L.C.R. 135*
- Arab v. Halifax (1994) 55 L.C.R. 275*
- Cook v. Nova Scotia (1991) 44 L.C.R. 275*
- Durette v. New Brunswick (Transportation) 21 L.C.R. 124*
- Yaklin v. Alberta (1988) 38 L.C.R. 347*
- Lorenz v. Lloydminster (1982) 26 L.C.R. 157*
- Aipi Investments Ltd. v. Maple Ridge (1990) 43 L.C.R. 49*

*The New Law of Expropriation*<sup>9</sup> provides examples in case law of injurious affection on a province-by-province basis.

The Standards address injurious affection under 12.27.2, which states that a partial taking may require consideration of injurious affection (loss to the remainder).

Damages also include disturbance damages,<sup>10</sup> which may be defined generally as economic loss suffered by an owner by reason of having to vacate expropriated property. Claims under disturbance damages could include items such as business loss, crop damage, relocation costs, demolition costs, loss of income, replacement of well, and so on.

## Cost to Cure

A method that can be used to offset damages is the cost to cure<sup>11</sup> approach. Cost to cure can be used to offset damages and is defined as the cost to restore an item of physical depreciation or functional depreciation to near new or new condition. However, it must make economic sense to apply the cost to cure as a measure of damage.

An example of cost to cure would be reinstating access to a site that would otherwise be landlocked as a result of the taking.

## Double Recovery

As mentioned earlier, under valuation principles, the concept of double recovery is tied into the principle of consistent use and is an important consideration in a partial taking with respect to damages.

**In *Horn v. Sunderland Corporation (1941)*,<sup>12</sup> the decision was as follows:**

- a) the value of the land determined on the basis of its highest and best use, or
- b) the aggregate of the value of the land determined on the basis of its existing use, plus disturbance damages.

In other words, this case confirms that compensation must be awarded on a consistent basis. Therefore, it is not appropriate to double dip by awarding compensation based on the highest and best use, plus compensation for damages attributed to the lesser use. This concept has been entrenched in a number of expropriation acts such as British Columbia (31), Ontario (13), New Brunswick 38(1) and Nova Scotia 27(3). By way of an example, if the existing use was residential, but the highest and best use was commercial, it would not be consistent in arriving at a market value based on the commercial use and then adding compensation for injurious affection for the residential use.

For examples of double recovery cases, refer to the *UBC, Sauder School of Business, Expropriation Valuation, Professional Development Workbook*.<sup>13</sup>

## General Benefits and Special Benefits

Benefits are essentially the converse of injurious affection: it is an increase to the remainder property due to a partial taking. General benefits are an increase in value to the remainder property as a result of a partial acquisition and accrue to the community as a whole. On the other hand, special benefits are benefits from a public improvement, which accrue directly and solely to the advantage of the property remaining after a partial taking. Typically, only special benefits can be offset against injurious affection or damages and not against the value of the part taken. As referenced earlier, the courts will want to see a just result in that the owner is always compensated for at least the part taken.

Examples of special benefits could include improved frontage, visibility, grade, access and location. Further research on this item can be found in reviewing the following cases:

*F&F Realty Holdings Inc. v. Ontario (Ministry of Transportation)*, 64 L.C.R. 52

*Kear v. Manitoba (Department of Highways and Transportation)*, 66 L.C.R. 117

*Tanenbaum Estate v. Ontario (MTC)*, 54 L.C.R. 161

## Conclusion

Appraising real estate for expropriation purposes related to partial takings creates interesting challenges for the real estate appraiser. With this type of appraisal, it is important for the appraiser to understand the two partial taking valuation methods and how each is applied. As well, the appraiser must be familiar with the concepts of injurious affection, damages and benefits. Finally, it is important for the appraiser to obtain clear terms of reference from the client as well as an agreed scope of work with the client. Legal counsel can be very useful in agreeing on terms of reference and scope, as well as providing necessary instructions on an assignment. Research into case law and familiarity with the applicable expropriation act is essential, but may go beyond the role of the appraiser. In this event, legal counsel might be consulted to receive instructions as it applies to an expropriation. ❖

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## References

<sup>1</sup>Bundle of rights includes the rights to bequeath, enjoy, give away, rent or lease, sell, use, or even the right not to exercise any of these rights. While subject to certain governmental limitations and private restrictions. Principles of Right of Way, Chapter Eight: Real Estate Fundamentals, pg. 1

<sup>2</sup>Sisters of Charity of Rockingham v. The King, [1922] 2A.C.315(Privy Council)

<sup>3</sup>Minute Muffler Installations Ltd. v. R(1981), 23 L.C.R. 213

<sup>4</sup>Farlinger Developments Ltd. and Borough of East York (1975), 9 O.R.(2d) 553 (C.A.), leave to appeal to the SCC dismissed

<sup>5</sup>Highest and best use and partial acquisitions, Todd Pickett, AIC Candidate, Canadian Appraiser, Volume 50, Book 1, 2006

<sup>6</sup>The Law of Expropriation and Compensation in Canada, 2nd Edition, Eric C.E. Todd, pg. 344 – 352

<sup>7</sup>The Appraisal of Partial Takings, Course 401, International Right of Way Association

<sup>8</sup>Expropriation and Condemnation: the Larger Parcel, Tony Sevelka, MAI, AACI, Appraisal Journal, Jan 03

<sup>9</sup>New Law of Expropriation, John Coates, Q.C., LL.B., LL.M., of the British Columbia Bar and Stephen Waquè, LL.B., of the Ontario Bar, Carswell Publishing

<sup>10</sup>New Law of Expropriation ibid

<sup>11</sup>International Right of Way Textbook, Canadian Glossary

<sup>12</sup>Horn v. Sunderland Corporation (1941) 2K.B.26, 49 (C.A.)

<sup>13</sup>UBC, Sauder School of Business, Expropriation Valuation, Professional Development CPD 122 Course Workbook, Table 14, Appendix .48