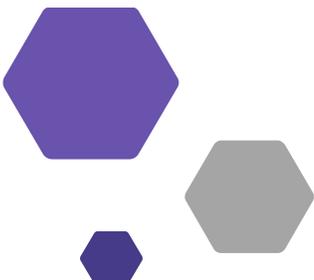

A Primer on Expropriation Are You Missing Elements of Compensation?

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Introduction

I would like to acknowledge the assistance of Stéphanie Tétreault in the preparation of this paper. Appendix A and B were current as of May 1, 2009 and represent a compilation of compensation provisions across Canada. Given the variations in the wording of those compensation provisions, it is prudent to verify whether a case from a different Province or Territory would be applicable in your particular Province. It is hoped that this paper is of assistance in providing added value to clients - whether they may be owners or the expropriating authority - in identifying items, in addition to market value which may be payable in the event of a compulsory acquisition.

Expropriation is defined as the government's right to take the whole or part of privately owned land for public use and benefit, upon the obligation to pay just compensation to the owner.¹ Depending on the nature of the taking and the applicable legislation, the owner of the property can receive compensation in the form of market value of the property, injurious affection, disturbance, and special value. Interest and consulting costs are also commonly awarded in the owner's compensation package.

This paper serves as a refresher on basic principles of expropriation and compensation. The main focus of this paper is to provide a checklist of due compensation for the category of "disturbance" which is generally broadly defined to include any costs, expenses and losses arising of or incidental to the expropriation. The law of expropriation has developed significantly over the past 20 years, and in most Canadian jurisdictions the law has undergone a complete restructuring.² Almost all expropriation statutes across the provinces now provide for generous compensation and reasonable procedures.

History / Interpretation

Canadian expropriation statutes initially were modeled on the English statute, *The Acquisition of Land (Assessment of Compensation) Act*, 1919. The Act changed the basis of compensation from "value to the owner" to "open market value", and set out a clear and defined list of other compensable and non-compensable items.³

Until the late 1960s, procedures regarding expropriation varied widely across Canada. The various statutes authorizing expropriation in the provinces were inconsistent, at best. Hearings were conducted before a wide spectrum of forums, ranging from ad hoc arbitration boards to the Federal Court.

The first Federal statute on expropriation, *The Expropriation Act*, 1886⁴, which later became known as *The Expropriation Act*, 1952⁵, remained in force until its repeal in 1970. Until that date, the Canadian law on expropriation had remained virtually the same since its beginning. The current federal Expropriation Act⁶,

¹ Kenneth J. Boyd, *Expropriation in Canada; A Practitioner's Guide* (Ontario: Canada Law Book Inc., 1988) at 1.

² Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada* (Ontario: Carswell, 1992) *Supra* note 2 at 2.

³ *Supra* note 2 at 6.

⁴ *Expropriation Act*, 1886, R.S.C. 1886, c.39.

⁵ *Expropriation Act*, 1952, R.S.C. 1952, c.106; R.S.C. 1970, c. E-19.

⁶ *Expropriation Act*, 1985, R.S.C. 1985, c. E-21.

modelled on the Ontario Act⁷, was enacted to clarify the subjective system of expropriation and remove the arbitrary features associated with the existing law.⁸

Each province has its own Expropriation Act. The purpose of these remedial statutes is to adequately compensate the owner of land, which is taken from him to serve the public interest. In *Dell*⁹, the S.C.C. reconfirmed that "the power of an expropriating authority should be strictly construed in favour of those whose rights have been affected".¹⁰ The statute as a whole ought to be given a broad and liberal interpretation, consistent with its purpose. Though the right to compensation must be set out in the statute, where land has been taken away from the owner, the statute will be construed in light of a presumption favouring compensation.¹¹

Relevant Statutory Provisions on Compensation

The path of legislative reform of the law of expropriation in Canada has spread out over half a century's time. Thus, the basis of compensation in most provinces has returned to the basic system that has operated in England since 1919.¹² The "value to the owner" is still the approach to compensation used in the Provinces of Prince Edward Island, Québec, and Saskatchewan, while the "market value" approach is applied widely in the remaining seven Provinces, as well as the three Territories. However, as Todd explains, "if the concept of value to the owner is applied correctly, the final result is not much different from that which is reached by taking the market value concept and adding thereto those items which are enumerated in most expropriation statutes".¹³

Special Provisions with respect to Compensation on Homes and Leased Properties

One of the most frequently heard criticisms on the law of expropriation and compensation is that it can cause serious economic hardship to homeowners¹⁴ and/or tenants. Such hardship can arise when the compensation provided for in the statute (usually based on the market value of the home) and the cost of moving, do not economically allow an owner to put himself in the same position that he was in had the expropriation not taken place. Thus, the owner may have to purchase a smaller home, or a comparable home at an additional personal cost. However, in provinces where compensation is determined based on the value of the home to the owner, the owner may receive sufficient compensation to allow for relocation in similar accommodations.¹⁵

⁷ *Expropriations Act, 1968-69*, S.O. 1968-69, c. 36, now R.S.O. 1990, c. E.26.

⁸ *Supra* note 2 at 12, see also R.B. Robinson, *Report on The Expropriations Act*, October 11, 1974 (Ontario, Ministry of the Attorney General); 1967 Report of The Ontario Law Reform Commission on *The Basis for Compensation on Expropriation*.

⁹ *Dell Holdings Limited v. Toronto Area Transit Operating Authority*, 1997 SCC 400, [1997] 1 S.C.R. 32, 142 D.L.R. (4th) 206, (hereinafter referred to as "Dell"); see also *Montréal (Ville de) c. 150460 Canada inc.*, 2008 QCCA 1807 which confirms that the Quebec Court of Appeal follows the principles set forth in *Dell*.

¹⁰ *Ibid* at para 20.

¹¹ *Supra* note 2 at 35-36.

¹² *Ibid.* at 6.

¹³ *Ibid.* at 6-7.

¹⁴ *Supra* note 2 at 256.

¹⁵ *Ibid.*

In rising markets, the issue arises as to valuation date should be chosen for the replacement home. A time period of 5 months from the date the owner received an advance was held to be a reasonable time period.¹⁶

In the *Leblanc*¹⁷ case, the owner whose home was expropriated was awarded compensation on the basis of "special value". The court awarded compensation on the grounds of equivalent reinstatement: "compensation was awarded not on the basis of market value of the house in its actual location [...] but on the basis of what its market value would have been had it been located in another area to which, on the facts, the owner would have to move in order to acquire comparable accommodations".¹⁸ The concept of special value will be discussed further in the paper.

