Environmental Issues in Expropriation

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A. Indirect Expropriation through Environmental Regulation

Claims for indirect expropriation may arise through environmental regulatory regimes. Where legislative schemes operate to interfere with existing property rights, such interference may constitute *de facto*, or indirect, expropriation. One example of a legislative regime that has been the subject of indirect expropriation claims is the federal *Species at Risk Act*[1] (the "*SARA*"). Under the *SARA*, the Governor in Council is empowered to make emergency orders to provide for the protection of certain wildlife species.[2] The emergency protection order may extend not only to Crown land, but also private property.[3] The *SARA* provides for a limited compensation scheme. The Minister may provide for reasonable compensation for losses suffered "as a result of any extraordinary impact of the application of" the emergency protection order.[4] The Governor in Council may make regulations with respect to the procedures to be followed and the methods to be used to determine the compensation.[5]

The sage grouse order exemplifies how a *SARA* emergency protection order may give rise to an expropriation claim. The sage grouse order was the first emergency protection order to be issued under section 80 of the *SARA*. It was issued to protect the greater sage grouse population in Alberta and Saskatchewan, and came into force on February 18, 2014. The sage grouse is an endangered species under the *SARA* and Alberta's *Wildlife Act.*[6] Under the *Wildlife Act* it is an offence to "willfully molest, disturb, ore destroy a house, nest or den" of sage grouse. The sage grouse order restricted activities on 1,672 km^2 of provincial and federal Crown lands in southeastern Alberta and southwestern Saskatchewan.

In *The City of Medicine Hat et al v Canada (AG) et al,*[7] LGX Oil and Gas and the City of Medicine Hat, which had interests in the Manyberries oil production site that was affected by the sage grouse order, brought a judicial review and constitutional challenge of the sage grouse order at the Federal Court of Canada. The applicants successfully resisted a summary dismissal motion brought by the Crown and subsequently commenced an action at the Alberta Court of Queen's Bench for $123.6 million in compensation (including accelerated reclamation costs) for *de facto* expropriation of existing oil and gas mineral rights, leases and rights-of-way. This case is ongoing. At this point, the Governor in Council has not made regulations with respect to compensation. The Crown pleads that the emergency protection order is regulatory and, in the alternative, that compensation under the *SARA* is discretionary. In the

further alternative, the Governor in Council had chosen not to make regulations, and the emergency order did not have an "extraordinary impact" on the plaintiffs.

Another case was *Groupe Maison Candiac Inc v Canada (AG)*.[8] This case concerns the second emergency protection order made under the *SARA*, which protects the western chorus frog. The western chorus frog is listed on the *SARA*'s list of endangered species as a threatened species in the provinces of Ontario and Quebec. The emergency protection order prohibits excavation, deforestation and construction within a two km^2 area in the municipalities of La Prairie, Candiac and St-Philippe, Quebec to protect the frog and its habitat. This order was the first time a *SARA* emergency protection order restricted development on private land.

As a result of the western frog order, Groupe Maison Candiac Inc. ("Groupe Maison") was forced to reduce its residential development by 171 units after construction was already underway and Groupe Maison had obtained the requisite municipal and provincial approvals. Groupe Maison brought a judicial review of the emergency protection order by way of a constitutional challenge and an expropriation claim. The Federal Court dismissed the application, finding that: (1) section 4(c)(ii) of the *SARA* is within the federal government's jurisdiction over criminal law; and protected by the doctrine of ancillary powers, including jurisdiction over peace, order and good governance; (2) the western chorus frog order did not amount to expropriation that required compensation; and (3) the Parliament had already provided a mechanism for compensation under the *SARA* that applies in "extraordinary circumstances."

In 2017, the Minister of Environment and Climate Change received three petitions to recommend to the Governor in Council for an emergency order to protect the southern mountain woodland caribou population. The Minister conducted an Imminent Threat Assessment and, on May 4, 2018, determined that the southern mountain caribou faced imminent threats requiring intervention for recovery. An emergency protection order may be forthcoming for Alberta and British Columbia. The *SARA* public registry and the Canada Gazette will provide updates on this matter.

B. Polluter Pays in Expropriation of Contaminated Lands

Alberta's *Environmental Protection and Enhancement Act*[9] (the "*EPEA*") is another environmental protection legislation that affects expropriation claims. As one of its purposes, the *EPEA* adopts the "polluter pays" principle to address contamination. The *EPEA* includes three regulatory mechanisms with respect to contamination: (1) Part 5 Division 1 concerns the release of substances generally; (2) Part 5 Division 2 concerns contaminated sites designation; and (3) Part 6 deals with conservation and reclamation. Further, the *EPEA* expressly acknowledges an affected person's recourse to court through private civil claims.[10] Some of the key concepts related to the three regulatory mechanisms are considered below.

