720/66

BUREAU OF MUNICIPAL RESEARCH

A bulletin issued by the Bureau of Municipal Research

CIVIC AFFAIRS

NOVEMBER 1966 TORONTO 4 RICHMOND ST. E.

Expropriation: Public Purpose vs. Private Property

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This Bulletin in Brief — Its Findings and Recommendations

This year, in Metro, about 1,500 private properties will be expropriated and at least 3,000 loss and damage claims will be filed by owners and others affected. The constantly increasing volume of public takings has many legitimate causes. Two of the most significant are the demands or urbanization and the fact that expropriation has come to embrace public **objectives** (urban renewal, public housing) as well as traditional public **uses** (roads, sewers, schools, etc.).

With over 2,000 authorities in Ontario possessing expropriation powers under about 30 acts, current expropriation procedures relating to negotiation and settlement of compensation are in need of basic examination and revision. This Bulletin deals with the problems faced by totally expropriated owner-occupants. Difference dilemmas confront owners who suffer partial or temporary takings, and residential and business tenants who are forced to relocate at a time and in a market not of their choosing.

The Expropriation Procedures Act of 1963, while a major improvement, relies too heavily on the prudence of owners and the resourcefulness of tribunals. The Bureau believes that amendments are needed to put owners on a more nearly equal footing with expropriators, to encourage voluntary and amicably reached settlements, and to tighten proceedings before the Board of Negotiation established under a 1965 amendment to the Act.

While providing that owners are entitled to "due compensation" for their lost property, the Act makes no attempt to set down either principles or elements to guide those who must arrive at "due compensation". This vagueness invites inconsistency in legal application and further enhances the superior position of the expropriator **vis a vis** the expropriated.

THE BUREAU RECOMMENDS THAT OWNERS BE GRANTED ALL REASONABLE INFORMATION AND ASSISTANCE NEEDED TO ESTABLISH THEIR LEGAL POSITION AND TO DETERMINE THE FAIR VALUE OF THEIR PROPERTY.

TO ACCOMPLISH THIS, THE BUREAU RECOMMENDS THAT THE UNDETAILED FORMAL NOTICE OF EXPROPRIATION NOW GIVEN TO AN OWNER BE SUPPLEMENTED BY A COPY OF THE ORIGINAL APPRAISALS TOGETHER WITH AN EXPLANATION OF HOW THE FIRST CASH OFFER WAS DETERMINED.

Ontario courts have adopted the **value to the owner** standard of compensation (the two other basic standards being **value to the taker** and **market value).** Yet in the interests of equity (but at the expense of consistency) fragments of the latter two standards have crept into court awards. The Bureau believes that market value, if properly supplemented, can provide the most practical and equitable method of determining compensation. Market value relates directly to what the owner is losing, it is usually subject to accurate determination, and it is understood by laymen.

WE RECOMMEND THAT THE EXPROPRIATION PROCEDURES ACT BE AMENDED TO REFLECT A **MARKET-PLUS** STANDARD OF COMPENSATION.

Market value should serve as the acknowledged basis for the expropriating authority's initial offer to an owner, with the appraisal system designed to facilitate and equalize the determination of market value. If additional compensable elements exist, or are claimed, the responsibility for proving same should rest primarily with the owner.

WE RECOMMEND THAT ADDITIONAL COMPENSABLE ELEMENTS IN A MARKET-PLUS STANDARD INCLUDE BUSINESS LOSSES, RESIDENTIAL AMENITIES LOSSES, AND THE INCIDENTAL EXPENSE OF MOVING AND RELOCATION, REDECORATION, REFINANCING, AND PROFESSIONAL COSTS.

Although market-plus compensation would require careful administration and adjudication, many of the difficulties to be faced exist under current practice as well. For example, the problems of potentiality (future zoning) and special advantage (possession of a licence) should prove no greater under our recommended system. The market-plus concept has been employed successfully in the United Kingdom since 1919, when the value to the owner standard was discarded, and is being adopted increasingly in the United States.

Supplemented by less partisan negotiations, the market-plus standard could eliminate pressures for enforced settlement through compulsory arbitration.

THE BUREAU RECOMMENDS THAT COMPULSORY ARBITRATION NOT BE ADOPTED TO RESOLVE EXPROPRIATION DISPUTES SINCE IT WOULD BE CONTRARY TO THE OBJECTIVES OF MUTUAL RESPONSIBILITY FOR SETTLEMENT AND TO EXPEDITIOUS EXPROPRIATION.

Arbitration jurisdiction is highly fragmented in Metro. Cases are not reported systematically, completely outdated cost schedules persist (eg. a tariff of eight dollars per day is allowed for expert witnesses), awards fail to show adequate consistency, and undue delays often result.

WE RECOMMEND THAT METRO'S PRESENT FRAGMENTED EXPROPRIATION JURISDICTION BE REPLACED BY A UNIFIED ARBITRATION TRIBUNAL APPOINTED BY THE PROVINCE.