The *Leblanc* case was decided before most jurisdictions, where the statutory basis of compensation is market value, enacted special statutory provisions to deal with compensation on homes and leased properties: "these provisions are hybrids of the value to the owner and reinstatement principles".¹⁹ The first province to enact such a provision was Newfoundland.²⁰ Now, every Canadian expropriation code, except those of Québec, Saskatchewan and P.E.I., has what is known as a "home for a home" provision. As Todd explains, the purpose of these provisions is similar, however the Canada Act section is narrower than the provincial provisions.

Market Value

The concept of market value can be defined as "the present value of all possible utility reached in a competitive field"²¹ and "the price on which a prudent and willing vendor and a similar purchaser would agree".²² More simply stated, market value is the amount that the land would be worth if it was sold on the open market.²³ While the Courts generally accept the Appraisal Institute's approach to and definition of market value, one should always check the definition in the applicable statute.

In the Ontario, Alberta, Newfoundland and Labrador, Yukon and Manitoba Acts, market value is defined as "the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer".²⁴ Similarly, the Canada, New Brunswick, Nova Scotia and British Columbia Acts defined market value as "the amount that would have been paid for the interest if, at the time of its taking, it had been sold in the

¹⁶ *Owens v. Calgary (City)*, (2009) 96 L.C.R. 304 at 319 (Alta.L.C.B.) A large 100 year old tree in the front yard; Easy access to the river which was about 200 feet away; Central location near his workplace; and Period finishing in the house such as stained glass and hardwoodbase boards; \$87,500 additional compensation awarded for home for a home.

¹⁷ *Leblanc v. Halifax (City)*, (1967) 66 D.L.R. (2d) 15 (N.S.C.A.).

¹⁸ *Supra* note 2 at 257.

¹⁹ *Ibid.* at 257.

²⁰ See the *Family Homes Expropriation Act*, R.S.N. 1990, c. F-1.

²¹ *R. v. Northumberland* [1945] 3 D.L.R. 145, [1945] S.C.R.

²² *Gagetown Lumber Co. v. R.* 6 D.L.R. (2d) 657, 661, [1957] S.C.R. 44, 51.

²³ *Supra* note 2 at 132.

²⁴ Ont. s. 14(1); Alta. s. 41. Yukon s. 8 (a);Man. s. 27(1) omits the word "expropriated" and inserts "reasonably" before the word "expected", Nfld. s. 27(1)(b) adds "...but the board is entitled to consider all returns and assessments of capital value for taxation made or acquiesced in by the owner of the land"

open market by a willing seller to a willing buyer".²⁵ In the Northwest Territories and Nunavut, the definition reads as follows: "market value", in relation to an expropriated interest, means the amount that would have been paid for the interest if, at the time of its taking, it had been sold in the open market by a willing seller to a willing buyer and fully paid for in cash.²⁶

Equivalent Reinstatement

As discussed above, compensation will generally be assessed based on the market value, or the value to the owner, in addition to any losses caused by the owner of the land due to disturbance. The owner can then decide to obtain other land and reinstate the use to which he had put the land taken from him by force.²⁷ However, where the owner puts the land to a use for which there is no market, "its open market value can not be ascertained by reference to sales of similar property, and reinstatement might not be achieved merely by the claimant purchasing premises put to a similar use elsewhere".²⁸

Therefore, the rule of equivalent reinstatement provides that:

Where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the Lands Tribunal is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement.²⁹

For this rule to apply, there are certain conditions that must be met: (1) the land must be devoted to a purpose for which there is no general demand or market for; (2) if the land had not been expropriated, it would have continued to be devoted to that purpose; and (3) the owner has a true intention to reinstate the purpose somewhere else.³⁰

²⁵ Can. s. 26(2); N.B. s. 39(1); N.S. s. 27(2); B.C. s. 31.

²⁶ Northwest Territories s. 26(1).

²⁷ Compulsory Purchase & Compensation Service I, Tottel Publishing, June 2006.

²⁸ *Ibid.* at 1601.

²⁹ *Ibid.* at 1601-1602; see also Todd at 228 to 256.

³⁰ *Ibid.* at 1602, see also Todd at 228 to 256

Injurious Affection

The term injurious affection describes an effect of expropriation. To be injuriously affected means "hurtfully affected".³¹ When land is "hurt" due to expropriation, the owner may obtain compensation through the actions of trespass, nuisance or negligence, but common law action may only be taken after the owner has resorted to the remedy which is expressly or impliedly provided for in the statute.³²

Regardless of how a claim for injurious affection is brought forth, it must be based on some statutory provision.³³ Most Canadian statutes that provide for compensation for injurious affection do so in very broad and general terms. Thus, the Canada Act does not even refer to the term "injuriously affected", whereas in Ontario, New Brunswick and Nova Scotia the Acts require that a statutory authority compensate the owner of land for loss or damage caused by injurious affection, that the claim be filed within one year of the damage sustained, and that any advantage to the owner's remaining land be set off against the affection.³⁴

An example of an instance where a claim for injurious affection may be filed is when a part of the owner's land is expropriated, the piece of land remaining may be considered less valuable. This often occurs when a strip of land is taken from a larger piece of land for a road, pipeline, or railway.³⁵ In these types of situations, the owner of the land may claim compensation not only for the value of the expropriated piece of land, but also for the severance damage to the remaining portion of the land.³⁶

Disturbance

The term disturbance may be defined generally as "economic loss suffered by an owner by reason of having to vacate expropriated property".³⁷ The concept of disturbance appeared for the first time in 1919, when the basis of compensation in England evolved from the value to the owner, to market value. In the *Thomas*³⁸ case, the court said that compensation for disturbances can be awarded in a variety of cases, "including the cost of moving to new premises, the depreciation in value of machinery, equipment of other chattels through necessary removal or sale, the increased cost of doing business in the new premises, the disturbance or loss of business or the chance of making profits or the loss or diminution in value of good will".³⁹

Perhaps one of the greatest challenges in the law of expropriation is determining whether any particular item is compensable as a disturbance damage. This will depend on the statutory provisions, the facts, and the evidence

³¹ *Supra* note 2 at 328.

³² *Ibid.*

³³ *Ibid.*

³⁴ Ont. s. 1(1) and 22 and 23; N.B. s. 1 and 47 and 48; N.S. s. 3(1)(h) and 31(1) and 32.

³⁵ *McGregor v. Alberta* (1982) 26 L.C.R. 304, 306 (Alta. Q.B.).

³⁶ *Supra* note 2 at 332.

³⁷ *Ibid.* at 274.

³⁸ *R. v. Thomas Lawson & Sons Ltd.* [1948] 3 D.L.R. 334, [1948] Ex. C.R. 44, 55, 62 C.R.T. 227.