Part 5 Division 1 of the *EPEA* deals with the release of substances into the environment. Under section 112, the person responsible for the substance has the duty to take remedial measures with respect to any release of same.[11] Environmental protection orders may also be issued to the person responsible for the substance where the release is causing, has caused or may cause an adverse effect.[12]

The statutory definition of "person responsible" includes: (1) owner and previous owner of substance; (2) every person who has or has had charge, management or control of the substance; (3) successor, assignee, executor, administrator, receiver, receiver-manager or trustee of (1) to (2); and (4) principal or agent of (1) to (3).[13] The "person responsible' excludes, unless they release new or additional substances: (1) a municipality in respect of land shown on its tax arrears list, or land acquired by it by dedication or gift of an environmental reserve, municipal reserve, school reserve, road, utility lot or right of way; (2) a person who investigates or tests the land for the purpose of determining the environmental condition of that parcel; and (3) the Minister responsible for the *Unclaimed Personal Property and Vested Property Act*, with respect to a parcel of land to which that Act applies. Thus, it appears that the notion of "person responsible" is based on one's relationship to the substance/release only, and not based on the cause of the release.

Part 5 Division 2 of the *EPEA* provides for the designation of contaminated sites. Under section 129 of the *EPEA*, the Director may designate a site as a contaminated site and issue an environmental protection order to a person responsible for the contaminated site. The Director must consider several factors before issuing an environmental protection order for a contaminated site, including: (1) due diligence of the owner or previous owner; (2) whether the presence of the substance at the site was caused solely by the act or omission of another person, other than an employee, agent or person with whom the owner or previous owner has or had a contractual relationship; and (3) the price the owner paid for the site and the relationship between that price and the fair market value of the site had the substance not been present.[14]

The "person responsible for the contaminated site" means: (1) a person responsible for the substance that is in, on or under the contaminated site; (2) any other person who the Director considers caused or contributed to the release of the substance into the environment; (3) the owner of the contaminated site; (4) any previous owner of the contaminated site who was the owner at any time when the substance was in, on or under the contaminated site; (5) a successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in any of subclauses (2) to (4); and (6) a person who acts as the principal or agent of a person referred to in any of subclauses (2) to (5). As was the case with Division 1, the definition of "person responsible for the contaminated site" again excludes municipalities and investigators. In this case, the test is based on the relationship to the substance/release and the property.

In practice, Division 2 is rarely used. Designation will only occur as a last resort when there are no other appropriate tools. There have only been five instances of designation of a contaminated site since 1993 and no environmental protection order appears to have been issued under Division 2. Division 2 offers options otherwise unavailable, including the allocation of responsibility to present and past site owners who may have contractually assumed liability for the pollution, remedial actions plans and agreements with the Director, and the apportionment of costs of remedial work among responsible parties. The Minister may also pay compensation to any person who suffers loss or damage as a direct result of the application of Part 5 Division 2.[15]

Environmental contamination may affect the valuation of expropriated property. Under the *Expropriation Act,*[16] compensation for expropriation is based on the market value of the expropriated land, which is in turn "the amount realized if sold in the open market by

a willing seller to a willing buyer",[17] and provable damages. The determination of market value accounts for everything that is present in the site, except for the legislated exclusions found in section 45 of the *Expropriation Act*.

Contamination introduces issues in valuing expropriated property, given the uncertainty in liability exposure, scope, duration, risk and stigma. Below are some case law on the interaction between the expropriation of contaminated lands and the "polluter pays" principle.

In *Toronto (City) v Bernardo,*[18] the respondent Bernardo was the registered owner of a property and permitted the corporate respondent's scrap metal business on property rent-free by oral licence to occupy. The City of Toronto served and published notice to expropriate property. The City conducted environmental testing on property which showed contamination, and was advised that clean-up costs for property could be in range of $250,000 to $750,000. The appraised value of the property was $242,500 before taking into consideration site remediation or clean-up costs. Given the estimated cost of remediation which exceeded value of land, the City's offer of compensation to the respondents was $1. The respondents did not request compensation hearing but refused to surrender possession. The City brought motion for order to take possession. The Ontario Supreme Court granted the City's motion as the respondents had the opportunity to contest the City's offer of compensation in proceedings before the Ontario Municipal Board and chose not to take any action to assert claims for compensation.

