

# The A, B, C's of Expropriation

Presentation to the Ontario Bar Association  
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# Elements of Compensation

**1. Market Value:**

An objective standard usually based on appraisal advice.

**2. Injurious Affection or Loss of Value in Residual or Non-Expropriated Land:**

Also based on objective standards and usually assessed by appraisers.

**3. Disturbance Damages:**

Out of pocket expenses triggered by the expropriation and other losses that must be addressed to make the expropriated owner whole.

**4. Special Difficulties in Relocation:**

A special category of this for homeowners is equivalent reinstatement.

# Elements of Compensation

- The *Act* contains further direction with respect to business losses and loss of goodwill: Elements usually assessed by business loss accountants.
- The categories of loss are based on circumstance and continue to grow.
- Injurious Affection has also been generously interpreted in the cases.
- Examples of categories of Disturbance Damages and Injurious Affection which have been allowed are set out on Schedules A and B attached.
- Interest and costs are also included elements of compensation.
- Interest is at a statutory rate of 6% per cent. (Section 33)
- Costs provide for full reimbursement of reasonable legal, appraisal and other fees incurred to determine the compensation payable. (Section 32)

# Compensation – Section 13

## Compensation

**13. (1)** Where land is expropriated, the expropriating authority shall pay the owner such compensation as is determined in accordance with this Act. R.S.O. 1990, c. E.26, s. 13 (1).

## Idem

**(2)** Where the land of an owner is expropriated, the compensation payable to the owner shall be based upon,

- (a) the market value of the land;
- (b) the damages attributable to disturbance;
- (c) damages for injurious affection; and
- (d) any special difficulties in relocation,

but, where the market value is based upon a use of the land other than the existing use, no compensation shall be paid under clause (b) for damages attributable to disturbance that would have been incurred by the owner in using the land for such other use. R.S.O. 1990, c. E.26, s. 13 (2).

# Compensation – Section 18

## Allowance for disturbance

### Owner other than tenant

**18. (1)** The expropriating authority shall pay to an owner other than a tenant, in respect of disturbance, such reasonable costs as are the natural and reasonable consequences of the expropriation, including,

- (a) where the premises taken include the owner's residence,
  - (i) an allowance to compensate for inconvenience and the cost of finding another residence of 5 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, provided that such part was not being offered for sale on the date of the expropriation, and
  - (ii) an allowance for improvements the value of which is not reflected in the market value of the land;
- (b) where the premises taken do not include the owner's residence, the owner's costs of finding premises to replace those expropriated, provided that the lands were not being offered for sale on the date of expropriation; and
- (c) relocation costs, including,
  - (i) the moving costs, and
  - (ii) the legal and survey costs and other non-recoverable expenditures incurred in acquiring other premises.  
R.S.O. 1990, c. E.26, s. 18 (1).

### Tenant

**(2)** The expropriating authority shall pay to a tenant occupying expropriated land in respect of disturbance so much of the cost referred to in subsection (1) as is appropriate having regard to,

- (a) the length of the term;
- (b) the portion of the term remaining;
- (c) any rights to renew the tenancy or the reasonable prospects of renewal;
- (d) in the case of a business, the nature of the business; and
- (e) the extent of the tenant's investment in the land. R.S.O. 1990, c. E.26, s. 18 (2).

# Compensation – Section 19

## **Business loss**

**19. (1)** Where a business is located on the land expropriated, the expropriating authority shall pay compensation for business loss resulting from the relocation of the business made necessary by the expropriation and, unless the owner and the expropriating authority otherwise agree, the business losses shall not be determined until the business has moved and been in operation for six months or until a three-year period has elapsed, whichever occurs first. R.S.O. 1990, c. E.26, s. 19 (1).

## **Good will**

**(2)** The Board may, in determining compensation on the application of the expropriating authority or an owner, include an amount not exceeding the value of the good will of a business where the land is valued on the basis of its existing use and, in the opinion of the Board, it is not feasible for the owner to relocate. R.S.O. 1990, c. E.26, s. 19 (2).

# Costs - Section 32

## Costs

32. (1) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Board and the amount awarded by the Board is 85 per cent, or more, of the amount offered by the statutory authority, the Board shall make an order directing the statutory authority to pay the reasonable legal, appraisal and other costs actually incurred by the owner for the purposes of determining the compensation payable, and may fix the costs in a lump sum or may order that the determination of the amount of such costs be referred to an assessment officer who shall assess and allow the costs in accordance with this subsection and the tariffs and rules prescribed under clause 44 (d). R.S.O. 1990, c. E.26, s. 32 (1).

## Idem

(2) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Board and the amount awarded by the Board is less than 85 per cent of the amount offered by the statutory authority, the Board may make such order, if any, for the payment of costs as it considers appropriate, and may fix the costs in a lump sum or may order that the determination of the amount of such costs be referred to an assessment officer who shall assess and allow the costs in accordance with the order and the tariffs and rules prescribed under clause 44 (d) in like manner to the assessment of costs awarded on a party and party basis. R.S.O. 1990, c. E.26, s. 32 (2).