³⁹ *Ibid.* at 34.

in any given case.⁴⁰ Each Act defines disturbance damages differently. For example, the Ontario Act provides that disturbance damages are those “reasonable costs [which] are the natural and reasonable consequences of the expropriation”.⁴¹

There are two Supreme Court of Canada cases which provide considerable guidance on the tests to be applied. The first is the *Laidlaw*⁴² case decided 30 years ago. The owner had recently constructed a 540 square foot extension to a residence at a cost of \$26,000.00. The owner was paid for the market value of the residence. The appraisers were of the opinion that this \$26,000.00 extension only increased the market value by \$10,000.00. When faced with similar claims, it is my experience that authorities are of the view that, the owner can go in the market and purchase a replacement home with the market value award. Therefore it is the position of the authority that the owner is not suffering a loss. The owner in *Laidlaw* felt this was unfair because she could not enjoy the fruit of her expenditure. The S.C.C. agreed that she should receive a “disturbance damage” and held:

The appellant had spent the \$26,000.00. Due solely to the expropriation, she could not enjoy the fruit of that expenditure. If she could only recover the market value she would only be reimbursed to the extent of \$10,000. The balance of \$16,000 was a loss to her and a direct cost of the expropriation.

Although there is a specific section in Ontario entitling the owner of a residence to an award with respect to improvements not reflected in market value, the S.C.C. held that the award was entitled to succeed based on a “disturbance damage” award. Therefore this principle applies to any category of property - residential, agricultural, commercial and industrial.

The second leading case by the S.C.C. on the issue is also from Ontario. It is the *Dell*⁴³ case decided 12 years ago. There is an excellent article on this case written by Adjunct Professor Ken Strong who teaches at the University of Western Ontario entitled *Dell Holdings, Disturbance Damages, and the Temptations of Palm Tree Justice*⁴⁴.

Dell Holdings Ltd. suffered damages because its development business was curtailed for more than two years while the authority determined which portion of its land was needed for the GO Station. There were increased costs of Dell’s development business during the waiting period between the announcement of potential expropriation and the actual taking of the land. The Ontario Municipal Board found that Dell was entitled to be paid for these increased development costs. The Toronto Area Transit Operating Authority won its appeal to the Ontario Divisional Court which agreed with a restrictive interpretation of what constituted “disturbance”. The Divisional Court was of the view that disturbance damages were restricted to relocation and moving costs

⁴⁰ *Supra* note 2 at 277.

⁴¹ *Supra* note 6 at s. 18(1).

⁴² *Laidlaw v. Municipality of Metro Toronto* (1978), 15 L.C.R. 24 (S.C.C.)

⁴³ *Supra*, note 8.

⁴⁴ (2005) 10 M.P.L.R. (4th) 207 and (2005) 33 R.P.R 173.

and damages caused to a business or undertaking being carried on the premises. Dell Holdings Ltd. appealed to the Court of Appeal but lost its appeal. It further appealed to the S.C.C. Dell Holdings Ltd. won its appeal at the S.C.C. Although the decision is based on the wording of the *Expropriation Act* of Ontario, Courts across the country follow the general principles established in *Dell*.

1. First, the S.C.C. rejected the authority's contention that disturbance damages are only available if they arise in relation to the expropriated land itself and not to adjoining land which the owner retained after the expropriation⁴⁵.
2. Second, the S.C.C. established that where land has been taken, Expropriation Acts will be construed in light of a presumption in favour of compensation.⁴⁶
3. Third, the S.C.C. held that the approach to damages flowing from expropriation should not be a temporal one; rather it should be based upon causation. Thus damages may be claimed for a time period preceding the actual taking of land by the authority.⁴⁷ Losses incurred in anticipation of expropriation and because of the threat which expropriation presents, are to be regarded as losses caused by the expropriation as much as losses arising after the expropriation.
4. Fourth, the S.C.C. held that owners have a duty to mitigate and that all steps taken in order to mitigate the damages will be compensable in expropriation cases.⁴⁸
5. Last, the losses must not be too remote.⁴⁹ An example of losses which were denied as being too remote were estimates of permanent increases in business taxes, property taxes and utility costs with respect to a relocation site which had not yet been built.⁵⁰ The Court did however indicate that the owner was entitled to resubmit its claim after the move and after the owner had operated in the retrofitted premises.⁵¹

Appendix C sets out a list of the more usual disturbance items which have been considered by the courts and tribunals. Reference is made to selected cases in which the award was granted or rejected.⁵² Appendix C also contains lists of selected cases on various other issues such as permanent increased costs.

⁴⁵ *Supra* note 8 at para. 29.

⁴⁶ *Ibid.* at para. 34.

⁴⁷ *Ibid.* at para. 38.

⁴⁸ *Ibid.* at para. 40.

⁴⁹ *Ibid.* at para. 44.

⁵⁰ *Rebel Holdings Ltd. et al. v. Division Scolaire Franco-Manitobaine*, 2008 MBCA 65 (CanLII), [2008] 9 W.W.R. 19 • (2008), 228 Man. R. (2d) 157.

⁵¹ *Ibid.* para. 185.

⁵² Note that though these cases may be influential, they are not necessarily binding in your jurisdiction.

Special Value

When there is a special economic advantage to the owner of the land that arises out of or incidental to his actual occupation of the land, he may be compensated for special value.⁵³ In *Schooley*⁵⁴, the court held “special value refers to the present use of land, and means its added worth to the owners for the actual and particular use to which it is being put, and for which it is specially fit”.⁵⁵ Todd explains that special value is a concept used to illustrate a feature of the expropriated interest that is of a special economic value to the owner of the land, but which does not improve the market value of the interest.⁵⁶

The most often cited situation where special value is applied is where a business can no longer continue on the land to equal advantage on another site, or at all.⁵⁷ Other cases involving special value could be for example, where a quadriplegic person may have made alterations to her residence, such as built ramps, lowered countertops or widened entrances and doorways, to accommodate her disability: “such alterations may detract from, rather than add to, the market value of the property in the hands of anyone other than a person with the same type of disability. Upon expropriation the owner should recover the proven economic value to him or her of the structural alterations”.⁵⁸

In *Canada (National Capital Commission) v. Hobbs*⁵⁹, the Supreme Court of Canada said that:

Where it is claimed that a property has a special value to the owner over and above its market value, the owner must adduce the facts necessary to prove this value, which must be such that it can be measured in terms of money. It is not sufficient for a claimant to say that he would pay a certain amount of money rather than be deprived of his property. There must be proof that the land had special advantages that gave it a special economic value for the expropriated party, and no value should be attributed for sentimental attachment.⁶⁰

Special value can be described as a value to the owner of the land, beyond what it would be in similar use by somebody else.⁶¹

⁵³ *Supra* note 2 at 113-114.

