

Large Scale Expropriations and Reverberative Effects
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Introduction

Even the simplest of expropriations is not simple. Although the determination of compensation arising from the compulsory taking of property may be straight forward, the fact that a property owner's common law right to enjoy private property has been disturbed inevitably complicates matters. Moreover, the intricate statutory scheme intended to ensure that expropriated owners are made whole by receiving full and fair compensation for losses arising from an expropriation often leads to a complicated and, at times, cumbersome process. Needless to say, when the project underlying an expropriation is large and its effects far-reaching, the process through which expropriated owners are compensated becomes more byzantine.

Plans are now under way to construct a new international border crossing between Windsor, Ontario and Detroit, Michigan. Few dispute the fact that this new international thoroughfare is needed in order to alleviate congestion associated with the Detroit-Windsor border crossing and to facilitate the economic benefits associated with the free flow of both people and goods between Canada and the United States. Although the route for the new border crossing has not yet been finalized, nor have government studies been completed, recently published data indicates that the probably path for this new crossing will traverse through the City of Windsor to the City of Detroit and will connect major transportation corridors in Ontario (Highway 401) to interstates in Michigan.²

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² Detroit River International Crossing Study – Area of Continued Analysis, November 2005.

The rights-of-way required for this massive undertaking are projected to cross established urban areas. As a consequence, it appears that an unprecedented number of property owners and businesses will be subject to expropriation (either in whole or in part). Although the route for the project has not been finalized, it is estimated that hundreds of property owners and businesses will be expropriated on the Ontario side, making this undertaking potentially the largest expropriation in Ontario since the land acquisitions for the Pickering Airport/North Pickering Project in the 1970s.³ The size of this undertaking, and its impact on the communities through which it crosses, will complicate issues concerning compensation, as various aspects of compensation will be influenced by the secondary impacts of the project itself.

The Ontario *Expropriations Act*,⁴ provides for a compensatory regime that screens out the secondary effects of an expropriation and the works associated therewith. This analysis will explore the ways in which major infrastructural works or public undertakings have secondary or reverberative impacts on factors influencing compensation. This paper will also highlight how Ontario's expropriation legislation addresses these secondary impacts.

The Secondary Impacts of Major Public Works Projects

When a major public work or infrastructural development is announced, it almost immediately has effects on the local economy, real estate market and businesses. The larger the public undertaking, the more pronounced the effects. Economic aspects that are influenced by the announcement of a large public development and a corresponding land acquisition include the following:

³ Pickering Lands Internet Cite, Transports Canada - Ontario Region, Pickering Lands (History), online: Transport Canada <http://www.tc.gc.ca/OntarioRegion/Pickering/history.htm> (last modified October 17, 2005).

⁴ *Expropriations Act*, R.S.O. 1990, c.E. 26.

1. The market value of land in areas in or around the public undertaking is influenced by the development. This can take the form of increases in value due to the complimentary influences the public work will have on land value or, conversely, decreases in market value based on the detrimental factors resulting from the development. The market value of commercial properties abutting a new major public thoroughfare will likely increase as a result of its announcement. Conversely, the market value of residences abutting a newly-proposed sewage lagoon will likely decrease.
2. The value of property is influenced by the potential scarcity of available lands, as a result of the demands a large public project has on a real estate market. This effect is more pronounced in smaller communities, or niche areas, where a limited supply of serviced or niche-use land exists.
3. Businesses are affected by the announcement of a development, as some businesses will enjoy benefits from a development and others will suffer. Another effect on businesses, which corresponds with the increase or decrease on real estate values is the change in rental rates for properties in or around the proposed development. The impact on rental rates is often a highbred between business impacts and real estate values.
4. When lands are located within the right-of-way required for the development, the subject lands often become blighted, due to deferred investment and maintenance or increased vacancy. This blight arises from the uncertainty created by the impending development. Furthermore, lands within a proposed right-of-way become less marketable due to the imminence of expropriation.
5. Although not purely economic, planning impacts are also associated with a major development. Lands may be “frozen” from development as a result of the impending development or even the potential for a development. At times, planning decisions relating to future uses may be influenced by the impending developments for which expropriation is required. Such planning decisions sometimes take the form of “down-zoning” in order to control the quantum required to acquire the required lands.