# Interest - Section 33

## Interest

**33. (1)** Subject to subsection 25 (4), the owner of lands expropriated is entitled to be paid interest on the portion of the market value of the owner's interest in the land and on the portion of any allowance for injurious affection to which the owner is entitled, outstanding from time to time, at the rate of 6 per cent a year calculated from the date the owner ceases to reside on or make productive use of the lands. R.S.O. 1990, c. E.26, s. 33 (1).

## Variation of interest

**(2)** Subject to subsection (3), where the Board is of the opinion that any delay in determining the compensation is attributable in whole or in part to the owner, it may refuse to allow the owner interest for the whole or any part of the time for which the owner might otherwise be entitled to interest, or may allow interest at such rate less than 6 per cent a year as appears reasonable. R.S.O. 1990, c. E.26, s. 33 (2).

## Idem

**(3)** The interest to which an owner is entitled under subsection (1) shall not be reduced for the reason only that the owner did not accept the offer made by the expropriating authority, although the compensation as finally determined is less than the offer. R.S.O. 1990, c. E.26, s. 33 (3).

## Idem

**(4)** Where the Board is of the opinion that any delay in determining compensation is attributable in whole or in part to the expropriating authority, the Board may order the expropriating authority to pay to the owner interest under subsection (1) at a rate exceeding 6 per cent a year but not exceeding 12 per cent a year. R.S.O. 1990, c. E.26, s. 33 (4).

# Schedule A – Disturbance Damages

10-66 S. 13	New Law of Expropriation
<i>Disturbance damages awarded for:</i>	
business, loss of, where owner unable to relocate within the same trading area	<i>Schiedel v. Waterloo (Regional Municipality)</i> (1982), 25 L.C.R. 189, 1982 CarswellOnt 2017 (L.C.B.) at 191
business loss, extra costs of dislocation and relocation	<i>Madsen v. Toronto (Metropolitan)</i> (1970), 1 L.C.R. 27, 1970 CarswellOnt 858 (Ont. C.A.) at 36-38
business loss on new business	<i>Lafleche v. Ontario</i> (1975), 8 L.C.R. 77, 1975 CarswellOnt 1308 (Ont. Div. Ct.) at 84
business loss, temporary	<i>Famous Players Ltd. v. Sudbury (City)</i> (1978), 15 L.C.R. 49, 1978 CarswellOnt 1719 (Ont. L.C.B.) at 65
business loss, where it was not feasible for owner to relocate for five-year period	<i>Schlotzer v. Ontario</i> (1978), 15 L.C.R. 312, 1978 CarswellOnt 1714 (L.C.B.) at 320-323
business loss from relocation	<i>Ontario Canoe Trip Outfitters Ltd. v. Ontario</i> (1988), 39 L.C.R. 378, 1988 CarswellOnt 3516 (O.M.B.) at 380-381
business loss caused by delayed expropriation	<i>Dell Holdings v. Toronto Area Transit Operating Authority</i> (1997), 60 L.C.R. 81, 1997 CarswellOnt 78 (S.C.C.)  <i>Bernard Homes Ltd. v. York Catholic District School Board</i> (2002), 75 L.C.R. 147, 2001 CarswellOnt 5516 (O.M.B.), additional reasons (2002), 77 L.C.R. 216, 2002 CarswellOnt 4778 (O.M.B.), additional reasons (2003), 80 L.C.R. 66, 2003 CarswellOnt 4418 (O.M.B.), additional reasons (May 21, 2003), Doc. LC 980021, 2003 CarswellOnt 6160 (O.M.B.), reversed (2004), 83 L.C.R. 176, 2004 CarswellOnt 3008 (Ont. Div. Ct.), leave to appeal to Court of Appeal refused (March 4, 2005), Doc. CA M31487, 2005 CarswellOnt 1326 (Ont. C.A.)