⁵⁴ *Schooley v. Lake Erie & Nor. Ry.* (1915) 25 D.L.R. 537, *vrđ.* 30 D.L.R. 289, (1916) 53 S.C.R. 416.

⁵⁵ *Ibid.* at 541.

⁵⁶ *Supra* note 2 at 114.

⁵⁷ *Pastoral Finance Assoc. Ltd. v. Minister* [1914] A.C. 1083 (P.C.) & *Gagetown Lumber Co. v. R.* 6 D.L.R. (2d) 657, [1957] S.C.R. 44.

⁵⁸ *Supra* note 2 at 116.

⁵⁹ *Canada (National Capital Commission) v. Hobbs* (1970) 10 D.L.R. (3d) 11 (S.C.C.).

⁶⁰ *Ibid.* at 13.

⁶¹ *Ibid.*

In the *Campbell River Woodworkers*⁶² case, the British Columbia Court of Appeal, in interpreting the special economic advantage section, held:

“Special economic advantage, as that phrase is used in the current statute, must, as the statute says, be something that is not incorporated in market value. In my view, it must be something that accrues peculiarly to the owner or to a limited number of purchasers. This provision allows the owner to be compensated for advantages that have no or only a limited market such that their value to the owner cannot be obtained in part or in whole in a sale on the open market”. (emphasis added)

In *NTJB Investments Ltd.*⁶³, the Saskatchewan District Court considered a claim by a long established physiotherapy business. The basis of compensation was the price paid for comparables properties, as adjusted to the subject property, plus the estimated cost of providing facilities necessary for the operation of the business in a manner comparable to previous operations.

In *Merrithew*⁶⁴, the New Brunswick Court of Appeal in considering special value to the owner, measured the economic value thereof by the cost of the development of an alternate site. The court also made a disturbance award to compensate the owner for increased operating costs. The owner of a property is entitled to its special value to him, and it is not essential that the building be a special purpose building⁶⁵.

In *Bank of Nova Scotia*⁶⁶, the Nova Scotia Court of Appeal, in interpreting its section, adopted a statement from various appellate cases including one of its own cases which had been affirmed by the Supreme Court of Canada (see the reference to *POW Investments* at paragraph 62 of the decision) in which it held:

Special value, as I understand it, arises when the owner is actually putting the property to some use for which it is especially well suited.

A general review of cases in this area of law confirms that cases in which the concept of special value applies are far and few between. Often owners, through an award on disturbance which allows the retrofitting of replacement premises, end up being compensated for special features of the property which is expropriated.

⁶² *Campbell River Woodworkers v. British Columbia* 2003 BCCA 121 at page 6, paragraph 16.

⁶³ *NTJB Investments Ltd. et al. v. Province of Saskatchewan* (1978), 14 L.C.R. 98 (Sask. Dist. Ct.).

⁶⁴ *Merrithew v. Minister of Highways* (1974), 7 L.C.R. 275 (N.B.C.A.).

⁶⁵ *Norris and City of Kitchener* (1962), O.R. 490 (C.A.) pp.493 and 494.

⁶⁶ *Bank of Nova Scotia, Woodlawn Farms Ltd., W. Eric Whebby Ltd., Portland Estates Ltd., Morash, Morash, Morash and Morash v. Province of Nova Scotia*, [1977] N.S.J. No. 539 (C.A.).

Income Tax Considerations

In *Todd*⁶⁷ at pages 560 to 562, the author explains that “Claims for compensation to indemnify the expropriated owner for the income tax consequences of the receipt of compensation and claims to be compensated for tax benefits allegedly lost as a result of expropriation are invariably denied”. As it will be further explained, some of these cases are based on authorities which were overruled. This may change the result and older cases ought to be carefully scrutinized.

The authorities cited by *Todd* precede the S.C.C.’s 1997 decision in *Dell* which expanded the previous view of what was included in a disturbance award. They generally deal with capital gains tax which can be avoided if a replacement property is purchased⁶⁸. Second, some cases are based on a personal injury case of the S.C.C. decided some 43 years ago which has since been overruled.

It is submitted that generally a three step approach in *Dell* should be applied. The first question is whether there is a loss or cost with respect to income tax caused by the expropriation. The second question is whether the owner is able to mitigate his loss. For example, can or will the owner avoid the loss or cost by the purchase of a replacement property thus deferring indefinitely the loss or cost? Finally, is the loss or cost too remote?

The *Hebron* case⁶⁹ and in the *Hilger* case⁷⁰, which are two decisions quoted by *Todd*, were based on the *Jennings*⁷¹ case of the S.C.C. which held that, in assessing damages for personal injuries, the estimated amount of income tax on future earnings should be ignored. The current law should now be applied.

In personal injury damage awards, the S.C.C. had initially refused to allow for an income tax gross up because of the perceived difficulty in predicting the actual tax burden. *Watkins v. Olafson*, [1989] 2 S.C.R. 750 reversed this line of authorities and established 3 principles which apply to this case. First, although the exercise of assessing future damages over a period of decades is fraught with uncertainty, the courts must do their best to calculate an appropriate award and must make an allowance for taxation (p.767). Second, the claimant is entitled to a lump sum award instead of a reviewable periodic payment which would bind it in an uneasy and untermiated (sic) relationship (p.763). Third, if no allowance is made for the tax, the award will prove insufficient (p.764)⁷².

In *Townsend v. Kroppmanns*, [2004] 1 S.C.R. 315 the Court restated principles of damage awards. Compensation aims at restoring the claimant to the position it would have been in had no loss occurred. Since it is impossible to calculate the exact amount of money that will be needed in the future, courts should assess damages relying on actuarial evidence (p.323, para.19). Damages are awarded in a lump sum in order to respect the principle of

⁶⁷ *Supra*, note 1.

⁶⁸ See also cases such as *Gardiner Burton Agencies Ltd. v. N.S. Power Corp.* 1986 CarswellINS 136 (N.S.T.D.).

⁶⁹ *Hebron Investments Ltd. v. Scarborough Board of Education* (1972), 3 L.C.R. 356 (Ont. L.C.B.).

⁷⁰ *Manitoba v. Hilger* (1982), L.C.R. 308 (Man. Q.B.).

⁷¹ *The Queen in the Right of the Province of Ontario v. Jennings* (1966), 57 D.L.R. (2d) 644 (S.C.C.).

⁷² see also C.E.D. (West) Damages Volume 11, pp.217/218.

finality (p.324, para.20). The claimant has property of the award and is free to do whatever it wants with the sum of money awarded (p.325, para.21).