Knowledge of the real estate market is as essential to equitable expropriation settlements as is legal and judical training. We believe that it is preferable to seek such real estate expertise among the real estate community itself.

THE BUREAU RECOMMENDS THAT ARBITRATION TRIBUNAL MEMBERS INCLUDE PERSONS WITH DIRECT REAL ESTATE EXPERIENCE AS WELL AS THOSE VERSED IN THE LAW.

Expropriation: Public Purpose vs. Private Property

THE POWER OF EXPROPRIATION

The public power to take private property for a public use or purpose, which in Canada is called "expropriation", in England "compulsory purchase", and in the United States "eminent domain", is necessary for the effective operation of modern government. Yet, the consequences of its use are grave. Expropriation usually results in serious disruption to owners, tenants, and others who have an interest in the affected properties. Hence, it is especially important that expropriation statutes clearly establish legislative intent as to just procedures and compensation. Failing this, the often inconsistent development of administrative practices and court interpretation tend to weaken and confuse the position of those being expropriated.

The need for effective legislative restraints is amplified by the extensive and increasing use of the power by public agencies. In Ontario there are over 2,000 authorities which can expropriate under some 30 Acts. Private property within North York, for example, can be taken by the Department of Highways, the Department of Public Works, the Minister of Planning, the Municipal Council (for direct purposes, utility operations, etc.) the Public School Board, the Separate School Board, the Continuation School Board, the Parks Board, the Library Board, Agricultural Societies Boards, Hospital Boards, cemetery trustees, the Hydro Commission, gas utility companies under the Energy Act, the Metropolitan Toronto and Region Conservation Authority, the Ontario Water Resources Commission, the Stockyard Board, the Liquor Control Board, the University of Toronto, and, finally, Metropolitan Toronto itself for its own and for T.T.C. purposes.

It should not be assumed, however, as has been assumed in the Toronto press, that Ontario is unique in granting expropriation powers to a multitude of agencies. Most Canadian provinces and American states are at least as liberal as Ontario. Moreover, it should be realized that expropriation in Ontario is exercised most frequently by directly elected municipal councils and school boards, and that the relatively large number of expropriating authorities is primarily a reflection of the growing urbanization of the Province. (Indeed, almost all American municipalities have a general power to assemble land for private redevelopment; Ontario municipalities do not.)

Expropriation within Metropolitan Toronto by municipal agencies, school boards, and the University of Toronto has been increasing in the past few years. In 1966 alone, there will be almost 1,500 properties expropriated and over 3,000 loss and damage claims made by owners and other affected. This is over twice the annual volume of the immediate post-war decade. The reason for this increase can be attributed in large part to a significant development — expropriation has come to embrace public **objectives** (urban renewal, public housing as well as traditional public **uses** (roads, sewers, schools, etc.).

Yet it should be emphasized that the large majority of municipal expropriations currently consist of a relatively small number of simultaneous mass takings for a single purpose, often under a single general authorization. Approximately one-half of the nearly 5,000 total takings for municipal purposes in Metropolitan Toronto since 1959 have been connected with only five projects — the Bloor-Danforth subway, the Spadina Expressway, and the renewal projects in Moss Part, Alexandra Park, and Napier Place. Takings associated with these five projects were authorized by only seven general expropriation by-laws.

Obviously, simultaneous mass takings such as these pose special problems. Expropriated owner-occupants face complex relocation problems, and their relocation needs exert an inflating demand on comparable properties. Although owners possess differing abilities to drive a hard real estate bargain, expropriating authorities should not discriminate in their offers for similar properties. Nor should they use earlier settlements as precedents in the negotiation of later settlements.

Interviews with public property officials, lawyers, arbitrators, and expropriated citizens, suggest that current expropriation procedures with respect to the negotiation and settlement of compensation are in need of basic examination and revision. Heated and recurrent controversy has been associated with the measure of compensation offered to expropriated owners. Two notable recent examples concerned the development value of properties in Eglinton Flats, expropriated by the Metropolitan Toronto and Region Conservation Authority, and the market value of properties recently expropriated by the City of Toronto in Napier Place. Such controversy has multiple causes, including the desire of owners to profit from expropriation, the hard and sometimes unfair bargaining of expropriating agencies, and fundamental disagreement on the applicable principles of compensation.

In 1965, the arbitrator of the City of Toronto increased compensation to an expropriated owner of four properties in Alexandra Park by twice the final City offer. This same case revealed loose and distorted appraisals made for the City. In the other direction, a November, 1966, Ontario Court of Appeal decision upheld a Metro appeal from an arbitration award and reduced the compensation from $770,000 to $143,500!

Although the above examples represent exceptions to the steady flow of publicly uncontested expropriations and negotiated settlements, they do point to serious problems in the determination of compensation. In the following discussion, the Bureau outlines these problems and suggests some fundamental solutions. Our treatment is oriented primarily to the financial and physical difficulties faced by totally expropriated owner-occupants. Different dilemmas confront those who suffer partial or temporary takings. A third group is composed of those residential and business tenants who are forced to relocate at a time and in a market not of their choosing.