All of these factors can influence the comparable sales or measures of compensation for owners affected by an expropriation. An injustice occurs when an expropriated owner receives less compensation for his or her land or business, as a result of its loss in value due to the announcement of the expropriation or its secondary effects. Similarly, an expropriated owner is unjustly enriched if he or she receives compensation greater than that to which he or she would have otherwise been entitled, as a result of the announcement of the expropriation. The English common law, as adopted in Canada and as codified by expropriation legislation, attempts to prevent either injustice as will be discussed below.⁵

Screening Out Secondary Impacts of Expropriation

When an owner is expropriated, he or she has the following entitlements to compensation under the *Expropriations Act*:

1. Compensation for the market value of the lands expropriated;⁶
2. Compensation for injurious affection to the remaining lands;⁷
3. Compensation for disturbance damages and business loss resulting from the expropriation;⁸ and
4. Compensation for relocation expenses, including the cost of equivalent reinstatement.⁹

⁵ *Pointe Gourde Quarrying & Transport Co. v. Sub-Intendent of Crown Lands*, [1949] A.C. 565 (P.C.), considered in *Fraser v. R.* (1963), 40 D.L.R. (2d) 707 at 718 (S.C.C.); Section 14(4)(b) of the *Expropriations Act*.

⁶ *Expropriations Act*, Sections 13(2)(a) and 14.

⁷ *Expropriations Act*, Sections 13(2)(c) and 21.

⁸ *Expropriations Act*, Sections 13(2)(b), 18 and 19.

⁹ *Expropriations Act*, Section 13(2)(d), 14(2), 15 and 18(1).

The provision of compensation for the heads of damages set out above is intended to provide an owner with full compensation, as assessed on an objective, rather than subjective, basis.¹⁰ Thus, compensation is to be evaluated looking at the highest and best use for properties and not based on the “value to the owner” approach.¹¹ As discussed above, under the *Expropriations Act*, the impact of the development for which lands are expropriated, as well as any secondary or reverberative effects from the development are to be excluded from the determination of compensation.

The Development and Market Value

The *Expropriations Act* endeavours to screen out the effects of the “development” or the “scheme”¹² in the determination of market value. Section 14 of the *Expropriations Act* addresses market value and reads as follows:

Market value

14. (1) The market value of land expropriated is the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer. R.S.O. 1990, c. E.26, s. 14 (1).

...

Idem

(3) Where only part of the land of an owner is taken and such part is of a size, shape or nature for which there is no general demand or market, the market value and the injurious affection caused by the taking may be determined by determining the market value of the whole of the owner's land and deducting therefrom the market value of the owner's land after the taking. R.S.O. 1990, c. E.26, s. 14 (3).

Idem

(4) In determining the market value of land, no account shall be taken of,
(a) the special use to which the expropriating authority will put the land;

¹⁰ Ontario, *Report of the Royal Commission Inquiry into Civil Rights*, vol. 3 (Toronto, Queen's Printer: 1968).

¹¹ John A. Coates and Stephen F. Waqué, *The New Law of Expropriation*, looseleaf ed. (Toronto, Carswell) at 10-82.

¹² The words “scheme” and “development” are used interchangeably throughout this paper. Both words have the same meaning, as defined under Section 14(4)(b) of the *Expropriations Act*. The *Expropriations Act* uses the term “development” and the common law often uses the term “scheme”.

(b) any increase or decrease in the value of the land resulting from the development or the imminence of the development in respect of which the expropriation is made or from any expropriation or imminent prospect of expropriation; or

(c) any increase in the value of the land resulting from the land being put to a use that could be restrained by any court or is contrary to law or is detrimental to the health of the occupants of the land or to the public health. R.S.O. 1990, c. E.26, s. 14 (4).

Section 14(4) is used to screen out any scheme related activities including:

1. Land use restrictions imposed in advance of the actual land acquisition (at times known as “down zoning”);
2. The announcement of the expropriation having the effect of freezing private development, discouraging restoration or renovation of properties in and around the lands to be acquired (at times leading to urban blight) and creating a negative stigma for the surrounding area; and
3. The effect of pre-expropriation voluntary acquisitions by the expropriating authority or related entities on real estate trends.

