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MUNICIPAL EXPROPRIATION: THE NEED FOR A JEALOUS VIGILANCE

THE POWER TO EXPROPRIATE

The power to expropriate is a statutory power to take land, or any interest in land, without the consent of the owner. There are no constitutional limitations on the powers of the legislatures of the provincial governments, provided they are acting within the confines of legislative competence to create and confer upon any body or person they see fit the power of expropriation. The Province of Ontario has taken ample advantage of this circumstance and conferred such powers with almost reckless liberality on a wide assortment of over 8,000 expropriating authorities. Yet the mere existence of such a power, even aside from its exercise, constitutes a serious encroachment on the security of the individual. Each time the authority to expropriate is drawn from the bag of public powers, a thorny balance of civil rights and general welfare must be struck. The property rights of the individual are traded off against a public need.

Expropriation of private property is often essential to the development and servicing of a modern community. The power exercised in cases of public use or public purpose, and according to proper principles and procedures, is usually construed to be in the public interest. However, the consequences of such authority are grave. Expropriation often results in serious disruption to owners, and those with a lesser interest in the affected properties such as tenants, who are required to relocate. Both business and individuals must incur the monetary and social expenses of displacement and relocation. Expropriation, then, should be viewed as a necessary evil which must be restricted to cases where it is the only justifiable alternative. Even then, its use must be subject to procedural safeguards which will protect the rights and interests of the individual and are consistent with the demands of the public interest.

Expropriation authority, however, has not been free from abuse. The image of the white-haired lady ejected from her ivy-covered cottage with a few dollars stuffed into her hand is not entirely fantasy. One of the few relevant studies, the Don Mount Village Study, after reviewing the practice and effects of expropriation in the former Napier Place in Toronto concluded: [1]

Most of those subject to expropriation were poorly

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1. This study, prepared by Prof. M.M. Dennis, appeared in the Report of the Ontario Law Reform Commission on The Basis For Compensation on Expropriation, pp.77-84.

> informed as to their rights. They often believed that they were being bullied by an all-powerful government agency and they understood little of the process that was dispossessing them..... The elements of compulsion involved, and the relative lack of sophistication in bargaining among those being expropriated compared to the city negotiators, make any concept of "bargain" and "meeting of minds" ludicrous.

The apparent inequities of the situation were examined by the Clyne Commission in British Columbia and later the McRuer Commission in Ontario. Both reports suggested a review of expropriation procedures and a series of comprehensive recommendations. Two broad procedural guidelines can summarize the effectual philosophy of these reports:

(1) procedures should be explicitly set out with a view to protecting the rights and responsibilities of each party to the expropriation, and
(2) procedures should facilitate voluntary negotiation based upon a complete exchange of confidence and information culminating in a just settlement.

THE EXPROPRIATIONS ACT

The Ontario Expropriations Act,[2] incorporated a large percentage of the McRuer recommendations. However, despite the adoption of several desirable procedural innovations in uniform legislation designed to protect the interests of the parties, the Act has not eliminated the major problem of expropriation.

According to the Clyne Report, the central problem of expropriation lies in formulating rules for the assessment of compensation which will ensure fair awards to both the owner and taker.[3] Once expropriation proceedings are authorized, the compensation to be paid for the dispossessed property is the most immediate and salient issue, yet it is here that the Act is weakest.

"Due compensation" for affected lands is a difficult matter to calculate since real property is, to a certain extent, a unique commodity. Prior to recent expropriation legislation, compensation was determined as a matter of judicial discretion. The case law pointed to a general rule of compensation which permitted an investigation of the many factors involved in a particular displacement. The relevance and monetary value, if any, of each factor could be introduced and considered. Under The Expropriations Act compensation is to be determined according to a legislated formula. The Act attempts to formulate the amount of awards in a few sections where the United Kingdom, for example, has deemed an entire statute to be necessary.

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2. S.O. 1968-69, c.36.