NEGOTIATION OF SETTLEMENT

Effective expropriation procedures should serve two basic objectives. First, procedures should clearly establish and protect the rights and fix the responsibilities of both the expropriating and expropriated parties. Secondly, procedures should facilitate negotiation between both parties to encourage voluntarily and amicably reached settlements, with each side possessing the confidence, information, and basic approach of the other.

The Expropriation Procedures Act of 1963 brought the important aspects of expropriation under uniform legislation and established a number of desirable procedural innovations. To a degree, these innovations have facilitated the negotiation and settlement of compensation by establishing:

(1) a standard date of expropriation;
(2) a standard notice of expropriation and time limit;
(3) a formal offer of settlement by the expropriating authority within six months of the expropriation; and
(4) as of 1965, a provincial Board of Negotiation to mediate deadlocked cases upon application before arbitration.

In the past, expropriation procedures were most often resorted to only after the expropriating authority had failed to secure a voluntary settlement of compensation. A great deal of public land acquisition is now processed under the 1963 Act which tends to standardize responsibilities and practices. This is generally beneficial, particularly in the course of large-scale public property acquisitions. Yet it is essential that the negotiation phase of expropriation be covered completely in legislation, and that such provisions be based on the principle that the relationship between the expropriator and the expropriated be as open, fair, and equal as possible.

The Expropriation Procedures Act relies almost entirely on the acumen of property owners and the wisdom of tribunals and courts to ensure that these objectives are met. Such reliance has had inequitable effects because of vagueness and inconsistency in tribunal and court applications of the "due compensation" clause and because of the differing abilities of expropriated owners to drive the best real estate bargain. Owners should not be expected to bear the full responsibility for negotiating with an expropriating authority since the classic "willing buyer, willing seller" equation does not apply. The expropriator is not an ordinary purchaser on the open market; the relationship is not voluntary; and the resources of the parties are not equal. In the open market, it is solely up to the owner what dispossession bonus must be paid to him by a land assembler. Such a bonus reflects his own estimate of all costs associated with the sale of his land (and, of course, his estimate of the buyer's top offer).

Under expropriation, the principles and postures of free bargaining are lacking; yet expropriation negotiation proceed under the Expropriation Procedures Act along traditional bargaining concepts. Formal notices of expropriation give owners little or no information concerning the basis of the policy to expropriate, and communication throughout the procedure is usually minimal. This does not establish a favourable atmosphere for equitable settlement. Appraisals are conducted "for" one or the other party; the professional costs of negotiation are the obligation of owners; and original "offers" made by expropriating authorities (by the admission of some public property officials in the Toronto area) are purposely low to protect the bargaining position of the authority. Moreover, owners are presented with little more than a single-sentence cash offer during the course of "negotiations", with no clear and detailed indication of the basis of the offer. Owners often react negatively on the basis of their own criteria of compensation. The upshot is all too often a bargaining stand-off, lacking the basis for negotiation or mutual understanding.

Current expropriation procedures in Ontario are based on the principle of mutual responsibility for settlement of compensation and the assumption that voluntary negotiation ordinarily results in "due compensation". The principle of mutual responsibility should continue to apply, especially with respect to the disclosure of information and the award of tribunal and court costs resulting from disputed settlement. Yet examination is needed of the assumption that the process of bilateral negotiation takes care of itself once the owner receives sufficient notice and a formal cash offer after six months. A simple bargaining relationship between an expropriating authority and an owner places many owners at an unfair disadvantage.

The Bureau recommends that owners be granted, as a matter of right, all the information and reasonable professional assistance which they require to establish their legal position and the fair value of their property. Expropriation authorities should be required to provide owners with a copy of the original appraisals together with an explanation of how the first cash offer was determined.

This requires that the original appraisals be disclosed to the owner and that the original offer be presented in such a way as to make clear the expropriating authority's position and the owner's responsibilities. This could be accomplished best if the original offer was

for the market value of the property taken, and if it was clearly indicated to the owner that he was entitled to question the appraised market value and to claim additional compensation for any of several specified loss and relocation items (see below). In this way the two basic aspects of an owner's loss resulting from expropriation would be separated procedurally, and the position of both the owner and the expropriating authority would be open to more meaningful and objective negotiation.

Although the suggestions above may result in expropriating authorities having to "prejudice" their position during the course of negotiation, it should be pointed out that the concept of prejudiced position is really relevant only to voluntary transactions.

The 1965 amendment to the Expropriation Procedures Act which established a provincial Board of Negotiation has been more attractive in theory than in practice. The main problem with respect to the Board of Negotiation concerns the fact that neither the authority nor the owner is bound by any rules of evidence in the presentation of his position. In a number of cases, for example, owners have merely presented unsupported cash demands and the Board of Negotiation has suggested a settlement which **appears** to be the arithmetic average between the offer of the expropriating authority and the demand of the owner. It would appear that a more equitable approach to mediation is needed.