Some tribunals and courts have begun to make awards for accelerated tax consequences. In a British Columbia case, after reviewing the evolution in law in personal injury cases, the Expropriation Compensation Board, in *Corner's Pride*⁷³, held:

Thus, the question is not whether an allowance should be made for the impact of taxation, but whether there is evidence to support such allowance. The doctrine would appear to be just as applicable to awards of compensation following expropriation as it is to the cost of future care in an action for damages. The question is one of proof. Is there evidence to support the claimant's contention that the income to defray taxation will be taxed at 44.84 per cent?

In Nova Scotia, it appears that in some cases⁷⁴ the Board waits until the effect of taxation is known. The Nova Scotia Court of Appeal has held⁷⁵:

An award for lost future income presumably involves income tax considerations. The impact of taxation cannot be known with certainty until payment of compensation and its assessment by the taxing authority. Neither the Expropriation Act nor the Utility and Review Board Act preclude the Board from retaining jurisdiction to deal with tax concerns should they arise, and it is reasonable that the Board should do so.

Appraisers should recommend to owners that they seek appropriate tax advice. Generally speaking, compensation received from an expropriation can fall into three general categories - Income, Capital Gains and a windfall. Windfalls are not taxable.

Thus in *Bellingham*⁷⁶, the Federal Court of Appeal taxed ordinary interest as income and punitive additional interest was not taxed because it was held to be a windfall. Although CRA takes the position that a payment in respect of damages occasioned as a result of the inability of the owner to relocate would now be taxable, as a

⁷³ *Corner's Pride Farms Ltd. v. British Columbia (Minister of Transportation & Highways)* 1994 CarswellBC 2735, 52 L.C.R. 15 (B.C. Exp. Bd.).

⁷⁴ *Nova Scotia (Attorney General) v. Williams* 1996 CarswellNS 256, 59 L.C.R. 81, 152 N.S.R. (2d) 291, 442 A.P.R. 291 (N.S.C.A.); *Johnson v. Nova Scotia* 2003 CarswellNS 622 at para. 288 to 290, 2003 NSUAR 154.

⁷⁵ *Nova Scotia (Attorney General) v. Williams* 1996 CarswellNS 256, 59 L.C.R. 81, 152 N.S.R. (2d) 291, 442 A.P.R. 291 (N.S.C.A.).

⁷⁶ *Bellingham v. Canada (C.A.)*, [1996] 1 F.C. 613 • (1995), 130 D.L.R. (4th) 585 • (1995), 50 D.T.C. 6075 • (1995), [1996] 1 C.T.C. 187 • (1995), 104 F.T.R. 159.

result of legislative changes, the Federal Court of Appeal, in the *Toronto Refiners*⁷⁷ case held that a \$9,000,000 payment was not taxable. There may continue to be significant tax planning opportunities depending on the particular facts of the case.

The bigger surprises which owners wish to avoid are:

- having an amount taxed as income instead of capital gain;
- having a capital gain which cannot be deferred; or
- receiving a lump sum with respect to a permanent increase in operating costs without receiving the necessary gross up which takes into account the effect of income tax.

One should not assume that purchasing a replacement property will always result in a deferral. For example, the replacement of a vacant building lot owned by someone who intended to build a home on it will not necessarily result in a deferral of tax. In a recent case which I settled, there was a payment for the immediate adverse tax consequence which occurred as a result of the expropriation of a building lot.

Conclusion

The power of expropriation is recognized as an important component of government. However, its exercise almost always results in a traumatic experience for the property owner.⁷⁸ As we have seen, depending on the nature of the taking, the owner of the property can receive compensation in the form of market value of the property, injurious affection, disturbance, and special value. The affected party may also receive interest and costs.

⁷⁷ *Canada v. Toronto Refiners and Smelters Ltd.*, (2002), 57 D.T.C. 5001 • (2002), [2003] 1 C.T.C. 365

⁷⁸ *Thompson v. R.* (1978) 16 L.C.R. 131, 135, 89 D.L.R. (3d) 217 (Man. Q.B.).

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Appendix

APPENDIX A

RELEVANT PROVISIONS - DUE COMPENSATION

Manitoba

Due compensation for land

26(1) Where land is expropriated, the due compensation payable to the owner therefor shall be the aggregate of

- (a) the market value of the land determined as hereinafter set forth;
- (b) the reasonable costs, expenses and losses arising out of or incidental to the owner's disturbance determined as hereinafter set forth;
- (c) damages for injurious affection as hereinafter set forth; and
- (d) the value to the owner of any special economic advantage to him arising out of or incidental to his actual occupation of the land, to the extent that no other provision is made therefor in due compensation.

Market value defined

27(1) The market value of land is the amount that the land might reasonably be expected to realize if sold in the open market by a willing seller to a willing buyer.

Factors not considered

27(2) In determining the due compensation payable to the owner no account shall be taken of

- (a) the special use to which the authority will put the land; or
- (b) any increase or decrease in the value of the land resulting from the imminence of the development in respect of which the expropriation is made or from any imminent prospect of expropriation; or
- (c) any depreciation of the value of the land which is attributable to the fact that, whether by way of designation, allocation or other particulars contained in a development plan published by any government or

government authority or whether by any other means, an indication has been given that the land is, or is likely, to be acquired by any authority; or

(d) 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.

Determining market value in certain partial takings

27(3) Where only part of the land of an owner is expropriated, and that part is of a size or shape for which there is no general demand or market, the market value of the part taken and the injurious affection of the remainder caused by the taking of the part may be determined as being the market value of the whole of the owner's land less the market value of the remainder.

Unit value of land in certain cases

27(4) Where an authority expropriates for a highway or a drain a part of a parcel of land that is not within an incorporated city, town or village and that is undeveloped or used for agricultural purposes, the compensation payable to the owner of the parcel in respect of the value of the land expropriated, not including the value of any buildings, fixtures or improvements expropriated or damages for injurious affection or disturbance,

(a) shall be determined, if the part expropriated is less than 5% of the area of the entire parcel; and

(b) may be determined if the part expropriated is 5% or more of the area of the entire parcel;

as the value of the land taken based on a unit price of the value of all the land in the parcel that is of equivalent physical character to the land taken and that, at the date as of which due compensation for the land is to be determined, was actually used for purposes similar to those for which the land taken was used, except that no consideration shall be given to any greater or lesser value of any part of the parcel by reason of the proximity to the work for which the right-of-way is required and excluding the value of any buildings, improvements or fixtures in the parcel.