3. British Columbia Royal Commission on Expropriation, Report, 1964, p.8. (emphasis added).

Perhaps a statutory check-list lends the issue certainty and definiteness, but in this case the list is itself summary and vague. Since the expropriated owner is being deprived of his property and being put to the expenses of dislocation for the sake of the general public, he should be confident and certain of a whole indemnification. At the same time, of course, the public purse should be protected. In order that this may be accomplished, the broad spectrum of consequential damages which may or may not be claimed should be set out clearly in the statute.

The Act acknowledges a duty on the part of the expropriating authority to pay compensation where land is taken. (This is by no means a trivial provision as there is no basic constitutional duty on public bodies to compensate dispossessed owners such as is found in the Australian and American constitutions.) The Act adopts the "market value plus" standard of value based upon four determinable elements:

a.) the market value of the land
b.) disturbance damages
c.) injurious affection
d.) special difficulties of relocation

Market value is defined in the Act as the amount the land would realize if sold on the open market by a prudent and willing seller to a prudent and willing buyer. No doubt this definition was expressly provided to eliminate the exclusive consideration of either the value to the owner on the one hand or the value to the taker on the other. However, the Act takes no account of premises which may be of special value to the owner. For example, a home with a specially installed ramp system may be of unique value to a paraplegic, but may not be reflected in the open market price. Provided such improvements are not totally eccentric, they should be adequately compensated. Another measure of true market value is the notion of "special adaptability". In the past, the imminent possibility of rezoning or potential use has been taken into account in expropriation proceedings. The Act, however, is silent on this point.

These various concerns may, in fact, be taken into consideration depending upon how the vagaries of the Act are interpreted. On the other hand, the very listing of the elements of a statutory formula may restrict the general rules of compensation to those explicitly noted. To ensure that each party receives just terms of settlement, the standards of compensation should be clearly established and set out.

The legislation is satisfyingly more explicit when dealing with disturbance damages. Account must be taken of relocation costs, business costs, professional costs, and financing and refinancing costs. Consequently, the individual is in a position to know what items can be claimed and, if applicable, on what basis.

The Act further provides for compensation awards in cases of "injurious affection". This term has developed a technical legal meaning and has come to be a remedy of definite limitations. Where only a portion

of an owner's land is expropriated, he may recover compensation for the remaining lands provided certain recognized conditions obtain. Briefly put, the expropriated and the remaining lands need not be contiguous but must be owned by the same person, and the injury must be occasioned by the construction or user of public works on the land taken and not on some other lands. However, any benefit to the remaining lands derived from the work for which the land was expropriated is to be offset against the damages to the lands remaining.

Where no land is taken from an individual but his lands are injuriously affected by the construction of works upon lands expropriated from others, damages may also be recovered from the expropriating authority. The rules which apply to claims for injurious affection in this case are unnecessarily more stringent than in the case of a partial taking. For example, in order that an injury be compensable, the damage must be caused by the construction of the public work on expropriated lands and not its user. Consequently, properties expropriated for an expressway would receive compensation but those properties sufficiently proximate to the route to be damaged by the user (i.e. noise and exhaust pollution) would not. In previous proceedings the provincial government has offered to buy those homes for use as subsidized housing. While such relief is appropriate it should not be dependent upon executive clemency. Recovery of this type should be a legal right wherever the damage was a proximate result of the construction or user of a public undertaking upon expropriated lands.

In general, then, while the provisions for compensation are less than satisfactory, the procedural safeguards outlined in the Act are a noticeable improvement over prior expropriation legislation. The parties are encouraged to be open and frank with each other and to disclose and exchange relevant information. While it is impossible to oblige the parties by legislation to bargain and negotiate with courtesy and fairness, the legislation does provide some protection against abuse in an unbalanced and unnatural bargaining situation.

Perhaps the most effective restriction on the possible indiscriminate use and abuse of public powers remains the requirement that such authority only be exercised for defined public purposes or uses. Municipal powers of expropriation are generally limited to instances of certain narrowly defined municipal objectives. Even the unusually broad powers given to the municipalities under The Municipal Act must be exercised for "a municipal purpose".