"DUE COMPENSATION"

The provision of the Act respecting compensation to expropriated owners is the basic reference in the measurement of such compensation. Accordingly, one would expect that the compensation provision would clearly set down both the principles and the elements of compensation. Unfortunately, the current provision is summary and vague. Section 6 (1) of the Act merely provides that:

> *Where land is expropriated or injuriously affected by an expropriating authority in the exercise of its statutory powers, the expropriating authority shall make due compensation to the owner of the land expropriated or from any damage necessarily resulting from the exercise of such powers, as the case may be, beyond any advantage that he may derive from the work for which the land was expropriated or injuriously affected.*

The rules of compensation continue to derive from the vagaries of court decision and from negotiation between the parties. This stands in marked contrast to many other jurisdictions. In the United Kingdom, an entire statute is devoted to compensation — The Land Compensation Act. In the American states of Pennsylvania and Wisconsin, where uniform expropriation statutes recently have been passed, 14-part and 8-part sections, respectively, are devoted to compensation.

It is important to distinguish between compensating an owner for his property and "making him whole" as a result. Compensation in the former case is based on the principle of exchange, whereas compensation in the latter case is, or should be, based on the principle of indemnity or reparation. It is the principle of indemnity — literally the principle of making whole again — which is applicable to "due compensation" for expropriation, and it is the condition of the owner rather than the condition of his property which should be essentially under consideration. The commodity-oriented principle of exchange applies only in a voluntary market place where transactions, prices and expenses "incidental" to transactions must be mutually acceptable to the parties concerned before transactions occur.

STANDARDS OF COMPENSATION

Three traditional standards of value must be considered in the determination of compensation for expropriated property. Such property may be conceived of as having **value to the taker, market value,** or **value to the owner.**

The fact that expropriated property may have some special value to the expropriating authority, in itself, is not

normally at issue in determining compensation due to the expropriated owner. Such value to the taker may arise from an urgent public need for the property, the unique adaptability of the property to the public use or purpose concerned, or because the property represents the last parcel in a mass acquisition (and hence possesses a special "hold-up" value that the authority may be willing to pay in order to complete its acquisition). In each of these cases, the value to the taker bears little or no relationship to either the loss sustained by the expropriated owner or to the ordinary market value of the property. Only if the expropriating authority's need for a property is in competition with other similar demands in the open market can it be said that value to the taker has a direct bearing on compensation for expropriation.

The market value of the property taken is the basic element to be considered in the compensation of an owner for his loss. In many of the American states market value remains the sole element of compensation to which the expropriated owner is entitled. In the United Kingdom, market value of the property taken, plus certain specified additional allowances, constitute the basis of compensation. While the Canadian situation is somewhat confused by the continued application of value to the owner, the market value of the property taken is still the major element of compensation.

Market value may be simply stated as the price at which a prudent owner under no compulsion to sell would sell a property to a prudent buyer under no compulsion to buy. Most property has a readily appraisable market value relating to its use and location. The best measure of its value is usually the current normal sale value of comparable properties. In other cases, where a property is owned for its income rather than directly for its amenities, and where comparative sales are infrequent, the main test of present market value is the capitalized rental value. In rare cases, where there is no market demand for a property (e.g. certain institutional properties such as churches) or where unusual structures are involved, "market" value can be determined only by calculating the cost of reproducing the building subject to depreciation plus the cost of land.

Market value has served as the basis for compensation for two reasons. First, it provides a practical and objective method of determining compensation. Secondly, it relates directly to what an owner is losing as a result of expropriation. Yet both of these advantages of the market value approach are subject to qualification. Property appraisal is not an exact science, and specific appraisals of market value are always based on certin assumptions respecting building life, sales comparability, rental considerations, and the condition of the market itself. In some extreme cases, such as with respect to the four Alexandra Park properties mentioned above, different appraisal assumptions may result in substantially different appraisals of a property's market value. Many expropriating authorities, aware of this problem, wisely require two appraisals of expropriated property before they make an offer to the owner.

The essential criticism of the market value approach, however, traces not to its imprecision but to its incompleteness. If an owner of expropriated property receives only the market value of the property he is losing, he is by no means fully compensated or "made whole again" for all the losses resulting from the expropriation. Some jurisdictions, in recognizing the public obligation to fully indemnify an owner for expropriation, permit special allowances in addition to market value. This is the case in the United Kingdom and is developing in American federal and state jurisdictions.

