Modernizing the Expropriation Framework: A Year of Change

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For the first time in decades, Ontario's Legislature over the past year has enacted a number of changes to provincial expropriation procedures, including the first significant changes to the *Expropriations Act*, R.S.O. 1990, c.E.26 (the *Expropriations Act*) since it was adopted in 1970.

The changes primarily affect the public's right to challenge a proposed expropriation through a "hearing of necessity," but also have the effect of abolishing the Board of Negotiation, which has long provided an early mediation opportunity for parties to an expropriation. Even the generous interest and cost protections in the *Expropriations Act*, provisions that many have considered unique to expropriated landowners, are now the subject of amendment. This bulletin is intended to provide readers with a thumbnail overview of the major changes to the *Expropriations Act* expected to come into force on June 1, 2021, and related legislation enacted over the past year affecting the relationship between public authorities and landowners in expropriation-like circumstances.

Limiting the Availability of Hearings of Necessity

Ontario first adopted the "hearing of necessity" (HON) procedure for expropriations in 1970, following the recommendations of J.C. McRuer in the monumental report of the Royal Commission Inquiry into Civil Rights. The HON allowed expropriated owners to challenge, in front of a neutral "inquiry officer," whether a proposed expropriation was "fair, sound and reasonably necessary" to the achievement of the expropriating authority's objectives.

In practice, the HON process did deliver limited measures of accountability and due process to the expropriation process, and could result in project improvements, but it also slowed the expropriation process down and led to increased costs for expropriating authorities. Moreover, the inquiry officer's report is non-binding – approval authorities are merely obliged to "consider" the report – and expropriating authorities are typically also the "approval" authority for their own expropriations, *i.e.* the judge in their own cause.

Under section 6(3) of the *Expropriations Act*, the provincial government is authorized to exempt expropriations from the HON requirement on a case-by-case basis, but it rarely does so. A HON was thus a potential component of every provincial expropriation until July 2020, when the Legislature enacted Bill 171, the *Building Transit Faster Act, 2020*,[1] which exempts certain "priority transit projects" in the Greater Toronto Area from the HON requirement where the land proposed to be taken has been designated by Order in Council as "transit corridor land." The four "priority transit projects" at present are the Ontario Line, Scarborough Subway Extension, Yonge North Subway Extension and Eglinton Crosstown West Extension.

Later in July 2020, the Legislature extended the exemption to (a) provincial highway projects under the *Public Transportation and Highway Improvement Act*, and (b) land designated as "transit-oriented community land" in support of "transit-oriented community projects" associated with priority transit projects under the *Transit-Oriented Communities Act, 2020*.[2] Under both amendments, the Minister may establish a process for receiving comments from owners regarding a proposed expropriation, and may make regulations regarding that process. As of this publication, no regulations have been made.

In December 2020, the government enacted Bill 222,[3] which amended both the *Building Transit Faster Act, 2020* and the *Transit-Oriented Communities Act, 2020* to broaden the potential exemption from the HON process, from the current four priority transit projects, to any other prescribed provincial transit project. The Minister can now make regulations prescribing additional provincial transit projects.

Now, Bill 245 – the *Accelerating Access to Justice Act, 2021* – amends the *Expropriations Act* itself with respect to HONs. The current HON process remains in place, except that the Local Planning Appeal Tribunal (LPAT) or its successor, the Ontario Land Tribunal,[4] will conduct the hearings, and the government can enact regulations to increase the long-standing cap of $200 on costs payable to an owner. However, more significantly, the government can now enact, at any time, regulations that would exempt additional classes of projects from the HON requirement under the *Expropriations Act*, including municipal projects.

The Province has not legislated a replacement for the HON process, but has anticipated allowing owners to deliver "comments" to the expropriating authority about the proposed taking. Under Bill 245, the Legislature offers more detailed guidance in a new section 8.1 of the *Expropriations Act*, which foresees regulations that partially reproduce the current HON process by requiring that expropriating authorities "consider" the comments received, and give reasons for their determination. However, no other procedures are prescribed. Most notably, there is no requirement that the authority disclose the "grounds" on which it proposes to expropriate, which is required under the current HON process and forces authorities to articulate their objectives in enough detail to allow for an assessment as to how the taking relates to those objectives. Nor is there any standard in this comments process such as "fair, sound and reasonably necessary" against which a proposed expropriation can be measured, nor any role for a third-party neutral to evaluate the expropriation in those terms, including through consideration of oral evidence.