The City of Toronto has apparently found these procedural restrictions overly cumbersome.

BILL PR30

Last December Council voted to give the City the power to expropriate land from one private individual and to convey it to another. In fact, the City sought from the Province (through section 10 of Bill PR30,

introduced in Spring, 1971, session) the power to assemble land even where there was no immediate requirement nor any specific project at hand. The lands to be seized would not have to be slums nor underused or in any way or in need of urban renewal. What the City would in effect be doing would be backing into the problems of a land bank system without reaping any of the benefits of such a programme.

Two issues were raised by section 10 of Bill PR 30 which until recently had been foreign to the matter of expropriation:

1.) the right of the City to appropriate the property rights of one individual for no apparent purpose other than the benefit of another private individual, and
2.) the right of an owner or occupier to retain and enjoy property which a developer wants to develop in a manner that may benefit the City.

The Bureau strongly rejects any such all-embracing authority which would bear no relation to any real municipal purpose. As has already been stressed, the right of use and enjoyment is a right that must only be interfered with when the taking embraces an overriding general interest. If the situation is a proper one for dispossession, the City already has appropriate powers under at least seven different provincial statutes, most of which contain more than one enabling section.[4.]

Under section 10, no objective or public benefit would be necessary since, by definition, any expropriation would be for a municipal purpose. Such a provision flies directly in the face of the persuasive comments of Chief Justice McRuer:[5.]

> Powers of expropriation do not exist at large. They must be related to some specific purpose or purposes. When the Legislature decides to confer on any body the power of expropriation, it should know, and state in clear and precise language, the purpose for which it is conferring the power.

Nowhere in the innocuous-looking six line section (located between provisions for an anti-noise by-law and a tax credit plan for old-age pensioners) was there any explicit intent or rationale or any boundaries within which the power must be exercised.

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4. The Cemeteries Act, R.S.O. 1960, C.47, S.40, 61.
The Municipal Act, R S.O. 1960, C.249, S.333,338,377(63), 379(1) (49).
The Ontario Water Resources Commission Act, R.S.O. 1960, C.281, S.32.
The Planning Act, R.S.O. 1960, C.296, S.20, 23.
The Power Commission Act, R.S.O. 1960, C.300, S.66.
The Public Utilities Act, R.S.O. 1960, C.335, S.2, 4, 20, S 62.
The Telephone Act, R.S.O. 1960, C.394, S.28, 54.

5. Royal Commission Enquiry into Civil Rights, Report, No.I, Vol.3, P.984.

Council supporters contended that section 10 was essential to the development of the City. While orderly planning and development may be laudable goals, the matter of necessity is seriously questionable in view of the present City statutory authority. It is worthy of note that identical powers were received by the City of Sault Ste. Marie in 1970 and have yet to be exercised. In any case the necessity would have to be overwhelming in order to justify such a naked assumption of power.

Certainly unlimited powers of land assembly would often expedite urban developments. For example, the problem of the "hold-out" would be legislated away by eliminating the legal right to do so. However, the difficulties which would be overcome would not compensate for the inequities of the situation. Even the mere threat of expropriation might well depreciate market prices to the point where owners could well be obliged to sell for considerably less than the true market value. The suggestion that local councils simply be "trusted" to exercise this expanded expropriation authority with discretion is not a sufficient safeguard.

The growth of our urban centres will be accompanied by new demands for servicing and planned development. Consequently, expropriation will increasingly become more essential as a tool of modern government. Notwithstanding this trend, municipalities, as well as all expropriating authorities, must continue to respect and protect the property rights of individual owners. Both the McRuer Report and the Ontario Expropriations Act have reflected a growing concern in this regard and attempted to restrict the use and abuse of expropriation powers. Section 10 represented a counter effort by the City of Toronto to reverse this trend. To its credit, the Private Bills Committee deleted the section from the Bill. The Bureau urges the Province to go further in this vein and repeal an identical section in The City of Sault Ste. Marie Act for the reasons outlined in this COMMENT.