The above examples all have an impact on the value of land. Due to Section 14(4)(b) of the *Expropriations Act*, these impacts may not be directly or indirectly considered in making a determination of value for the expropriated lands. At times in the compensation process, scheme related real estate transactions (such as those in the examples above) are relied upon by either side to demonstrate evidence of market value. Care must be taken by the parties and the decision maker to define the scheme and fairly screen out any transactions or indicators of value tainted by the development for which the expropriation takes place or the imminence thereof.

The Imminence of Development

As the effects of the development are to be screened out of the determination of market value, an important issue in the valuation process is the identification of the development and what factors the development has on market value. This exercise begins with determining when the effects of the development are triggered. Section 14(4)(b) specifically states that the effects to be screened out are brought on by the “imminence of development”.

The Ontario Municipal Board and the courts in Ontario have followed the general principle that the “imminence of development” is triggered at the time of the publication or announcement of the authority’s intention to expropriate, so long as the intention holds a degree of certainty. As the Ontario Municipal Board stated in the decision of *Torvalley Development Ltd. v. M.T.R.C.A.*¹³ in its discussion of the scheme (at page 87):

The board has no difficulty finding therefore, that even though the first statement of acquisition intent is clearly made public approximately 28 years prior to the expropriation, that intent is continued and has been supported by ongoing statements of the Respondent in published documents. That clearly brings it within the wording of “imminent prospect of expropriation” in the Act and is therefore not to be taken into account in determining the market value....

That, in turn, affects a variety of other issues such as the willingness of the public authorities to process the application for official plan and zoning amendment and the approach to the granting of the necessary fill permit. It follows that these issues must be examined in light of there being no prospect of expropriation.

The Ontario Municipal Board in the recent decision of *Gadzala v. Toronto*,¹⁴ found that a scheme to acquire lands on the Etobicoke Motel Strip had been in place since the adoption of the Toronto Waterfront Plan in 1967 even though the expropriations only

¹³ *Torvalley Development Ltd. v. M.T.R.C.A.* (1988), 40 L.C.R. 81 (O.M.B.), aff’d (1989), 42 L.C.R. 101 (Ont. Div. Ct.).

¹⁴ *Gadzala v. Toronto* (2004), 84 L.C.R. 176 at 195 (O.M.B.).

took place in 1996 and 1998. This finding was made where the Board identified (at page 195), "...that it was the clear intention of the public authorities to initiate a significant Scheme for the Motel Strip that included massive filling along the shores of the Lake, the capture of privately held lands, the creation of a public recreation area and the creation of a scenic drive".

In other cases, however, the Board has held that even though a development may have been announced, it did not become "imminent" until a later date.¹⁵ In all cases before the Board the finding of "imminence" is a finding of fact, which must be determined by the Board based on the evidence before it and the circumstances in each particular case.

Although jurisprudence has established the parameters for a test for determining the "imminence of development" in the context of determining market value, courts have applied a different test when evaluating the impact the impending expropriation and development has on business loss. This distinction will be discussed below in the section relating to disturbance damages.

The Scope of the Scheme

Another important finding of fact that must be made in regard to Section 14(4)(b) is the determination of the scope of the scheme. This determination is necessary in order to find a causal link between the development and certain factors affecting the value of the lands to be expropriated. In most circumstances, the Board will regard the scheme to be the planning regime or development relating to the land acquisition. However, at times the Board may find that the planning regime and development affecting the lands to be expropriated is part of a larger undertaking, which cannot be considered the scheme.¹⁶

¹⁵ See e.g. *Dempsey Estate v. Metropolitan Toronto* (1977), 14 L.C.R. 55 (L.C.B.).

¹⁶ See e.g. *Salvation Army, Canada East v. Ministry of Government Services* (1983) 29 L.C.R. 193 (O.M.B.), rev'd (1984), 31 L.C.R. 129 (Ont. Div. Ct.), aff'd (1986), 34 L.C.R. 193 (Ont. C.A.).