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Expropriations Act—Ontario	10-67 S. 13
carrying costs of property incurred during delayed expropriation	<i>Devine v. Ontario (Minister of Transportation)</i> (1999), 67 L.C.R. 253, 1999 CarswellOnt 4637 (O.M.B.), additional reasons (1999), 67 L.C.R. 253 at 277, 1999 CarswellOnt 4638 (O.M.B.), reversed (March 5, 2001), Doc. Toronto 752/99, 2001 CarswellOnt 4939 (Ont. Div. Ct.), reversed (2002), 76 L.C.R. 89, 2002 CarswellOnt 883 (Ont. C.A.) (affirming the O.M.B. decision)
cleaning pond following construction	<i>Ruddell v. Ontario Hydro</i> (1983), 28 L.C.R. 240, 1983 CarswellOnt 1942 (Ont. L.C.B.) at 244
closing down, costs of	<i>Funshine Investments Ltd. v. Ontario (Minister of Transportation &amp; Communications)</i> (1986), 35 L.C.R. 52, 1986 CarswellOnt 3247 (O.M.B.), additional reasons (1986), 35 L.C.R. 52 at 74 (O.M.B.)
construction damage	<i>Kowalik v. Ontario</i> (1986), 34 L.C.R. 124, 1986 CarswellOnt 3244 (O.M.B.), additional reasons (1986), 36 L.C.R. 382, 1986 CarswellOnt 3250 (O.M.B.)
crop damage	<i>Kowalik v. Ontario, supra</i>
debris left on owner's land, cost of removing	<i>MacLeod v. Ontario</i> (1983), 29 L.C.R. 245, 1983 CarswellOnt 1952 (O.M.B.), affirmed (1985), 45 L.C.R. 285, 1985 CarswellOnt 968 (Ont. Div. Ct.), leave to appeal to Ont. C.A. refused
demolition costs of building on the expropriated lands where demolition was required by the expropriating authority	<i>Cronish v. Toronto</i> (1984), 30 L.C.R. 294, 1984 CarswellOnt 1867 (O.M.B.), varied (1986), 37 L.C.R. 107, 1986 CarswellOnt 701 (Ont. Div. Ct.)
depreciation lost	<i>BP Oil Ltd. v. Ontario</i> (1975), 8 L.C.R. 62, 1975 CarswellOnt 1307 (Ont. L.C.B.) at 72

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# Schedule A – Disturbance Damages

10-68 S. 13	New Law of Expropriation	Expropriations Act—Ontario	10-69 S. 13
equipment	<i>Boucherie Paquette Meat Market Ltd. v. Ottawa-Carleton</i> (1988), 38 L.C.R. 338, 1988 CarswellOnt 3513 (O.M.B.) at 344	interest on money borrowed for bridge financing	<i>Shearer v. Ontario</i> (1980), 21 L.C.R. 329, 1980 CarswellOnt 1722 (L.C.B.)
fence	<i>Bailey v. Ottawa-Carleton</i> (1976), 9 L.C.R. 342, 1976 CarswellOnt 1193 (Ont. L.C.B.) at 347 <i>Jack v. Napanee Region Conservation Authority</i> (1973), 3 L.C.R. 301 (L.C.B.) at 303	interest on money borrowed to pay professional fees	<i>Lofranco v. Toronto</i> (1982), 25 L.C.R. 11 (L.C.B.) at 34 <i>Calgas Investments Ltd. v. York</i> (1983), 29 L.C.R. 297, 1983 CarswellOnt 1954 (O.M.B.) <i>Melinyzyn v. York</i> (1984), 29 L.C.R. 339, 1984 CarswellOnt 1860 (O.M.B.)
frustration of contract, loss on	<i>Kozak v. M.T.R.C.A.</i> (1978), 16 L.C.R. 77, 1978 CarswellOnt 1733 (L.C.B.) at 88	interest on mortgage of relocation property	<i>Gorczyca, supra</i> , at 49
garage	<i>Barrick v. Muskoka</i> (1991), 46 L.C.R. 222, 1991 CarswellOnt 4192 (O.M.B.) at 228	inventory, loss on disposal of	<i>Plouffe v. Ottawa</i> (1973), 4 L.C.R. 37, 1973 CarswellOnt 1342 (L.C.B.) at 44 <i>Lofranco, supra</i> , at 32 <i>Gorczyca, supra</i> , at 49
household furnishings lost or replaced	<i>Lang v. London</i> (1977), 14 L.C.R. 185, 1977 CarswellOnt 1473 (L.C.B.) at 189	legal fees and land transfer tax	<i>Kowalik, supra</i>
income, loss of	<i>Schiedel v. Waterloo</i> (1982), 25 L.C.R. 189, 1982 CarswellOnt 2017 (L.C.B.) at 191 13 L.C.R. 261 at 263 <i>Bersenas v. Ontario</i> (1982), 25 L.C.R. 137, 1982 CarswellOnt 2015 (L.C.B.) at 146-148, affirmed (1984), 31 L.C.R. 97, 1982 CarswellOnt 2015 (Ont. Div. Ct.) <i>Moroz v. Hamilton-Wentworth</i> (1984), 29 L.C.R. 350, 1984 CarswellOnt 1861 (O.M.B.) at 386	loss of future profit from farm operation	<i>Barriage v. Ontario Hydro</i> (1983), 30 L.C.R. 159, 1983 CarswellOnt 1955 (O.M.B.) at 170
increased costs of construction	<i>Kelly v. Northumberland</i> (November 13, 1990), O.M.B. File No. L 870012, 1990 CarswellOnt 3615 (O.M.B.)	loss of use of profits from business venture frustrated by the expropriation	<i>Lang v. London</i> (1977), 14 L.C.R. 185, 1977 CarswellOnt 1473 (L.C.B.) at 191
insurance on equipment in storage	<i>Bersenas, supra</i> , at 145-146	mortgage bonus to discharge mortgage on new premises	<i>Lang v. London</i> (1977), 14 L.C.R. 185, 1977 CarswellOnt 1473 (L.C.B.) at 191
insurance premiums for house on expropriated property	<i>Gorczyca v. Ontario</i> (1988), 41 L.C.R. 39, 1988 CarswellOnt 3401 (O.M.B.) at 49	mortgage discharge costs	<i>Levine v. Ottawa</i> (1989), 42 L.C.R. 148, 1989 CarswellOnt 3433 (O.M.B.) at 156-157, affirmed (1990), 44 L.C.R. 1, 1990 CarswellOnt 1046 (Ont. Div. Ct.), leave to appeal to Ont. C.A. and S.C.C. refused
interest on borrowed money	<i>Martin v. Ottawa-Carleton</i> (1976), 11 L.C.R. 56, 1976 CarswellOnt 1222 (L.C.B.) at 62	mortgage prepayment cost	<i>Winston Spencer Churchill (Ontario No. 3) Branch of Royal Canadian Legion v. Toronto</i> (1980), 19 L.C.R. 337, 1980 CarswellOnt 1714 (L.C.B.) at 356
		moving costs	<i>Gray Coach Lines Ltd. v. Hamilton</i> (1972), 3 L.C.R. 1, 1972 CarswellOnt 218 (S.C.C.) <i>Winston Spencer, supra</i> , at 366