In Canada, the courts have relied upon a third concept in the measurement of compensation — value to the owner. The Supreme Court of Canada in Woods Manufacturing Co. v. The King (2 D.L.R. 465 (1951) stated:

> *It does not follow, of course, that the owner whose land is compulsorily taken is entitled only to compensation measured by the scale of the selling price of the land in the open market. He is entitled to that in any event, but in his hands the land may be capable of being used for some profitable business which he is carrying on or desires to carry on upon it and, in such circumstances it may well be that the selling price of the land in the open market would be no adequate compensation to him for the loss of the opportunity to carry on that business there. In such a case Lord Moulton in Pastoral Finance Association v. the Minister (1914) A.C. 1083 at 1088, has given what he describes as a practical formula, which is that the owner is entitled to that which a prudent person in his position would be willing to give for the land sooner than fail to obtain it.*

The Moulton formula of value to the owner is obviously not a market value formula, and it would seem to provide clear and fair grounds for full compensation to an owner for loss resulting from expropriation. Yet there are problems in applying the formula. It is roundly condemned in the United Stated and the United Kingdom as being too subjective and resulting in unpredictable and excessive compensation. Moreover, expropriating authorities usually consider value to the owner as being the same as market value. That is, they feel that an owner would be profiting from expropriation if he were given more than the fair market value of his property, and that only rarely does market value and value to the owner fail to coincide. This view is variously based on the assumption that owner expenses incurred as a result of expropriation are normally reflected in market values, are indirect and often inestimable, and are compensated for anyway because all-cash settlements improve the financial position of owners.

In actual settlement, however, expropriating authorities usually include a degree of special consideration in their final offer. The inconsistency between the stated position and the actual behaviour in this respect is the result of two factors. First, expropriating authorities are reluctant to state publicly that they will compensate above market value for fear of risking their bargaining position. Secondly, the Courts themselves have not given consistent guidance in the meaning of "value to the owner". The problem has centred around attempts by the Courts to include all compensable elements under the single all-embracing concept of value to the owner. A 1950 summary of the law in this respect, contained in the Canadian Encyclopedic Digest, put it as follows:

> *If the owner has suffered any loss by disturbance or otherwise resulting from the expropriation, the court in estimating the value of the property may take such loss into account only to the extent that it is an element in its value, but not otherwise; and the owner has no independent cause of action for damages for such loss apart from such value. What the court must do when a claim for the property is made is estimate its value. The owner's right to compensation for loss can exist only if his loss is an element of such value; if it is not, there is no statutory authority for granting compensation for it.*

It is not clear from this summary what aspect of an owner's loss, in addition to the market value of the property concerned, will be compensable.

The customary arbitration and court practice of allowing 10% for compulsory taking reflected the imprecision of the value to the owner concept. Nevertheless, in 1946 an important case — Irving Oil v. The King — established that at least loss owing to business disruption was a compensable item, even though it bore little or no relationship to the market value of the property. Moreover, court decisions in 1961 and 1962 — Drew v. The Queen and Samuel, Son & Co. and City of Toronto — rejected as invalid the customary 10% allowance for compulsory taking, apparently opening the door to a whole range of special allowances. In the words of one judge in a 1962 decision (Norris and City of Kitchener):

> *There is no doubt that the effect of the Drew case as applied in the Samuel case is to alter the principle heretofore applied in this court in ascertaining special value to the owner to the extent of taking into account particular items of loss to the owner arising from the expropriation which have hitherto been excluded.*

The judge went on to cite several cases where allowance for such items as alterations, moving costs, business and profit loss, and dislocation and disturbance had been disallowed in the past. While more difficult to administer, this shift from an arbitrary percentage to an itemized allowance for losses is a well taken reform.

The value to the owner concept should be discarded. It was abandoned in the United Kingdom as long ago as 1919 when the Acquisition of the Land Act was passed. This Act adopted market value as the basis for compensation, supplemented by six specific rules defining additional elements of compensation. The latter approach is being adopted increasingly in the United States.

MARKET—PLUS COMPENSATION

The Bureau recommends that the value to the owner concept be discarded by amending the Ontario Expropriation Procedures Act in favour of a supplemented market value standard of compensation. Following is a discussion of the elements which we believe should be included in the **market-plus** compensation formula, if the totality of an expropriated owner's loss is to be taken into account.

(1) Market Value

The major, and most readily (although by no means exactly) determinable element of an expropriated owner's loss is the market value of the subject real estate. This should continue to be the **starting point** in the settlement of compensation, as we have recommended above.

It should be realized that there are certain aspects of market value, such as development potential and special advantages, which are always determined more by judgment than by calculation. Since the courts have recognized that reasonable potentialities and special advantages (such as the possession of a licence) are allowable aspects of market value and/or value to the owner, there is no necessity or advantage to legislating in this respect. But there is one aspect of potentiality which should receive some attention — the effect of zoning. The problem is not so much appraising the value of property within existing zoning as it is allowing for the possibility of a future change in zoning which would make the subject property more valuable. Many owners have argued that they are entitled to a special allowance because they have bought or continue to own property in the allegedly firm belief that such rezoning is probable. Purely speculative claims in this respect are readily rejected by expropriating authorities, arbitrators, and the courts. On the other hand, when a rezoning or subdivision application is under consideration, this must be and is judged as increasing the present market value of the subject property at the time of taking.