Compensation for disturbance of owner

28(1) Subject to subsection (3), the authority shall pay to an owner in respect of disturbance, such reasonable costs, expenses and losses as arise out of or are incidental to the expropriation, including

(a) where the land includes the residence of an owner, other than a tenant, an allowance to compensate for the inconvenience and the cost of finding another residence in the amount of five per cent of the compensation payable in respect of the market value of that part of the land expropriated that is used by the

owner for residential purposes, if that part was not being offered for sale on the date the declaration was signed;

(b) where the land taken does not include the owner's residence, the owner's costs of finding premises to replace those expropriated, if the lands were not being offered for sale on the date the declaration was signed;

(c) relocation expenses, including

(i) moving costs, and

(ii) legal fees, land survey costs and other expenses reasonably incurred in acquiring other lands; and

(d) where the land is subject to a security interest, the amount of any loss he is likely to sustain as a result of the acceleration of payment thereof due to the expropriation where the prevailing rate of interest for an equivalent security is greater than the rate of interest provided for by the security interest on the land.

No disturbance considered in certain cases

28(2) Where the market value of the land is determined upon the basis of a use of the land other than the existing use, the due compensation for the land shall not include compensation for any damages attributable to disturbance that would have been sustained by the owner in putting the land to that other use.

29(1) Where the commission is satisfied that an owner does not intend to relocate any business carried on upon the land expropriated, and that the relocation thereof would not be feasible, and if the owner's interest in the land has not been valued on a basis inconsistent with its use for the purposes of the business, due compensation may include compensation for the extinction of the goodwill of the business.

Determination of business loss may be deferred

29(2) Where a claim for compensation for disturbance includes any amount for business loss alleged to result from the relocation or intended relocation of a business from the land expropriated, the determination of the compensation in respect of the business loss shall, unless the authority and the owner otherwise agree, be deferred until the business has been relocated and in operation for six months; and the operating experience of the business following its relocation may be considered inter alia in determining the compensation.

Injurious affection in partial takings

30(1) Compensation for injurious affection where an authority expropriates part of the land of an owner shall consist of the amount of

- (a) any reduction in market value of the remaining land of the owner caused by the expropriation of the part;
- (b) the damages sustained by the owner as a result of the existence and the use but not the construction of the works upon the part of the land expropriated; and
- (c) such other damages sustained by the owner as a result of the existence, but not the construction or use, of the works as the authority would otherwise be responsible for in law if the existence of the works were not under the authority of a statute.

Partial taking defined

30(2) For the purposes of this section it shall be deemed that part of the lands of an owner is expropriated only where the owner from whom land is expropriated retains land contiguous to that expropriated or retains land of which the value was enhanced by unified ownership and unity of use with that expropriated.

Due compensation to include amount for injurious affection

30(3) Compensation under this section shall be determined in the proceedings for the determination of and as part of the due compensation payable for the land expropriated.

Injurious affection where no land taken

31(1) Due compensation for injurious affection where an authority does not acquire part of the land of an owner shall consist of the amount of such damages sustained by the owner, including any reduction in the market value of the land, as are the result of the existence, but not the construction or use, of the works and for which the authority would be responsible in law if the works were maintained otherwise than pursuant to the authority of a statute.

Time for making claim limited

31(2) Subject to subsection (3), a claim for due compensation under this section shall be made by the person suffering the damage or loss by application to the court within two years after the work is first used for the purpose for which it was constructed or acquired or after it has been substantially completed, and if not so made the right to compensation is forever barred.

Saving rights of persons under disability

31(3) Where the person whose land is injuriously affected is an infant, a mental incompetent, or a person incapable of managing his or her affairs, the person's claim for compensation shall be made before the expiration of two years after the disability ceases, or where the person dies while under the disability, within two years after the death, and, if not so made, the right to compensation is forever barred.

APPENDIX B

SPECIAL PROVISIONS ON SPECIAL PURPOSE AND LIMITED MARKET PROPERTIES, HOMES AND LEASED PROPERTIES

Province / Territory Relevant Statutory

Provisions Manitoba

Special value of residence of owner

26(2) Where the land expropriated includes a building occupied by the owner thereof as his residence, the due compensation payable for the land shall include

(a) compensation for the value of any improvements made to the land that is not adequately reflected in the market value of the land, and

(b) an amount, in addition to the market value of the land and any amount for improvements under clause (a), necessary to enable the owner to acquire other land that will afford him residential accommodation at least equivalent to that afforded by the land expropriated.

Equivalent reinstatement in certain cases

26(3) Where land is devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, and the owner intends in good faith to relocate in some other place, the due compensation shall be assessed on the basis of the reasonable cost of equivalent reinstatement.

Compensation for disturbance of lessee

28(3) Where the interest of an owner is a leasehold interest the compensation for disturbance of the owner shall be assessed having regard to

- (a) the length of the term of the lease under which the owner is in possession of the land;
- (b) the portion of the term remaining;
- (c) any right of renewal of the lease;
- (d) in the case of a business, the nature of the business; and
- (e) the value of the tenant's improvements in the land;

but in no case shall compensation for disturbance be less than the amount of the moving costs reasonably incurred by the owner.

Rent may be abated

46(1) Subject to subsection (2), where part only of the interest of a lessee is expropriated, the lessee's obligation to pay rent under the lease shall be abated pro tanto, as determined by the court.

Frustration of lease

46(2) Where all the interest of a lessee in land is expropriated or where part of the lessee's interest is expropriated and the expropriation renders the remaining part of the lessee's interest unfit for the purposes of the lease, as determined by the court, the lease shall be deemed to be frustrated from the date the lessee went out of possession.

APPENDIX C

CHECKLIST OF TYPES OF DISTURBANCE AWARDS

RESIDENTIAL

- 5% allowance in addition to relocation expenses
- Basement suite - new construction - replacement property not having one
Build up residence pad
- Cabin
- Cost of acquiring new premises (including professional's opinion)
Curtains / Drapes
- Demolition of old house prior to reconstruction of replacement home
Double move
- Double carrying costs on finance
Driveway (repairing)
- Driveway (loss of crushed stone)
Driveway (new driveway)
- Excavation of replacement dugout and connection of dugout to house
Fees for professional engineer
- Garage (new construction - replacement property not having one)
- Garden
- Improvement not reflected in market value
- Kennelling of dog
- Landscaping of yard at replacement property
Laneway to house
- Lawn
- Legal, survey and other costs involved in purchasing a replacement property

- Machinery costs
- Mortgage discharge fee
- Mortgage discharge registration fee

- Moving estimate
- Moving expenses
- New water line
- Non-conforming uses - loss of
- Personal Effort / General disruption of family life

- Post Office Change of Address
- Reconnect fees - Natural gas, videon, telephone
- Renovations denied where no evidence that replacement home was not reasonably equivalent