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# Schedule A – Disturbance Damages

10-70 S. 13	New Law of Expropriation	Expropriations Act—Ontario	10-71 S. 13
moving costs, where claimant moved himself, with the help of neighbours	<i>Marco v. Ontario</i> (1983), 28 L.C.R. 285, 1983 CarswellOnt 1945 (L.C.B.)	relocation of farm improvements	<i>Gorczyca, supra</i> , at 49
noise, dust and salt, damages for during construction on partial taking	<i>McCarthy v. Ontario</i> (1983), 28 L.C.R. 213, 1983 CarswellOnt 1941 (L.C.B.) at 224	relocation of residence	<i>Barrick v. Muskoka</i> (1991), 46 L.C.R. 222, 1991 CarswellOnt 4192 (O.M.B.) at 229
parking spaces, loss of	<i>Strezos v. Metropolitan Toronto (Municipality)</i> (1975), 8 L.C.R. 294 (L.C.B.) at 317	relocation of laneway and grading remedial work, cost of fill to reconstruct a beach and parking area on contiguous lands	<i>Kelly v. Northumberland, supra</i> <i>Waymouth v. Haliburton</i> (1984), 30 L.C.R. 73, 1984 CarswellOnt 1873 (O.M.B.)
professional fees thrown away	<i>Gray Coach, supra</i> , 1 at 7 <i>Liebovitch v. Vanier</i> (1975), 8 L.C.R. 109, 1975 CarswellOnt 1288 (L.C.B.) at 111 <i>Ridgeport Developments v. MTRCA</i> (1976), 11 L.C.R. 143, 1976 CarswellOnt 1210 (L.C.B.) at 156 <i>Winston Spencer, supra</i> , at 355–356 <i>Lofranco, supra</i> , at 34 (1986), LCA File 83017	rent, loss of	<i>Martin v. Ottawa-Carleton</i> (1976), 11 L.C.R. 56, 1976 CarswellOnt 1222 (L.C.B.) at 62 <i>Winston Spencer, supra</i> , at 355 <i>Bersenias, supra</i> , 25 L.C.R. 137 at 145–146 <i>Lofranco, supra</i> , 25 L.C.R. 11 at 32
profit, loss of	<i>BP Oil Ltd. v. Ontario</i> (1975), 8 L.C.R. 62, 1975 CarswellOnt 1307 (Ont. L.C.B.) at 72 <i>Blatchford Feeds Ltd. v. Toronto Board of Education</i> (1974), 6 L.C.R. 355, 1974 CarswellOnt 1313 (L.C.B.) at 375 <i>Lafleche, supra</i> , at 85	revenue, loss of	<i>Winston Spencer, supra</i> , at 355
relocation of driveway and fuel tank	<i>Bailey v. Ottawa-Carleton, supra</i> , at 347	storage costs	<i>Bersenias, supra</i> , 25 L.C.R. 137 at 145–146
relocation costs of business with reversionary interest	<i>Eai'n Putt Ltd. v. Ontario</i> (1987), 38 L.C.R. 26, 1987 CarswellOnt 693 (Ont. Div. Ct.) at 29	substitute premises, excess costs of acquiring or renovating	<i>Lofranco, supra</i> , 25 L.C.R. 11 at 32 <i>Winston Spencer, supra</i> , at 355 <i>Barrick, supra</i> , at 229
relocation costs of business	<i>Famous Players Ltd. v. Sudbury</i> (1978), 15 L.C.R. 49, 1978 CarswellOnt 1719 (L.C.B.) at 65 <i>Gentle v. Ottawa-Carleton</i> (1977), 14 L.C.R. 167, 1977 CarswellOnt 1472 (L.C.B.) at 171	shed	<i>Kelly v. Northumberland, supra</i> <i>Gray Coach, supra</i> , at 7
relocation cost of farm buildings due to proximity to new highway	<i>Kuzyk v. Windsor</i> (1984), 30 L.C.R. 223, 1984 CarswellOnt 1864 (O.M.B.)	survey	<i>MacLeod v. Ontario</i> (1983), 29 L.C.R. 245, 1983 CarswellOnt 1952 (O.M.B.), affirmed (1985), 45 L.C.R. 285, 1985 CarswellOnt 968 (Div. Ct.), leave to appeal to Ont. C.A. refused
		temporary facilities, cost of	<i>Blatchford Feeds, supra</i> , 6 L.C.R. 355
		test pumping well, cost of	<i>Lauzon v. Windsor</i> , 7 L.C.R. 11, 1974 CarswellOnt 1284 (L.C.B.) at 25 <i>ILGWU Centre Inc. v. Régie de la Place des Arts</i> (1975), 8 L.C.R. 1, 1975 CarswellQue 39 (S.C.C.) at 7
		time lost by owner or officer or employee of corporation as a result of expropriation	<i>King v. St. Catharines</i> (1978), 16 L.C.R. 173, 1978 CarswellOnt 1723 (L.C.B.) at 182