A critical element of a claim for compensation which relies on Section 14(4)(b) of the *Expropriations Act* is to properly characterize the scheme as causing the loss in value. If an expropriating authority can demonstrate that the planning or market forces that caused the blight or devaluing influence is not part of the “development”, the Claimant will be unable to have the effects of the negative influence screened out of the determination of market value.

In the decision of *Bozel v. City of Hamilton*,¹⁷ the Land Compensation Board determined a claim for compensation arising out of an urban renewal scheme in downtown Hamilton. In that case, the determination was made that the redevelopment plan received Ontario Municipal Board approval in 1967, even though the expropriation of the property did not take place until 1974.¹⁸ The appraiser for the Claimant made the determination that comparable properties around the subject suffered from planning blight since the initiation of the urban renewal scheme and, therefore, screened out such comparable sales. The appraiser for the Respondent did not agree with this position. The Board recognized that the urban renewal had the potential to influence value and was unable to accept the Respondent’s evidence.¹⁹ In discussing the effects of the urban renewal on market value, the Board stated (at page 21):

Obviously some properties that would have been improved under normal maintenance programmes suffered from deferred maintenance. The subject property may well have so suffered because of the market realization that the eventual use of this property would be for a land assembly for some form of redevelopment.

Whether the urban renewal had the effect of lowering the value of the subject property or enhancing the value of the subject property would be extremely difficult to determine. One could argue that because of the City Centre improvement there had been an enhancement in value of the total area. At the same time one could take the position that by the extension of the urban renewal to include the subject property and its eventual acquisition by expropriation

¹⁷ *Bozel v. City of Hamilton* (1978), 15 L.C.R. 16 (Ont. L.C.B.).

¹⁸ *Ibid.* at 16.

¹⁹ *Ibid.* at 17 and 20.

that in fact the market was totally destroyed and that there were no-free market systems affecting the subject property.

After recognizing that the urban renewal effected value pursuant to Section 14(4)(b), the Board in *Bozel* indicated that it would be of assistance if the appraisers could make a determination of value before the public notice or discussion of the scheme was known and then provide an adjustment factor for the elapsed time period. Although the Board conceded that this might not result in a more reliable determination of market value, it would at least provide some “check” as to the total effect of the scheme and whether an enhancement or reduction of market value existed in the subject area.²⁰ The Board in this decision recognized that certain schemes in an urban area can have dual effects on market value and, therefore, be difficult to screen out. This process becomes complicated further, if one is to attempt to separate “historical blight” in an area from “urban renewal blight”.

Once a scheme has been identified, one must examine all the impacts that the scheme would have on factors affecting the value of an expropriated property. In instances of urban blight or underutilization caused by a scheme, the following factors may be influenced:

- (1) The potential highest and best use for the expropriated property, as a result of land use restrictions and planning constraints;
- (2) The potential highest and best use for the expropriated property, as a result of market forces and private sector demand impacted by the announcement of the development;
- (3) The market demand for the expropriated property and the surrounding area, as a result of the announcement of the development;
- (4) The actual income of the expropriated property (if one is to employ the income approach to valuation);

²⁰ *Ibid.* at 22.

- (5) The physical condition of the expropriated property and its neighbouring properties as a result of deferred maintenance caused by the announcement of the intention to acquire;
- (6) The vacancy in the area surrounding the expropriated property, caused by the market having knowledge of the development and the impending expropriation; and
- (7) The sales price of neighbouring (and potentially comparable) properties similarly affected by the development (for the same reasons as those noted above).

In assessing the factors set out above, one must consider the potential benefits and detriments the impending development may have on the value of property to be expropriated and on comparable sales used to determine the value of the expropriated property. In certain instances, properties slated for acquisition may not enjoy the benefit of a value-increasing development for which the expropriation is taking place, but neighbouring properties may enjoy an appreciation in value as a result of the development. In this case, two competing effects on the value of properties must be considered and screened out in order to properly characterize the impact of the scheme.

Screening Out the Development and Injurious Affection

Injurious affection occurs when a portion of a property is expropriated and the remaining portion of the lands suffers from a loss in value. Injurious affection can occur as a result of lands becoming landlocked, being severed, losing exposure or becoming of a shape, size or configuration that would prohibit the maximization of utility of the property. Unlike claims for market value, claims for injurious affection are not to screen out the effects and impacts of the development.²¹

²¹ *Salvation Army v. Ministry of Government Services*, *supra* note 16 at 203 (C.A.).