A problem in this respect, however, concerns the practice of some courts of allowing evidence on potentiality for a period after the date of taking. Practice and precedent in this respect is uneven and should be examined. In 1956, a subdivider was not permitted compensation on the basis of the probable net profits of his subdivision even though it was approved by North York only two months after the expropriation of part of the tract by the school board (North York Board of Education v. Village Development Ltd. On the other hand, certain property owners along the Bloor subway were offered increases of up to 40% over the original offer for their property as a result of an unexpectedly accelerated high-density re-zoning policy in the area — a policy which did not become clear until several months after the date of expropriation.

The most difficult problem concerning municipal development policy and expropriation occurs when an owner is able to present evidence supporting his rezoning claim on the basis of general land-use trends or comparable municipal rezoning decisions elsewhere. Such factors must be considered in the light of the extreme flexibility of planning and zoning policies in Ontario municipalities. A classic case in point concerns a property, in the path of the Bloor subway in South Rosedale, which was expropriated by Metro in 1959. The arbitration award in this case was generous because the arbitrator considered the property to be an exceptionally ideal apartment location (even though the trend in City policy in the Rosedale area was toward a greater restriction on apartments). The award was substantially reduced by the Court of Appeal because two judges were of the opinion that there was **little or no possibility** of an increase in zoning density for the property at the date of expropriation. The third judge supported the arbitrator's decision that such rezoning **was probable.** In fact, 19 months after the date of expropriation (and before either hearing) apartment zoning in the area was restricted.

This case illustrates the difficulty in evaluating potentiality under circumstances of indefinite municipal planning and zoning controls. A useful reform in this respect would be the establishment of some method of systematically ascertaining municipal development policy at or immediately before the date of expropriation. In the United Kingdom, when the permitted development potential of an expropriated property is in doubt, a local certification of that potential (subject to Ministerial appeal) is required before the matter can be argued. If the local authority changes its development policy within five years of such certification, the former owner is entitled to additional compensation (Land Compensation Act, 1961 (9 & 10 Eliz. 2 Ch. 33) Section 23(1)). In all circumstances, unless such opinion is authoritatively documented, expressions of owners and appraisers should be held immaterial in the determination of a property's legal potentiality.

(2) Business Loss

Assuming that the market value of property has been fairly and openly determined, other elements should be considered if an owner is to be put in as good a position financially as he would have occupied if the property had not been taken.

The Canadian Encyclopedic Digest reflects the past uncertainty of the courts in the following comment on business loss resulting from expropriation:

> *. . . No allowance can be made for loss of profits, qua estimated profits, but a trader whose property has been expropriated is entitled to recover for a diminution in the value of his goodwill resulting from his ejectment, and this necessarily lets in some loss of business or estimated profits.*

Inconsistent court precedent and the lack of specific legislation have resulted in a considerable degree of injustice with respect to business loss resulting from expropriation. Clearly, it would not be fair to allow the owner of a business located on expropriated property to claim compensation for loss of profits without directly relating such loss to the actual loss of property. Nevertheless, many small businesses rely heavily on the goodwill the owner has built up in a specific location. In a new location, it may take several years before an owner can re-establish the goodwill that he had enjoyed in the previous location. In some cases a comparable location is simply not available, and the owner is forced out of business. This is particularly true of businesses which are almost entirely dependent upon ethnic and/or neighbourhood clienteles, or on the geographical nature of their location — e.g. a marina or a day camp within a metropolitan area. There are also the damages resulting from general business disruption (discussed below). Specific compensation for loss of profits and/or for business discontinuance should be determined on the basis of evidential proof. Legislative direction, however, would guarantee that such items would be specifically considered in the settlement of compensation and would eliminate the uncertainties of court precedent.

(3) Residential Loss

Under ordinary circumstances, the amenity value associated with a residential property — its proximity to shopping, schools, transportation, and the nature of the neighbourhood in which it is situated — is an integral part of its market value. In some situations an owner possesses a special relationship to his property which is neither marketable nor sentimental but which arises from the special adaptability of his property to his particular needs. Expropriating authorities, arbitrators, and the courts have long recognized this and have attempted to compensate for these relatively rare

situations. Examples often cited are the case of the parapalegic who has a special ramp system in his house or a blind person who is familiar with his house and neighbourhood. Yet in a recent case in York Township an expropriated home-owner who claimed that his garage was especially adapted to housing an aeronautical device which he was constructing was not given any additional allowance for such special adaptability. Clearly this is an area for specific judgment rather than general provisions.

Sentimental value never has been considered a compensable loss resulting from residential expropriation, although it can be pivotal in market transactions. This is practical since sentimental value does not lend itself to second- or third-party estimations, and, if legitimate, cannot be financially compensated for anyway. Nevertheless, such loss resulting from residential expropriation is sometimes harsh. The subjective elements of value to a home-owner arising for long-term residence in a neighbourhood and the proximity of an owner's place of employment can be important. While these subjective factors are inestimable and virtually non-negotiable, expropriating authorities, arbitrators, and the courts should exhibit greater willingness to give the expropriated owner the benefit of the doubt.