# Schedule A – Disturbance Damages

10-72 S. 13	New Law of Expropriation	
		<i>Dirksen v. Ontario</i> (1982), 26 L.C.R. 148, 1982 CarswellOnt 2022 (L.C.B.), affirmed (1984), 30 L.C.R. 221, 1983 CarswellOnt 1959 (Ont. Div. Ct.) at 155
		<i>Reed Vaughan Ltd. v. Ontario</i> (1984), 30 L.C.R. 369, 1984 CarswellOnt 1871 (O.M.B.), affirmed (1985), 34 L.C.R. 188, 1985 CarswellOnt 1071 (Ont. S.C.) at 383
		<i>Kowalik, supra</i>
trade fixtures and equipment, loss on forced sale		<i>Plouffe v. Ottawa</i> (1973), 4 L.C.R. 37, 1973 CarswellOnt 1342 (L.C.B.) at 44
trees, loss of, on partial taking		<i>Feder v. York</i> (1972), 3 L.C.R. 303, 1972 CarswellOnt 1335 (L.C.B.) at 307
		<i>Bailey, supra</i> , at 344
		<i>Hanenburg v. Oxford</i> (1979), 18 L.C.R. 334, 1979 CarswellOnt 1737 (L.C.B.)
trees, for screening purposes, on partial taking		<i>General Capital Growth Ltd. v. Burlington</i> (1980), 19 L.C.R. 153, 1980 CarswellOnt 1711 (L.C.B.)
		<i>McCarthy v. Ontario</i> (1983), 28 L.C.R. 213, 1983 CarswellOnt 1941 (L.C.B.) at 224
trees, loss of, on total taking where commercial value of trees not reflected in market value of lands		<i>Schlotzer v. Ontario</i> (1978), 15 L.C.R. 312, 1978 CarswellOnt 1714 (L.C.B.) at 315–316
trout pond, loss of, on partial taking		<i>McCarthy, supra</i> , at 224
trucking expense, additional		<i>Blatchford Feeds, supra</i> , 6 L.C.R. 355 at 375
wages, office staff, additional		<i>Blatchford Feeds, supra</i> , 6 L.C.R. 355 at 375
water, loss of, from well		<i>Harcaroy Farms Ltd. v. Ontario</i> (1975), 8 L.C.R. 248, 1975 CarswellOnt 1295 (L.C.B.) at 264–265
water damage to building		<i>Kalakaylo v. Ontario</i> (1986), 37 L.C.R. 269, 1986 CarswellOnt 3254 (O.M.B.) at 271