- Rental van, Uhaul
- Renting interim accommodation
- Rental - loss of for six months
- Rewiring fences
- Shelving - -new in basement to accommodate special hobbies of claimant
- Sod and site preparation
- Stigma of being adjacent to waste water treatment plant
- 5% Storage expense

- Temporary interim accommodation Time / Personal inconvenience denied
- Trees and shrubs (cost of buying new and cost of moving old)
- Vehicle damages due to an accident during reconstruction and inconvenience and cost of finding another residence not mandatory - claim denied

AGRICULTURAL

- Additional row of evergreens for noise buffer
- Adequate supply of water for farm purposes - claim denied
- Auction expenses
- Catch pens
- Construction of corrals and loading chute
- Continuing fixed machinery costs
- Cost of new calving shed
- Cost of relocation of well
- Disruptive process of severing a ranch during a busy season - claim denied
- Drilling, casing and frost proofing of well
- Earth work (each end of the cattle underpass)
- Escape of cattle
- Extra mileage to check on cattle
- Feed bunks
- Fence repairs
- Gravel
- Hydraulic report
- Impact no profitability
- Inconvenience / Loss of time
- Insurance and Interest
- Loss of crop and loss of access
- Loss of cultivated land and trees
- Loss of pasture rental - claim denied

- Maintenance and replacement of fence
- Moving and related damages
- Noise during the three-month construction period (based on value of milk loss)
- Passive movements of cattle
- Productivity of land
- Relocation of double wide trailer
- Relocation of the power supply
- Relocation of zebra enclosure
- Replacement of water-supply system
- Restoration of property
- Seed areas to grass
- Snow fences
- Surplus water
- Telephone costs
- Time spent on relocation of mobile home and well
- Transportation of cattle
- Travel costs Trees
- Weed control costs
- Wind-break fence

INDUSTRIAL

- Additional rent
- Additional telephone and delivery charges arising from the company's location
Buildings (office, warehouse, scow shed, tank shed)
- Business disturbance
- Claimant's time

- Cost incurred during shut-down of business
- Cost of advertising the move to the new location
- Cost of moving
- Cost of storage for inventory and chattels - claim denied
- Cost of relocation in temporary accommodations while the permanent location is being prepared

- Cost of removing a railway siding on vacating the property
- Double rent
- Electrical code upgrades

- Electrical installations

- Equipment
- Excavation
- Extra staff time
- Fees of chartered accountant
- Fire protection
- Fittings and fixtures
- Foundation
- Grade beams
- Intercom system
- Leasehold improvements to office space
- Lighting
- Loss of advertising value of the old site where the company had its name affixed to its building in a very prominent position

- Loss of employees' time in the moving operation

- Loss of furniture

- Loss of income allowed for period between termination

of possession and commencement of new job

(amount based on new salary)

- Loss of pick-up business and counter sales attributable to the former location
- Moving costs
- New slab
- Office expenses
- Plumbing
- Refrigeration and electrical equipment
- Relocation costs (moving, legal)
- Replacement of concrete foundation
- Roof covering
- Room dividers purchased
- Search for and evaluating relocation sites
- Site work (i.e. grading and excavation, paving, concrete curbs, etc.)
- Telephone, advertising and stationary costs
- Temporary loss of profits
- Time spent preparing a compensation claim or attending a hearing to give evidence regarding a compensation claim - claim denied
- Truck rental
- Vats and tanks
- Windows and entrances
- Work of accountant and employees of owner on construction and design of new club premises - claim denied

COMMERCIAL

- Additional cost of business tax
- Advertising costs
- Air conditioning
- Alarm system
- All costs incidental to re-establishing the business
- Alleged failure by church to double its congregation - claim denied
- Apprehended depreciation in the profitability of the business resulting from the change of location
- Architect
- Building permit
- Business loss (fixed overhead, interim financing costs and loss of profits)
- Business loss during move
- Carpeting
- Cash registers
- Cellular telephone
- Claimant's time
- Contractor's fee
- Consulting costs
- Cost to relocate hole on golf course (tee box, grass seeding, new green, earth moving, irrigation, move trees, new trees)
- Cost for plumbing, welding, and painting at new premises
- Cost of finding equally suitable business premises
- Cost of materials to install service counter at new premises
- Cost of transferring business (moving expenses)
- Cost to find other premises
- Cost to install exhaust fans, not at old premises, but required by regulations on the new premises

- Equipment
- Fire protection
- Garage
- HVAC
- Increased costs during the transitional period

- Interior design
- Leasehold improvements
- Legal fees related to leasing new premises

- Lessee's time
- Loss of claimant's time and travel expenses related to the taking
- Loss of leasehold improvements
- Loss on sale of inventory
- Mailing to clients
- Maintenance
- Moving and packing expenses
- New roof
- New safe

- Occupancy permit
- Office space
- Permanent financial loss
- Pest control
- Plumbing
- Potential loss of business

- Professional fees

- Relocation expenses
- Removal, storage and reinstallation of sign

- Renovations
- Rent differential
- Rent duplication
- Signage
- Site preparation and replacement costs
- Sound and light
- Start-up / relocation expenses
- Stationary and other redundant chattels
- Storage
- Telephone
- Temporary financial loss
- Time to find and negotiate replacement property

- Trees (moved and new)
- Trench drain, wiring, installation of hoists used in the business at the new premises
- Unsaleable items
- Wasted inventory

- Welding

DEVELOPMENTS

- Additional employee salary
- Advertising
- Annoyance (noise, dust, vibration)
- Business loss and increased overhead
- Cleaning awnings
- Cleaning carpets
- Computer related damages

- Cost of operating out of two locations
- Cost of site preparation
- Development costs
- Extraordinary property management expenses
- Improvements
- Inconvenience allowance
- Increased cost of development - claim denied
- Legal costs
- Limited easement
- Loss of executive time
- Loss of income
- Loss of developer's profit - claim denied
- Loss of builder's profit during delay period
- Loss of rental income
- Moving expenses
- Painting highway sign
- Paving parking lot
- Planning and legal services
- Property transfer tax
- Property taxes during delay period
- Reconstruction of shelving and workshop facilities

- Removing and reinstalling electric sign
- Roof repairs
- Weed cutting during delay period

PERMANENT INCREASED COSTS

Pre-statutory code where amount is not segregated as a disturbance item

4. Montreal v. ILGWU Centre Inc. [1974] S.C.R. 59. The Court held at paragraph 49:

The exemption from taxes enjoyed by respondent for an indefinite period lapsed as a result of the expropriation of the property for which it was granted. According to the evidence, the municipal administration of Montreal has never withdrawn an exemption so granted; thus it was an important advantage of which respondent was definitely deprived as a consequence of the expropriation. No reason was advanced as to why this very real loss should not form the basis of some compensation.