In instances where one is to determine injurious affection using the “before and after” method, pursuant to Section 14(3) of the *Expropriations Act*, one must ensure that there is no screening out of the development in the “before scenario”. This was articulated by the Ontario Municipal Board in the decision of *Salvation Army, Canada East v. Ontario*,²² when this arbitration was sent back to the Ontario Municipal Board (at page 309):

It appears to the board that, on a partial taking, the use together of S. 14(3) and (4)(b) will not be, in future, quite as simple as it had been understood in the past, prior to the appeal decisions in this case. This is especially true where large-scale planning programmes like the Parkway Belt Plans are involved. Subsequent to the usual “before and after” valuations and before drawing a final conclusion on the combined figure representing market value and injurious affection, a further step now appears to be required in order to assure that the resultant amount of injurious affection, when segregated from the rest, includes only a reduction in value for the retained portion caused by the acquisition, construction and/or the use of the works. Since, by its terms, Section 14(3) can only apply where the land taken is of a size, shape or nature denuding it of a separate value distinct from the remainder, there will be no shortage of difficulties.

Even though one is not to consider the effects of the scheme in valuing the remaining lands, one is to consider the effects of the acquisition, construction and/or use of the works for the injurious affection claim. This was articulated by the Ontario Municipal Board in the decision of *Parks v. Ministry of Transportation*,²³ where the Board addressed factors to consider in relation to injurious affection calculations as follows (at page 179):

... [T]he board agrees with counsel for the claimants submissions that the jurisprudence definitely requires a consideration of the “before-and-after” scenarios without any screening out of the development for the injurious affection calculation, in that s. 14(14)(b) [s.i.c.] only applies to the market value of lands taken. As a result, an appropriate consideration of the “before” situation would require a

²² *Salvation Army, Canada East v. Ontario* (1991), 44 L.C.R. 302 (O.M.B.).

²³ *Parks v. Ministry of Transportation* (1995), 56 L.C.R. 166 (O.M.B.), aff’d (1997), 62 L.C.R. 252 (Ont. Div. Ct.).

consideration of the various official plan documents as they address the highway. The “after” scenarios would require a consideration of the effects of the acquisition, construction and use of the highway on the remaining lands.

As seen from the passage above, which was affirmed by the Divisional Court, owners of remaining lands can claim compensation from the injurious affection that they suffer as a result of the taking itself. The Divisional Court elaborated on this principle in the recent decision of *Base Ninety Developments Ltd. v. Ontario*.²⁴ In this case, the Court affirmed two decisions by the Ontario Municipal Board, where the Board found injurious affection to lands caused by the existence and placement of the undertaking, even though the injurious affection was related to a loss in value due to planning and urban boundary issues. In these cases, the injurious affection caused by planning decisions was found to be compensable, as the planning decisions causing injurious affection resulted from the existence and placement of the highway and not the “scheme or development”.

In arriving at its conclusion, Mr. Justice Lane, writing for the majority of the Divisional Court wrote (at para. 31):

In other words, the Board found that the [scheme related] restrictions on which the Crown relies were not the effective reason why development of the [owners] lands was not now realistic; rather it was the physical presence of the Highway 407 that had destroyed the development potential.

As seen from the discussion above, the scheme or development related to an expropriation may not be the cause of injurious affection. However, the loss in value due to the existence and placement of an undertaking for which an expropriation is required, can cause compensable injurious affection.

²⁴ *Base Ninety Developments Ltd. v. Ontario (Management Board of Cabinet)*, [2005] CarswellOnt. 5155 (Div. Ct.).