# Schedule B – Injurious Affection

		Expropriations Act—Ontario	10-74.17 S. 13
			<i>Hewitt v. Ontario</i> (1984), 31 L.C.R. 227, 1984 CarswellOnt 1875 (O.M.B.)
		Landlocked parcel resulting from expropriation for highway construction	<i>Gorczyca v. Ontario</i> (1988), 41 L.C.R. 39, 1988 CarswellOnt 3401 (O.M.B.) at 49–50
		Landlocked remaining lands	<i>Salvation Army, Canada East v. Ontario</i> (1984), 31 L.C.R. 193, 1984 CarswellOnt 546 (Ont. Div. Ct.), affirmed (1986), 34 L.C.R. 193, 1986 CarswellOnt 692 (Ont. C.A.)
		Loss of access	<i>Hollywood v. Ontario</i> (1989), 41 L.C.R. 236, 1989 CarswellOnt 3430 (O.M.B.) at 238–240
		Loss of access resulting from expropriation for a highway	<i>Bramalea Ltd. v. Ontario</i> (1989), 42 L.C.R. 44, 1989 CarswellOnt 3438 (O.M.B.), varied (1992), 47 L.C.R. 239, 1992 CarswellOnt 979 (Ont. Div. Ct.)
<i>Injurious affection awarded for:</i>		Loss of access to lake for re-establishment of shore road along shoreline	<i>Harrington v. Huntsville</i> (1986), 37 L.C.R. 276, 1986 CarswellOnt 3020 (O.M.B.)
Diminished aesthetics and heightened noise level resulting from constructing of highway	<i>Brunet v. Ontario</i> (1988), 41 L.C.R. 50, 1988 CarswellOnt 3402 (O.M.B.) at 53–54	Loss of access to highway or adjoining land	<i>Rokoss v. Ontario</i> (1975), 8 L.C.R. 346, 1975 CarswellOnt 1302 (Ont. L.C.B.) at 352
Easement, flood	<i>Hay v. South Nation River Conservation Authority</i> (1971), 1 L.C.R. 387, 1971 CarswellOnt 852 (L.C.B.) at 389		<i>Head Construction &amp; Supply Ltd. v. Windsor</i> (1981), 23 L.C.R. 69, 1981 CarswellOnt 1574 (Ont. L.C.B.) at 79
Easement for buried watermain	<i>Trout Lake Mall Inc. v. North Bay (City)</i> (2006), 90 L.C.R. 144 (O.M.B.)		<i>Gmach v. Waterloo</i> (1980), 21 L.C.R. 369, 1980 CarswellOnt 1726 (Ont. L.C.B.) at 374–376
Hydro transmission line	<i>Salvation Army, Canada East v. Canada</i> (1990), 44 L.C.R. 302, 1990 CarswellOnt 3593 (O.M.B.)		<i>Walkerville Printing Co. v. Windsor</i> (1976), 9 L.C.R. 378, 1976 CarswellOnt 1201 (Ont. L.C.B.) at 382
Landlocked parcel	<i>Quayle v. Woodstock (City)</i> (1971), 1 L.C.R. 370, 1971 CarswellOnt 850 (L.C.B.) at 375		<i>Dempsey Estate v. Toronto</i> (1977), 14 L.C.R. 55, 1977 CarswellOnt 1476 (L.C.B.) at 73-74
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# Schedule B – Injurious Affection

10-74.18 S. 13	New Law of Expropriation	Expropriations Act—Ontario	10-74.19 S. 13
Loss of exposure and visibility from highway	<i>Airport Corporate Centre Inc. v. Ontario</i> (1995), 55 L.C.R. 135, 1995 CarswellOnt 5186 (O.M.B.), affirmed (1996), 58 L.C.R. 2, 1996 CarswellOnt 541 (Div. Ct.)		<i>Ruddell v. Ontario Hydro</i> (1983), 28 L.C.R. 240, 1983 CarswellOnt 1942 (L.C.B.) (1989), O.M.B. File L 870020
Loss of frontage to 10-acre industrial zoned parcel	<i>Standard Brands Canada Ltd. v. Toronto</i> (1985), 32 L.C.R. 31, 1985 CarswellOnt 2151 (O.M.B.) at 39	Re-alignment and improved control over creek flow and installation of storm sewers resulting in loss of garden and steel beams	
Loss of loading and harbour facilities	<i>Johnson v. Ontario</i> (1972), 3 L.C.R. 386, 1972 CarswellOnt 1341 (L.C.B.) at 403	Road widening	<i>Rosenberg v. York</i> (1983), 27 L.C.R. 378, 1983 CarswellOnt 1934 (L.C.B.) at 382-384
Loss of parking spaces	<i>Lenjo Enterprises Ltd. v. Toronto</i> (No. 2) (1975), 8 L.C.R. 336, 1975 CarswellOnt 1301 (Ont. T.O.) at 344	Severance of land for “constructing an access road”	<i>Golvin Trust v. Toronto Area Transit Operating Authority</i> (1986), 37 L.C.R. 173, 1986 CarswellOnt 3253 (O.M.B.) at 182-185 (1989), O.M.B. File L 860018
Loss of scenic view caused by large steel hydro transmission towers	<i>Lazar v. Hydro One Networks Inc.</i> (2002), 77 L.C.R. 317, 2002 CarswellOnt 4874 (O.M.B.)	Storm water diversion channel	
Loss of trees and landscaping	<i>Bannon v. Ontario</i> (1975), 8 L.C.R. 288, 1975 CarswellOnt 1297 (L.C.B.) at 292 <i>Rokoss, supra</i> , at 351		
Loss of water table	<i>Brunet v. Ontario</i> (1988), 41 L.C.R. 50, 1988 CarswellOnt 3402 (O.M.B.) at 53		
New expressway	<i>D’Amore v. Ontario</i> (1985), 32 L.C.R. 307, 1985 CarswellOnt 2150 (O.M.B.)		
Proximity to highway or public building	<i>Adams v. Ontario</i> (1980), 20 L.C.R. 24, 1980 CarswellOnt 825 (Ont. Div. Ct.) <i>Dart v. York</i> (1981), 22 L.C.R. 291, 1981 CarswellOnt 1563 (L.C.B.) <i>Sheareen Ltd. v. Nepean</i> (No. 1) (1980), 21 L.C.R. 318, 1980 CarswellOnt 1721 (L.C.B.) at 326		
Proximity to hydro transmission line towers and ultra-high voltage power line	<i>Wilson v. Ontario Hydro</i> (1982), 25 L.C.R. 162, 1982 CarswellOnt 660 (L.C.B.), affirmed (1983), 30 L.C.R. 293, 1983 CarswellOnt 651 (Ont. Div. Ct.)		