In *Thompson v Alberta (Minister of Environment),*[19] the claimant had purchased land for the sum of $1 million. At the time of purchase, the land was not part of any property acquired by the Crown for a proposed transportation corridor. The Crown reviewed roadway plan within months of claimant's purchase and determined that land was a necessary part of the corridor. The Crown expropriated land for $1,025,000. The claimant brought action for increased compensation. The action was allowed in part. The claimant was granted $1,120,000. The Crown's valuation discounted the value of the property because of the unknown cost of filling or remediating a wetland (which is 50% of the property) for future residential development, which posed an economic challenge for a prospective purchaser. The Court found that the cost of remediation calculated by the Crown was based on premature assumption that land was to be developed in isolation with no possible cost sharing by adjacent developers. The Court, however, recognized that a discount must be applied for market value because of this possibility of remediation.

In *Ville de Saint-Jean-sur-Richelieu c Cour du Québec,*[20] the subject property included a grocery store, snack-bar and a retail marina fuel distribution outlet for vessels navigating on Chambly canal, and a gas station for road vehicles. The issue before the Court was whether the costs of decontamination should be deducted from the compensation awarded for expropriation, based on the duty to remediate. It was argued that evidence demonstrated that there was a spill onto the neighbouring property, therefore the question as to cessation of activities no longer applied, and the mandatory provisions of the EQA regarding decontamination was triggered. The Tribunal Administratif du Québec (the "TAQ") ruled that the total remediation cost of $450,000 be paid by the owner of the property, 9092-9340 Québec Inc. ("9092") and should be deducted from its expropriation indemnity award. The value of the expropriated property, after deduction of the decontamination costs, was established as being $31,000.

The Court of Quebec allowed the appeal, holding that the finding of the TAQ was unreasonable and profoundly unfair. Were it not for the expropriation, 9092 could have ceased its activity at its own time, negotiated with a willing purchaser and, based upon the projects of the purchaser, negotiated the decontamination works remaining according to the circumstances. The City deprived 9092 of its right to complete the decontamination work at the time that it deemed the most suitable to its interests and subject to conditions that would have been more favourable. By forcing 9092 to assume the costs of decontamination estimated by the City engineer, the TAQ deprived the owner of the quasi-totality of the value of the expropriated property. The City brought a judicial review application which was subsequently dismissed. The Court found that the systemic analysis undertaken by the Court of Quebec highlights the significant defects and the fragility of the TAQ ruling to assign full liability to 9092 for the estimated costs of decontamination of the property.

Case law suggests that the law is not blind to the causation of the contamination when evaluating the market value of an expropriated property that has been contaminated. Liability for the remediation of contaminated land in Alberta clearly rests with "person responsible for the substance" and, in the rare case of designated contaminated sites, "person responsible for the contaminated site." Liability for contamination does not run with the land in Alberta.

This leads to the question of what is the intent of the law in respect of a faultless landowner for the environmental depreciation of land in the expropriation context. The principles of statutory interpretation apply to deem the legislature as knowing all the law and the necessary statutory language to give effect to its intention. The *EPEA* and the *Expropriation Act* are meant to be interpreted harmoniously as a scheme in cases of expropriation involving contamination. The *Expropriation Act* is a remedial statute. Accordingly, it must be given a broad and liberal interpretation consistent with its purpose.

Currently, the right of a faultless landowner to recover from a "person responsible" remediation costs in civil claims (whether under the common law or the *EPEA*) is a chose in action. This chose in action does not appear to be considered in the calculation of market value in expropriation. In the new era of third-party litigation funding, a chose in action for remediation costs is a valuable element that may offset some or all of the discounts associated with contaminated land, even in an open market.

[1] *Species at Risk Act*, SC 2002, c 29 [***SARA***].
[2] *SARA*, s 80(1).
[3] *SARA*, s 80(4)(c)(ii).
[4] *SARA*, s 64(1).
[5] *SARA*, s 64(2).
[6] *Wildlife Act*, RSA 2000, c W-10.
[7] *The City of Medicine Hat et al v Canada (AG) et al*, Federal Court of Canada File No. T-12-14. See also Federal Court of Canada, Proceeding Queries, Recorded Entries for T-12-14, online:
[8] *Groupe Maison Candiac Inc v Canada (AG)*, 2018 FC 643.
[9] *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 [***EPEA***].
[10] *EPEA*, ss 217, 219, 227-228.
[11] *EPEA*, s 112.
[12] *EPEA*, ss 113-114.

[13] *EPEA*, s 1(tt).
[14] *EPEA*, s 129(2).
[15] *EPEA*, s 131.
[16] *Expropriation Act*, RSA 2000, c E-13.
[17] *Expropriation Act*, ss 41-42.
[18] *Toronto (City) v Bernardo*, 2004 CanLII 5760 (ONSC).
[19] *Thompson v Alberta (Minister of Environment)*, 2006 ABQB 510.
[20] *Ville de Saint-Jean-sur-Richelieu c Cour du Québec*, 2017 QCCS 4832.

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