Disturbance Damages

As a result of the Supreme Court of Canada's decision in *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority*,²⁵ claims for disturbance damages are compensable so long as:

1. The loss suffered is logically and reasonably connected to the expropriation;²⁶
2. The loss suffered must not be too remote to the expropriation in terms of time or proximity to the lands expropriated;²⁷ and
3. The loss must flow from reasonable actions of the expropriated owner, who has reasonably attempted to mitigate damages.²⁸

In many instances, the uncertainty to a community caused by a pending expropriation or scheme can create damages to a property or a business thereon, prior to expropriation. These damages are typically caused by uncertainty and can include damages suffered by the property because of a loss of income from tenants who relocate as a result of the pending expropriation, or losses to business or property caused by deferred maintenance and investment due to a prospect of expropriation. The announcement of an expropriation can also bring about business losses as a result of blighting areas where businesses are located, as a result of the future uncertainty caused by the pending expropriation.

The Supreme Court expressly recognized in the *Dell* decision that the scope of disturbance damages encompasses pre-expropriation damages, which are the result of the development for which the expropriation takes place. These damages include damages

²⁵ *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority* (1997), 60 L.C.R. 81 (S.C.C.).

²⁶ *Ibid.* at 91-92.

²⁷ *Ibid.* at 92-93. Also see *LaFleche v. Ministry of Transportation of Communications* (1975), 8 L.C.R. 77 at 85 (Ont. Div. Ct.).

²⁸ *Ibid.* at 96.

arising from delays to development suffered by the expropriated property, which are the consequence of the scheme.²⁹ The period in which losses prior to the expropriation can affect business loss is at times referred to as the “shadow period”.³⁰ In the decision of *Gadzala v. T.R.C.A. and Toronto*, the Ontario Municipal Board recently made a finding that the subject properties of the Claimants suffered a loss of \$4,000,000.00, based on delay between 1986 and 1997. This award was calculated by the determining the “out of pocket” expenses that the Claimants were forced to incur as a result of not being able to sell their lands because of the future expropriation.³¹

In the decision of *Dell Holdings Limited v. Toronto Area Transit Authority*, Mr. Justice Cory, writing for the Supreme Court of Canada discussed pre-expropriation losses as follows (at pages 95 and 96):

The approach to damages flowing from the expropriation should not be a temporal one; rather it should be based on causation. It is not uncommon that damages which occur before the expropriation can in fact be caused by that very expropriation.

The Supreme Court of Canada in *Dell* elaborated on this principle by quoting Lord Nicholls, writing for the Judicial Committee of the Privy Council decision of *Director of Buildings and Lands v. Shun Fung Ironworks Ltd.*³² as follows (at pages 137 and 138):

... [L]osses incurred in anticipation of [expropriation] and because of the threat which [expropriation] presented are to be regarded as losses caused by the [expropriation] as much as losses arising after [expropriation]. This involves giving the concept of causal connection an extended meaning, wide enough to embrace all such losses. To qualify for compensation a loss suffered post-[expropriation] must satisfy the three

²⁹ *Ibid.* at 95-96.

³⁰ *Pitblado v. Town of Oakville*, [2005] CarswellOnt. 6382 at para. 58 (O.M.B.).

³¹ *Gadzala v. Toronto*, *supra* note 14 at 238.

³² *Director of Buildings and Lands v. Shun Fung Ironworks Ltd.*, [1995] 2 A.C. 111 (P.C. for Hong Kong).

conditions of being causally connected, not too remote, and not a loss which a reasonable person would have avoided. A loss sustained post-scheme and pre-[expropriation] will not fail for lack of causal connection by reason only that the loss arose before [expropriation], provided it arose in anticipation of [expropriation] and because of a threat which [expropriation] presented.

In the decision of *Shun Fung Ironworks*, the claimant sought compensation for business losses many years prior to the expropriation, as a result of the Director of Buildings and Lands clearly indicating that they intend to demolish the ironworks factory. This intention prevented the claimant from furthering its business operation.³³ Similarly, in the decision of *Dell Holdings*, the Toronto Area Transit Operating Authority had for many years been considering the Claimant's lands for a transit station. This consideration, even if not finalized, prevented the claimants from developing their lands and formed the basis of a claim for compensation for damages and business loss.

In the determination of pre-expropriation damages and business loss, courts have applied a flexible approach to determining when the "causal effects" of the expropriation begins. Despite this flexible approach, courts have maintained that losses will only be compensable when parties act reasonably in anticipation of a potential expropriation.³⁴ Thus, a claimant cannot establish a causal connection from a business loss unless a reasonable person, under similar circumstances, would have governed his or her actions in a similar way in light of the impending expropriation.