# Allocation of Compensation between Interests on Title

1. As addressed by other speakers, each registered owner as broadly defined by the *Act* is entitled to receive a Section 25 Offer.
2. It is often difficult for Expropriating Authorities to allocate compensation between landlords, tenants, mortgagees and other interest holders, so their solution is to make a joint offer.
3. There is, however, a duty on the part of the Expropriating Authority to allocate as between owners. (Section 16)
4. Special rules exist for payment out of security holders (mortgagees). (Section 17) Special rules also exist for an assessment of the tenant's interest which principally depends on security of tenure. (Section 18 (2))

# Section 16

## Separate interests

**16.** Where there are more separate interests than one in land, other than the interest of a security holder or a vendor under an agreement for sale, the market value of each such separate interest shall be valued separately. R.S.O. 1990, c. E.26, s. 16.

# Section 17

## Definition

**17. (1)** In this section, “bonus” means the amount by which the amount secured under a mortgage exceeds the amount actually advanced. R.S.O. 1990, c. E.26, s. 17 (1).

## Determining value

**(2)** Where land is subject to a security interest,  
(a) the value of the interest of the security holder shall be determined in accordance with this section and section 20 and not otherwise; and  
(b) the market value of the land shall be determined without regard to the interest of the security holder and the amount of such market value plus any damages for injurious affection shall stand in place of the land for the purposes of the security. R.S.O. 1990, c. E.26, s. 17 (2).

## Payment out of market value

**(3)** Security holders shall be paid the amount of principal and interest outstanding against the security out of the market value of the land and any damages for injurious affection payable in respect of the land subject to the security, in accordance with their priorities, whether or not such principal and interest is due, and subject to subsections (4) and (5). R.S.O. 1990, c. E.26, s. 17 (3).

# Section 17 (continued)

## **Bonus**

(4) Where the land is subject to a mortgage and the amount payable to the mortgagee under subsection (3) is insufficient to satisfy the mortgage in full,

- (a) where the mortgage is a purchase-money mortgage, the mortgage shall be deemed to be fully paid, satisfied and discharged for all purposes; and
- (b) where the mortgage is not a purchase-money mortgage and includes a bonus,
  - (i) the amount by which the amount payable to the mortgagee under subsection (3) is insufficient to pay the amount remaining unpaid under the mortgage, or
  - (ii) the amount of the bonus,

whichever is the lesser, shall be deemed to be fully paid and satisfied for all purposes. R.S.O. 1990, c. E.26, s. 17 (4).

## **Idem**

(5) No amount shall be paid in respect of a bonus until all security holders have been paid all amounts payable other than any bonus. R.S.O. 1990, c. E.26, s. 17 (5).

## **Payment out of market value**

(6) Where land held as security is expropriated in part or is injuriously affected, a security holder is entitled to be paid to the extent possible in accordance with the security holder's priority, out of the market value portion of the compensation and any damages for injurious affection therefor, as the case may be, a sum that is in the same ratio to such portion of the compensation and damages as the balance outstanding on the security at the date of the expropriation or injurious affection is to the market value of the entire land, provided however that the sum so determined shall be reduced by the amount of any payments made to the security holder by the owner after the date of expropriation or injurious affection. R.S.O. 1990, c. E.26, s. 17 (6).

# Section 18 (2)

## Tenant

(2) The expropriating authority shall pay to a tenant occupying expropriated land in respect of disturbance so much of the cost referred to in subsection (1) as is appropriate having regard to,

- (a) the length of the term;
- (b) the portion of the term remaining;
- (c) any rights to renew the tenancy or the reasonable prospects of renewal;
- (d) in the case of a business, the nature of the business; and
- (e) the extent of the tenant's investment in the land. R.S.O. 1990, c. E.26, s. 18 (2).