Post Statutory code authorities

5. Boyd, Expropriation in Canada, (1988, Canada Law Book Inc.) p. 96 re damages of a continuing nature.
6. January, 1981 memo from LVAC Chairman, Cameron Harvey, with respect to continuing fixed costs awards setting out its policy with respect to partial takings of cultivated land, native hay land and waste land.

Selected Manitoba cases

7. *Smith v. Manitoba* (1993) 49 L.C.R. 206 (Man. L.V.A.C.) - 10% of market value for fixed machinery costs awarded to a tenant.
8. *Genoway v. Department of Highways and Transportation* (1995) 55 LCR, 241 (Man. L.V.A.C.) - 10% of market value for fixed machinery costs for farmer not farming the subject parcel plus present worth of the cost license for two trucks for 10 years (\$1,500).
9. *Bodner v. Manitoba* (2003) 83 L.C.R. 71 (Man. L.V.A.C.) - 20% of market value for fixed machinery costs plus award of permanent increase and extra travel costs in the amount of \$10,500 based on an annual cost of \$1,290.00 for a 10 year period at 5%..

Selected Alberta cases

10. *Berry v. R.* (1979) 17 L.C.R. 131 (Alta Land Comp. Bd.) fixed costs for 20 years capitalized at 5% plus general disturbance damages of \$500.
11. *McGregor v. Province of Alberta* (1982) 26 L.C.R. 304 (Alta. Q.B.) re \$3,000 for inconvenience, \$2,000 for trespass exposure, \$1,333 for additional insurance and \$3,500 for fixed machinery costs for a 20 year period.
12. *Malin v. R.* (1988) 41 L.C.R. 143 (Alta. Land Comp. Bd.) - disturbance costs for increased permanent costs of a transportation of cattle (\$6,365), checking of cattle (\$14,424), maintenance and replacement of fencing for 30 years (\$3,200), present worth of permanent fixed machinery costs (\$7,925).
13. *Malmberg v. Cardston* (1997) 63 L.C.R. 8 (Alta. C.A.). Leave to Appeal refused at [1998] 1 S.C.R. xi - cost of maintaining improvements where the authority is responsible for the cost of the improvements.

Manitoba case - non agricultural permanent costs

14. *Genstar Corp. v. Department of Urban Affairs (No. 2)* (1986) 35 L.C.R. 253 (Man L.V.A.C.) - award for annual increased operating costs of getting aggregate (5 years at a 12% discount rate).

U.K Authorities

15. *Alfred Golightly Ltd. v. Durham CC* [1981] EGD 632 (England, Lands Tribunal) - tax, which, but for the expropriation, the owner would not have been required to pay.
16. *Mogridge (W.J.) Ltd. v. Bristol Corp.* (1956) [8 P. & C.R.] 78 - payment for increased cost of rents, rates and other costs.
17. In *R. v. Superior Propane*, 2004 NSCA 73, a business in operation for 44 years, based on the evidence adduced, was awarded damages with respect to increased property taxes calculated over 38 years. The parties had agreed that if there was a claim “for the value of increased property taxes ... such claim shall be determined by the Nova Scotia Utility and Review Board pursuant to the Act.” (p.4) In issue were the

method of calculating compensation, if any, and the appropriate time period. The Nova Scotia Court of Appeal, citing the Dell case held (p.7/8):

“The Board did not err in law by awarding disturbance damages for the increased tax liability without first finding that Superior had suffered a loss of overall profitability. No such requirement is found in the Act and to impose such a requirement in this case would defeat the clear intention of the parties as expressed in their agreement and be contrary to the broad and purposive manner of interpreting expropriation legislation favouring full compensation to the land owner ...

We are not persuaded that the Board erred in law either in interpreting the Act or in construing the contract”.

18. In *Jones v. City of Fernie* (1994), L.C.R. 285 (B.C. Exprop. Comp. Bd.), a farmer was awarded damages for increased operating costs for 50 years.

19. In *Tarani Rebuilders Inc. v. Edmonton (City)* (2000), 69 L.C.R. 161 (Alta. Comp. Bd.), the owner stated he intended on being in business for 15 years and claimed \$19,000/yr for increased property taxes, insurance, maintenance and repairs. The City of Edmonton submitted the proper amount was \$2,937/yr. The Alberta Compensation Board granted \$15,580/yr for 15 years (p.192/193).

20. In *Bartle & Gibson Co. v. Edmonton (City)* (1995), 58 L.C.R. 36 (Alta. C.A.), the Court of Appeal awarded increases in property taxes, business taxes, utility and maintenance costs.

EMPLOYEE, CLAIMANT AND EXECUTIVE TIME

1. In Todd, *The Law of Expropriation*, executive's loss of time is listed as a typical disturbance damage (see p.290).

2. In Manitoba, the LVAC will only award payment to a claimant for actual wage losses. Time spent by management employees who get paid a salary without overtime is not reimbursed. Nominal compensation is paid to self employed claimants and to management employees of claimants to recognize extraordinary efforts. In Nova Scotia, the Court of Appeal has ruled that an owner's time to prepare the case is not claimable as a disturbance claim where there is only a partial taking. However, time with respect to an owner's appearance at the hearing and with respect to the owner time spent on relocation is recoverable.

3. Examples of cases applying this indemnity approach for management employees and owners, instead of nominal compensation, include: *GWH Developments Ltd. v. The Queen* (1981), 21 L.C.R. 193 (Fed. Ct. Trial Div.) at p.214 - \$41,949.08; *Lauzon v. City of Windsor* (1974), 7 L.C.R. 11 (Ont. Land Compensation Board) at p.26; *Loblaws v. City of Toronto* (1979), 18 L.C.R. 363 (Ont. L.C.Bd.) at p.374; *Parkins v. Ministry of Transportation and Communications* (1985), 32 L.C.R. 182 (Ont. L.C.Bd.) at p.205

- even non-wage earners are compensated in Ontario ; *Foothills Pipe Lines (Alta.) Ltd. v. Rowe* (1982), 25 L.C.R. 95 (Alta. Q.B.) at p.105; *Captain Developments Ltd. v. Ontario* (1993), 50 L.C.R. 176 (Ont. L.C.Bd.) pp.187/198 - \$26,865 claimed and awarded. Included 239.25 hours of executive time at \$100 per hour ; *Woodbine Realty Ltd. v. Metropolitan Toronto* (1994), 53 L.C.R. 255 (Ont. Mun. Bd.) pp.268/269.