These changes to the HON process thus have the potential to weaken the already-limited ability of property owners to challenge a proposed expropriation. We note that

the government enacted these changes without first having studied the matter through a law review process, and it is not clear why eliminating the HON process was a priority for government. The government has cited reducing delay and improving "efficiency" as goals, but HONs have always been somewhat rare, and typically only delay a project by four to six months at the most. Having the LPAT or Ontario Land Tribunal conduct the hearings does little to address those concerns. The legislative debate on Bill 245 was limited, but the government did commit to consultations on any regulations to govern the commenting processes that could replace the HON.[5]

Municipal Right of Way Access Orders

Bill 171, the *Building Transit Faster Act, 2020*, establishes a process for Metrolinx to negotiate with municipalities for municipal service and right of way access in connection with construction of a priority transit project. Such "access" can take the form of use, occupation, modification or temporary closure of a municipal highway or right of way, and use of, access to and modification of municipal sanitary and water works.

If terms cannot be agreed, the Minister can develop a municipal service and right of way access order, after consultation with Metrolinx and the municipality, and those parties must comply with such an order. The order can, among other things, establish terms such as mitigation of impact and the provision of resources and compensation to address impact.

The government has established a similar regime in respect of construction of designated broadband projects under Bill 257, the *Building Broadband Faster Act, 2021*.[6] Where the Minister determines that construction of a project requires municipal service and right of way access, the municipality must negotiate access with the project proponent, failing which the Minister can make an order requiring municipal service and right of way access.

These orders can be filed in the Superior Court of Justice and enforced as an order of that court. Interestingly, Bill 257 imposes compensation exposure on municipalities that fail to negotiate or comply with orders, and compensation that cannot be settled is determined by the LPAT or the succeeding Ontario Land Tribunal. Bill 171 does not appear to impose such exposure.

Access and Compensation for Priority Transit Projects

Bill 171 gives the Minister additional powers in respect of entry onto private lands, testing, and removal of obstructions, which can be delegated to Metrolinx or a public body ("expropriating authorities"). Expropriating authorities now have the power to remove structures, trees, shrubs, hedges and other prescribed items after the following has occurred:

1. notice is served personally or by registered mail, and
2. 30-days has elapsed following the date notice is provided wherein good faith negotiations with a landowner have taken place. Expropriating authorities cannot, however, remove an obstruction in a dwelling. Items that pose an immediate

danger to construction (*i.e.* the health and safety of persons who may be carrying out construction) can be removed immediately.

Under s. 10(3) and s. 40 of the *Expropriations Act*, an expropriating authority has the ability to enter onto expropriated lands still in the possession of the owner for environmental testing and inspection, contingent upon securing a Tribunal order permitting access and testing.[7] Bill 171 codifies existing case law and streamlines the procedure set out in the *Expropriations Act* for priority transit projects, allowing an expropriating authority to undertake preview inspections upon 30 days notice. A preview inspection allows entry onto private property for due diligence testing in the planning and construction of a priority transit project. A preview inspection cannot take place in a dwelling.

Bill 171 provides a new right to compensation for landowners where an expropriating authority has removed an obstruction or undertaken inspections in accordance with the Act.

For obstruction removal, and provided a person does not "hinder, obstruct or interfere" with an obstruction removal or inspection, a landowner will be entitled to compensation "for the thing altered or removed and for any damages resulting from the work." If the property owner and the Minister or expropriating authority cannot agree on compensation, either may apply to the Tribunal to determine the compensation. The Bill does not specify how the parties bear the cost of litigating the compensation.

For entry onto private lands and testing, the authority is required to compensate the owner of any damages resulting from their work and make reasonable efforts to restore the property to its condition before the work.

For more information, please see BLG's Bulletin, "Ontario's Building Transit Faster Act: New Mechanisms Aim to Speed Up Priority Transit Projects".