# Key Considerations in Drafting Expropriation Clauses

## A. Termination of Leasehold Interest:

- (i) Who elects for termination in the case of a partial taking?
- (ii) What is the threshold for the election?
- (iii) Is provision made for future restrictions on access?
- (iv) Are impacts on parking addressed even if not part of the leasehold?

## B. Notice of Risk:

- (i) Is there a pending or threatened expropriation?
- (ii) Is there an expropriation precursor like a Notice of an Environmental Assessment?

# Key Considerations in Drafting Expropriation Clauses

## C. Allocation of Compensation:

- (i) Tenant could be entitled to part of the landlord's compensation based on leasehold advantage.
- (ii) Typically, expropriation clauses allocate market value to the landlord and disturbance damage and business loss to the tenant.
- (iii) Prudent to provide for assignment of right to make a claim if completely trying to avoid leasehold advantage.

## D. Cooperation in Making a Claim:

- (i) Useful to provide for obligation to cooperate in providing for a claim, particularly, if lease is terminated by the expropriation.
- (ii) Much of the knowledge of impact of the expropriation may be in the tenant's hands.

# Special Considerations When Condominiums are Expropriated

1. Is the expropriation of common elements or condominium units, or both?
2. Different considerations with respect to commercial v. residential condominiums.
3. Who has the authority to negotiate with the Expropriating Authority.
4. Rectification and mitigation of common elements.
5. Amending condominium documents to account for changes in common elements.
6. Addressing the period between expropriation and possession, particularly, where the condominium is dissolved by the expropriation.

# Injurious Affection Where No Land is Taken

1. There is a right to make a claim, even if not one square inch of the land is expropriated.
2. The right to claim injurious affection where no land is taken depends on the construction and not the use of the works.
3. An equivalent to a nuisance at common law must be established.
4. There is a limitation on damages that can be claimed.
5. There is a one year notice period under Section 22.

# Injurious Affection

Section 1(1) of the *Expropriations Act* states:

“injurious affection” means,

- (a) where a statutory authority acquires part of the land of an owner,
  - (i) the reduction in market value thereby caused to the remaining land of the owner by the acquisition or by the construction of the works thereon or by the use of the works thereon or any combination of them, and
  - (ii) such personal and business damages, resulting from the construction or use, or both, of the works as the statutory authority would be liable for if the construction or use were not under the authority of a statute,
  
- (b) where the statutory authority does not acquire part of the land of an owner,
  - (i) such reduction in the market value of the land of the owner, and
  - (ii) such personal and business damages,

resulting from the construction and not the use of the works by the statutory authority, as the statutory authority would be liable for if the construction were not under the authority of a statute,

and for the purposes of this clause, part of the lands of an owner shall be deemed to have been acquired where the owner from whom lands are acquired retains lands contiguous to those acquired or retains lands of which the use is enhanced by unified ownership with those acquired; (“effet préjudiciable”)

# Sample Expropriation Clause

If at any time during the Term, all or any material part of the Building or the Lands are acquired or expropriated by any lawful Expropriating Authority, or if in the Landlord's or the Tenant's opinion reasonable access to and use of the Lands and/or the Building are materially affected by any such acquisition or expropriation, then in either such events, at the option of the Landlord or the Tenant, this Lease shall cease and terminate as of the date of the interest acquired or expropriated or otherwise vesting in such Expropriating Authority and the Tenant shall have no claim against the Landlord for the value of any unexpired Term or for damages or for any reason whatsoever, and the Tenant shall look solely to the Expropriating Authority for compensation for the taking of its respective interest. If the Landlord or the Tenant does not so elect and terminate this Lease by notices aforesaid, this Lease shall continue in full force and effect, provided that if any part of the Leased Premises is expropriated, the Minimum Rent payable by the Tenant pursuant to Paragraph 3.01 hereof and the Additional Rent, shall be adjusted accordingly by the Landlord acting reasonably.

The Tenant acknowledges that it has reviewed [REDACTED] which refers to the possible expropriation of the Leased Premises. The Landlord and the Tenant (at no cost or expense to it) will cooperate with each other if there is an expropriation of all or part of the Leased Premises, so that each may receive the maximum award that it is entitled to at law. Specifically, the Landlord is entitled to all the compensation payable with respect to the land and buildings including loss of income pursuant to this Lease, market value, including any leasehold advantage and any other market value in excess of the then present value of the lease payments and injurious affection and the Tenant is entitled to all the compensation payable in respect of its business and its leasehold interest in the Leased Premises, including delay damages, disturbance damages and business loss and each hereby assigns to the other all right and entitlement to the claims the other is entitled to pursue and undertakes to execute any further document reasonably required to give effect to this intention.

The Landlord covenants and agrees not to solicit the acquisition or expropriation of the Lands/Building by any lawful Expropriating Authority during the Term and in the event of any such proposed or attempted acquisition or expropriation thereof, the Landlord agrees to use reasonable efforts and to cooperate with the Tenant so as to preserve the Lease and the entire duration of the Term hereof.

# Thank You!

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