For example, if the owner of a property in proximity to the Detroit River in Windsor maintains that since 2001 he or she has not taken any action to maintain the property, as a result of the possibility that a border crossing will exist somewhere along the Detroit River, this conduct would not appear to be reasonable, nor would it form a causal link to pre-expropriation damages. On the other hand, if an expropriation has not yet been announced, but studies have shown that certain lands will be expropriated and certain

³³ *Shun Fung Ironworks Ltd. v. Director of Buildings and Lands*, [1994] 1 H.K.C. 35 at 43 (C.A.).

³⁴ See e.g. *Associated Building Credits Ltd. v. B.C. (MoTH)* (2005), 88 L.C.R. 1 at 17 (B.C.E.C.B.).

steps have already been taken (e.g. registration of reference plans on title) an owner may be acting reasonably by avoiding or deferring the redevelopment of a property, when a reasonable likelihood exists that it will be acquired by an expropriating authority. In conclusion, the line that is drawn in assessing the causal effects for pre-expropriation business loss or disturbance damages is defined by a test assessing the reasonable conduct of expropriated owner.

Even though claims for disturbance damages are allowed to encompass claims for “pre-expropriation damages” and damages arising from delay, one must use care in establishing that such damages are caused by the expropriation or the scheme itself and not from other pre-existing factors. This consideration often arises in areas that suffer from historic blight and attract public developments for that reason. In such instances, owners are often challenged to prove that the blight to their neighbourhood was a result of the announcement of the expropriation and not from other pre-existing factors.

Conclusion and Practical Considerations

If property is acquired through compulsory acquisition, a complicated process is inevitable. This process often requires significant resources in order to ensure a fair and just resolution wherein an owner is made whole, but an expropriating authority does not pay a “ransom” to facilitate a public undertaking. Part of this balance is achieved by screening out the impact of the scheme or other secondary impacts of the expropriation. Fair compensation is also achieved by providing compensation for pre-expropriation losses that are rationally connected to the expropriation.

In the context of large scale expropriations, secondary effects become considerably more complicated as more economic influences come into play. Furthermore, when a large undertaking is to go forward, it is often announced or anticipated long before expropriation takes place. Thus, the reverberative effects of an expropriation and its

announcement require additional attention in the context of large scale public undertakings.

There is no strategy or clear method to avoid the reverberative impacts of an expropriation. Similarly, there is no clear way to gain advantage in the context of the determination of compensation in light of a “scheme”. Certain steps, however, can be taken to ensure a just and fair result, which is predictable and minimizes unnecessary losses and, likewise, unnecessary damages. These steps include:

1. The expropriating authority should act with diligence in the land acquisition process and ensure a relatively short period between the initial announcement of the undertaking and the formal land acquisition process, whenever possible. This avoids delay claims, caused by a lengthy “shadow period” prior to formal expropriation. This also reduces the potentially damaging secondary effects of the announcement of a development.
2. An expropriating authority should make a clear and public announcement of the development, including the areas required for acquisition. This announcement avoids rumours and unofficial information that leads to uncertainty by owners and potential damages arising therefrom. Clear public announcements also ensure definitive boundaries for the scope of the development and clarify the date for the commencement of the influence of the development.
3. Expropriated owners should endeavour to engage in reasonable conduct following the announcement of a public undertaking, to ensure any losses that are suffered are reasonable and, therefore, compensable.
4. Property owners and authorities should work together in order to minimize losses arising from an expropriation. This can include:
 - a. The sharing of information concerning the expropriation and the underlying development;
 - b. Early acquisitions of properties to avoid losses;

- c. Advance payments of compensation to facilitate business relocation and redevelopment; and
- d. Communication between owners and the authority to ensure agreements exist regarding reasonable steps to mitigate damages.

The above steps may not put an end to all losses or disputed claims arising from an expropriation, but they can assist in mitigating unnecessary losses and reducing the complexity of claims, by reducing uncertainty in the expropriation process and providing clarity with respect to the effect of expropriations and the public undertakings for which they occur.

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