Elimination and Reincarnation of the Board of Negotiation

Bill 245 amends the *Expropriations Act* by replacing section 26 and repealing section 27, essentially eliminating the "Board of Negotiation" (the BON). The BON was first created in 1964 under what was then the *Expropriation Procedures Act*. For the majority of property owners impacted by expropriations, the BON has been the "first stop" in the compensation process. While the former section 26 of the *Expropriations Act* was never explicit in this regard, case law decided under the former section of the Act ensured that BON proceedings in many cases were mandatory: neither an owner nor an authority could commence an arbitration proceeding without first attending, or mutually agreeing, to dispense with negotiation proceedings before the BON.[8]

Having an opportunity to mediate early in the compensation process and before arbitration proceedings could generally commence created an early and effective mechanism for resolving most expropriation compensation claims. For example, in 2019/2020, there were 164 active matters before the BON, of which 71 were resolved by the BON or the parties themselves and only seven of those matters led to arbitration proceedings being commenced before the LPAT.[9] For the majority of landowners, the

BON served not only to assist in the resolution of compensation claims but also as a forum for owners to express their frustrations, concerns and observations about the expropriation process. For expropriating authorities, successful BON proceedings made for an efficient, cost-effective and early opportunity for resolution.

Recognizing the importance and the efficiency of the BON not only to its stakeholders but also to the Tribunal itself, a new set of Rules of Practice and Procedure for the forthcoming Ontario Land Tribunal was published on May 26, 2021,[10] effectively replacing the function of the BON with a Tribunal-led mediation protocol. Developed with input from stakeholder organizations, the Tribunal's new Rules permit either a claimant (broadly defined as an "owner" in the *Expropriations Act*) or an expropriating authority to request a "pre-pleading" mediation with the Tribunal upon filing of a "Request to Negotiate."

Only time will tell how effective the Tribunal's effort to reinstate the function of the BON will be, but the Tribunal's new Rules demonstrate the continued importance of the BON function going forward despite the provincial "shake up" to the governing legislation.

Opening the Doors to (Un)intended Consequences for Costs and Interest

Expropriation disputes are unique in that costs rarely follow the cause. Section 32 of the Act provides that so long as an owner recovers at least 85 per cent of the amount offered by the authority, the Tribunal will direct that the authority compensate the owner for reasonable costs actually incurred. These disputes also provide the claimant with a statutory six per cent rate of interest on outstanding market value and injurious affection awards, with some discretion for potential variations to this rate where the Tribunal finds that the expropriating authority or owner has delayed the determination of compensation.

Costs: "Reasonable" or Prescribed?

Bill 245 amends section 32 of the *Expropriations Act* by adding a new subsection (3), which directs "the assessment officer" to assess costs in accordance with tariffs and rules to be published under section 44(d) of the Act or alternatively, in the absence of tariffs or rules, with reference to the rules made by the Tribunal under section 20 of the *Ontario Land Tribunal Act, 2021*.

While the direction to assess costs in accordance with prescribed tariffs is nothing new since section 32(1) always referred to "tariffs", no expropriation specific tariffs were ever published. More importantly, the authors are not aware of a reported decision involving the application of a tariff to assess the "reasonableness" of costs claimed. With the introduction of new subsection 32(3), the Province might be signalling a change in that regard. As of the date of publication of this article, no tariffs have been prescribed by regulation or otherwise.

Assessing costs having reference to the Tribunal's Rules also raises concerns, because the Tribunal's Rules were not drafted to address expropriation costs consequences. Instead, they provide a high threshold for costs orders – "unreasonable, frivolous or

vexatious" conduct or acting in bad faith – and a detailed process for the determination of costs, including when a party seeking costs must provide notice to the Tribunal, the format of written cost requests, and deadlines for filing of materials. Since cost assessments are directed to be carried out by the "assessment officer," query whether the Tribunal will impose limits on its own jurisdiction to assess expropriation costs. And further, since the new section requires the assessment officer to "have reference to" the Rules rather than be bound by them suggests some discretion on the part of assessment officers to depart from the Rules or the tariffs, but there is nothing in the new legislation by way of clarification about the limits of such discretion.

This lack of clarity about the risk of costs may result in some otherwise legitimate claims for compensation never coming up for determination, which seems counterintuitive when the amendments are intended to accelerate access to justice. Conversely, this approach may also lead landowners to think twice before taking very aggressive claims not supported by evidence even after substantial time has passed to establish such claims, or after the expropriating authority has made a subsequent offer following its initial statutory offer to trigger cost consequences. What is clear is that the Tribunal's interpretation of its cost rules, given the legislative changes and lack of prescribed rules or tariffs under subsection 32(2) of the *Expropriations Act*, has the potential to fundamentally change the principles established since the Supreme Court of Canada's decision in *Dell Holdings*[11] to adequately compensate those whose lands are taken to serve the public interest.