(4) The "Incidental" Expenses of Expropriation

(a) Moving Expenses

One of the most important of the so-called "incidental" expenses incurred by an expropriated owner is the cost of moving to new premises. While the cost of residential moving within the same urban area is usually moderate, business relocation can be very expensive. In both cases, however, moving expenses are of more than "incidental" importance to the owner concerned.

Since there is no statutory authority for compensating moving costs necessitated by expropriation, it has been left to the courts to determine to what extent they can be included under the concept of value to the owner. Precedent in this respect is uneven, and expropriating authorities have not been consistently directed. Just as decisions in 1961 and 1962 reversed previous precedent by allowing moving costs for businesses, so could they be upset by subsequent decisions. There appears to be no court decision which authoritatively establishes moving costs as a legitimate consideration in the determination of compensation to expropriated home-owners. (Expropriation for urban renewal schemes is a fortunate exception in this respect, since provincial and federal legislation provides that moving expenses must be included in calculating relocation compensation.)

The Expropriation Procedures Act should be amended to make explicit provision for moving costs necessitated by expropriation. In order to control against capricious moving, it may be necessary to write distance and cost maxima into the legislation with different maximum allowances for the residential and business categories. It should be noted, howevr, that U.S. attempts to place cost maxima on compensable business moving and relocation costs have resulted in some businesses with particularly complicated requirements being only partially compensated for these expenses. U.S. urban renewal legislation covering business moving and relocation compensation, although offering alternative formulae to the displacee under continually amended regulations, has not solved the problem. Instead, liberal administrative interpretation is being relied upon to achieve equity. But at least compensation is specifically authorized by legislation.

The various provisions for relocation compensation should be as simplified as possible and should give the displacee the option to decide whether to accept fixed schedule payments or to claim and prove compensation for his actual costs. This optional payment procedure should be adopted (with respect to moving, and all other compensable "incidental" costs of expropriation) by amendment to Ontario compensation legislation. As a recent U.S. study pointed out, the optional payment procedure has long been a successful income tax device permitting the taxpayer to take his choice of a standard deduction, or to prove his itemized deductible expenses.

(b) Redecoration

It is often argued that the costs of partially or fully redecorating a new home or place of business is a necessary cost of moving into a new property. The fact that redecorating costs are not currently compensable in expropriation compensation is a constant source of complaint by expropriated owners, especially home-owners. Certainly, moving into a new house necessitates expenditures on repainting, draperies, and carpeting; moving into new business premises necessitates expenditure on new signs, display cases, repainting, etc. In both cases, redecoration is a tangible and specific expense incurred as a result of expropriation. The Bureau recommends that redecoration allowances be a statutory element of expropriation compensation, although any allowance should be subject to rigorous evidential proof of the extraordinary expenses involved. The optional payment provision should apply.

(c) Refinancing

The majority of expropriated owners have undischarged mortgages on their properties at the time of expropriation. Such cash received in compensation from the expropriating authority must be used to discharge these mortgages and to finance other "incidental" expenses resulting from expropriation, and usually the owners must take out new mortgages on the properties to which they move. In most cases today new mortgages are obtainable only at considerably less favourable terms than former mortgages. This is particularly true when NHA mortgages cannot be obtained, as in the case of resales. The refinancing differential, together with the various fees and costs involved in refinancing, should be compensable subject to adequate proof that the owners extraordinary cash position resulting from expropriation has not fully compensated for it. The provision of the Wisconsin condemnation Act (32.19 (3)) in this respect should be considered for Ontario:

REFINANCING COSTS. All costs incurred by the owner to finance the purchase of another property substantially similar to the property taken provided that:

(1) At the time of taking the land condemned was subject to a bona fide mortgage or was held under a vendee's interest in a bonafide land contract, and (2) such mortgage or land contract had been executed in good faith prior to the date of the relocation order in condemnation . . . or determination of necessity of taking . . . Such costs shall include:

(a) Reasonable fees, commissions, discounts, surveying costs and title evidence costs necessary to refinance the balance of the debt at the time of taking actually incurred.

(b) Increased interest cost, if any, above that provided in the former financing. The computation of the increased costs, if any, shall be based upon and limited to:
1. A principal amount of indebtedness not to exceed the unpaid debt at the date of taking.

2. A term not to exceed the remaining term of the original mortgage or land contract at the date of taking.

3. An interest rate not to exceed the prevailing rate charged by mortgage lending institutions in the vicinity.

4. The present worth of the future payments of increased interest computed at the same rate of interest as in subs. 3.

(d) Professional Costs

An expropriated owner faces a variety of professional costs arising directly from the expropriation of his property. In order to determine and protect his legal and financial position, he should retain a lawyer and — under current negotiation practices —a qualified appraiser. A prudent owner must incur these costs whether or not he intends to go on to arbitration or litigation. If he does so proceed, his expenses mount and these are not covered adequately by the modest court fee schedules now in effect. For example, arbitration costs are still awarded on a party and party basis according to the Supreme Court tariff of eight dollars per day for expert witnesses, and three dollars for appraisers, who are not considered to be experts. This persists in spite of the recommendation of the On-

tario Select Committee on Land Expropriation that such a token tariff be revised and that costs be awarded on a solicitor and client basis for awards of under $1,000 at the discretion of the tribunal.

When an expropriated owner is acting in good faith, all his reasonable professional costs should be compensable **at both the negotiation and arbitration stages** of settlement of compensation. Compensable professional costs should include those necessitated by refinancing and relocation as well as those incurred during negotiation and arbitration of compensation. An expropriated owner very often requires legal assistance in the process of refinancing a new mortgage. Moreover, in the process of relocation necessitated by expropriation, an owner usually must find a new property with the assistance of a professional realtor. Once again, as with moving costs, current urban renewal legislation provides for a certain degree of relocation assistance in the form of current lists of comparable housing and free pool cars. No such assistance is offered in expropriation for other purposes. Indeed, many of the residents of Napier Place recently resorted to professional realty assistance above and beyond whatever assistance the City's list of comparable properties offered.

Thus professional costs necessitated by expropriation should be compensable. Moreover, if the Expropriation Procedures Act is amended in this respect, a realistic schedule of allowable costs should be included. Provision should also be made for an optional payment procedure as discussed above under moving expenses. Certainly, expropriating authorities, arbitration tribunals, and the courts, should be explicitly directed to take into account all of the professional costs justifiably incurred by expropriated owners.

Even where comprehensive relocation compensation has been allowed — for example in U.S. federally supported urban renewal programmes — it has been found that owners require additional assistance before they are fully indemnified for the expropriation of their property and for the forced move which results. Expropriated owners, and particularly owners of small businesses, often require considerable assistance from lawyers, realtors, relocation officers, and social workers before the full range of relocation options and payments is made clear to them. Often the further assistant of low interest loans is required (as through the U.S. Small Business Administration) to viably establish a business at a new location.

All of these aspects of relocation have been traditionally regarded as incidental to the problem of compensating for expropriation. Yet it is clear that the problem of relocation stemming from expropriation is often not soluble on the open realty market, and that **the expropriated owner is not properly compensated for the taking of his property until he is restored to his former residential and/or business position in the new location.** This is particularly true when property and location comparable to that expropriated is only obtainable at higher prices (as is frequently, but not exclusively, the case with slum clearance).

This has led some to propose that the traditional financial settlement of compensation should be replaced by the mutually agreeable equivalent reinstatement of an expropriated owner entirely at the cost of the expropriating authority. It would appear that such a procedure would be impractical in most situations since owners and expropriating authorities would find it difficult to agree on equivalent properties. It would also be inapplicable in slum clearance situations, where equivalent reinstatement would defeat the whole purpose of the clearance.

Market-plus financial compensation thus would appear to be the more practical way of indemnifying an owner for the expropriation of his property. Financial settlement has the added advantage of permitting an expropriated owner to move to a better level of accommodation with his other savings if he so desires.

A NOTE ON ARBITRATION

A system of compulsory arbitration, which some have recommended, is undesirable. We view such a system as being contrary to the objectives of mutual responsibility for settlement and to expeditious expropriation. It would be unnecessary, given effective legislative provision for less partisan negotiation between expropriator and expropriated and for comprehensive market-plus compensation.

If the compensation provisions of the Expropriation Procedures Act are to be substantially amended, it would be propitious to unify highly fragmented arbitration jurisdiction in some areas of Ontario. In fact, the Province itself set the stage for arbitration unification by establishing a provincial Board of Negotiation.

Arbitration jurisdiction is nowhere more fragmented in Ontario than it is in Metropolitan Toronto. The City of Toronto and the Township of Etobicoke and their respective school boards have designated an experienced lawyer as their "official arbitrator". North York, Scarborough, York, and Swansea, along with their respective school boards, have designated the Ontario Municipal Board as their arbitrator. On the other hand, the remaining municipalities and the Metropolitan Corporation for its own and Transit Commission purposes have designated the County judge.

The determination of market value, value to the owner, special allowance for compulsory purchase, and the award of tribunal costs are matters which require both special knowledge and consistent judgment; they rarely lend themselves to purely legal or mechanical calculation. Unification of jurisdiction in the Metro area, and in other Ontario regions where it is currently fragmented, would both expedite matters and would serve to ensure a consistent approach to arbitrated compensation.

Under the current system, if no official arbitrator has been designated arbitrations must either go to a County judge or to the Municipal Board. The latter is already overloaded with other judical and quasi-judical duties, and since arbitration hearings have no special priority on its schedule (as they do in many court jurisdictions in the United States) long delays can often result. For example, some owners recently expropriated by the University of Toronto had to wait up to a year before the Municipal Board heard arbitration.

In order to ensure consistent and expeditious arbitration, the Bureau recommends that a single arbitration tribunal be established in Metropolitan Toronto. This tribunal should be appointed by the Province and should consist of persons with professional real estate experience as well as lawyers and judges. In addition, cases and awards should be systematically reported and a realistic schedule of costs should be adopted.

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BUREAU OF MUNICIPAL RESEARCH

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