Interest: Tying Interest to the *Courts of Justice Act*?

Bill 245 opens the door to the first amendments to the interest rate in over 50 years. Specifically, the six percent statutory rate for market value and injurious affection is being replaced with a "prescribed annual rate." The statutory maximum of 12 per cent for penalty interest, where the Tribunal is of the opinion that any delay in determining compensation is attributable to the expropriating authority, is amended to reflect a prescribed rate that exceeds that rate provided in the usual course. Corresponding amendments have been made to address variation of interest where such delay is attributed to the owner.

As of the date of this bulletin, it is unclear how the to-be-prescribed annual rate for statutory and penalty interest will be applied and what the regulations will entail, although there is a general expectation that interest rates will be reduced and not increased for most expropriation matters. Will the prescribed rate be amended quarterly (like the *Courts of Justice Act* pre- and post-judgment interest rates), annually, or set at a fixed rate based on the regulation? Will there be a recognition that part of the statutory interest may be intended to offset the forced disposition on the part of the owner, or is it a strict reflection of market interest rates? (Note: The *Expropriations Act* interest rate on market value has consistently exceeded those *Courts of Justice Act* post-judgment interest rates, which for the past decade have hovered between two to three per cent).

An overall reduction in interest rates will have strategic implications on landowners who may have in the past sat on their claim and were satisfied with collecting a low risk six per cent growth, subject to variation of interest as described above. Further, if the change reduces the rate of penalty interest on the part of expropriating authorities, this may allow authorities to make decisions in the land acquisition process that may be interpreted, rightly or wrongly, to delay the determination of compensation with less

hesitation. Even minor differences in interest rates may have significant compensation consequences for large and/or dated expropriation claims.

Given the significant implications that interest rate changes may have on decisions made by all stakeholders, further consultation prior to the release of regulations, including discussion on transition from one regime to the next, would be a prudent approach for the Legislature to consider.

Conclusion

The impending changes to the *Expropriations Act* and related legislation will certainly make it possible to "build transit faster" particularly for enumerated priority transit projects. However, since the introduction of the first iteration of the new legislation, the Province has signalled an intention to expand the new streamlined powers to include more projects and reduce "costs." Time will tell how these changes improve access to justice and fair compensation.

[1] *Building Transit Faster Act, 2020*, S.O. 2020, c. 12 (Bill 171).

[2] *COVID-19 Economic Recovery Act, 2020*, S.O. 2020, c. 18 (Bill 197), Scheds. 19 and 20.

[3] *Ontario Rebuilding and Recovery Act*, S.O. 2020, c. 35 (Bill 222).

[4] The Ontario Land Tribunal, to be created by Bill 245, is a single tribunal consolidating the five existing land tribunals in Ontario: the Local Planning Appeal Tribunal, the Board of Negotiation, the Conservation Review Board, the Environmental Review Tribunal, and the Mining and Lands Tribunal.

[5] Ontario, Legislative Assembly, *Official Report of Debates* (Hansard), 42nd Parl, 1st Sess, No. 237A (March 23, 2021) at 12117, (Hon. Doug Downey).

[6] *Building Broadband Faster Act, 2021*, S.O. 2021, c. 2 (Bill 257).

[7] *Legoyeau Holdings Ltd. v. Windsor (City)* (1994), 52 L.C.R. 317 (OMB); *Markham (Town) v. 690346 Ontario Inc.* (2002), 77 L.C.R. 161

[8] *Pioneer Petroleums Ltd. Partnership v. Ontario (Minister of Transportation)*, 2001 CarswellOnt 5798, 75 L.C.R. 158.

[9] Tribunals Ontario 2019-2020 Annual Report.

[10] Rules of Practice and Procedure for the Ontario Land Tribunal - Tribunals Ontario - Environment & Land Division (gov.on.ca).

[11] *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 SCR 32.

By

Frank J. Sperduti, Isaac Tang, Robert Wood, Piper Morley, Pitman Patterson, Callum Hutchinson

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749