

Bowness Responsible Flood Mitigation Group

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Brief

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Revision History

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Glossary

Term	Description
MGA	Municipal Government Act
LCB	Land Compensation Board of Alberta
City	City of Calgary as a governing and administrative entity
LTO	Land Titles Office

Legislative References

Document	Sections
Expropriation Act	
Municipal Government Act	

Other References

Document	Sections
CanLII at https://www.canlii.org/en/ab/	

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1. Introduction

1.1 Description

This document was created for Bowness riverside land owners for the purposes of providing a general summary of how expropriation and compensation is performed in Alberta.

This document is not intended nor provided as legal advice. Please refer to the Cautionary Note above.

1.2 Background

In December 2017, The City informed riverside land owners in Bowness regarding a proposal to construct a flood barrier on properties located on Bow Crescent and Bow Bank Crescent. Circa 2000-2007 a flood barrier was designed and built by the City in Inglewood.

In Inglewood, there was one land owner holdout on negotiating an easement with the City. Eventually the City expropriated an easement on his property. The land owner then went to the Land Compensation Board (LCB) and received additional compensation.

There is a difference in expropriation of an easement versus an expropriation of the land. Expropriation of the land changes the title such that it is divided into two titles with the City owning the portion of land that is expropriated and the land owner owning the remaining portion. Expropriation of the land gives the City authority to do as they please with their land for public use or benefit. An expropriation of an easement gives the City the right to cross or otherwise use someone else's land for a specified purpose as documented in the easement agreement. Given the differences in the rights to the land, it can be expected that the amount compensated to a property owner for an expropriation of an easement (right to use land) would be less than that compensated for expropriated land (ownership of land).

This document's purpose is to summarize in a non legal, general nature expropriation and compensation cases that are as close as possible to the proposed barrier situation in Bowness.

1.3 Executive Summary

A decision to expropriate is generally considered to be a political one. A person cannot legally stop an expropriation. The best a person can do is receive a favourable report from an inquiry, and then convince the expropriating authority – the City of Calgary in this scenario – to accept the inquiry's recommendations. The City has no obligation to implement its recommendation. It is difficult to research how often the City has abided by the recommendations, but more often the recommendations are a change in design, not an outright statement that the expropriation should not be made. As such, the evidence before an inquiry is typically expert technical opinions from the City versus that of the property owner.

After an expropriation is performed, the land owner has the right to seek compensation from the LCB. It is here where the courts, including the Supreme Court of Canada (SCC) have in a number of cases sided with the land owner. In fact, the reasonable legal fees incurred by the land owner during an expropriation, are payable by the expropriating authority. The expropriating authority has tried to prevent legal fees from being paid, if the fees were incurred by fighting the expropriation. In our research we were unable to find a case where the fees were denied. However fees are typically negotiated. This should be a question, along with what are deemed to be "reasonable" expenses to be answered by legal counsel.

1.4 Expropriation Overview

The following is a summary of the process; please see Appendix A for more detail:

1. The City Authorizes a Notice of Intention to Expropriation (by council)
2. Registration of Notice of Intention to Expropriate is filed by the City
 - Notice of Intention to Expropriate is provided to the property owner.
 - Notice of Intention must be advertised twice in the local paper.
3. Notice of Objection to Expropriation can be filed by the property owner
 - Notice of Objection by the property owner must be served on the City within 21 days of service of the Notice of Intention.
 - If nobody objects to an expropriation within the 21-day period, the proposed expropriation can be approved.
4. Inquiry Hearing
 - The Inquiry Officer listens to information provided by the property owner (e.g. evidence of why the expropriation is not valid) and the City (e.g. evidence of why the expropriation is valid). However in most cases, an expert hired by the property owner gives technical evidence of why alternate designs are a preferred solution.
 - The Inquiry Officer must render a written decision within 30 days of being appointed.
 - The Alberta Minister of Justice may grant a single 30 day extension.
5. Approving Resolution to Expropriate
 - A report is provided to City Council to seek Council's approval for expropriation.
 - The Approving Authority (City Council) shall:
 - Approve or disapprove the proposed expropriation.
 - Provide its decision with reasons to the property owner.
 - Council's decision can either accept the recommendation of the Inquiry Officer or completely override the Inquiry Officer's recommendation, or do something in between. The City is under no obligation to abide by the recommendation, in whole or in part.
 - The Minister may grant a 30-day extension for deciding on the expropriation recommendation.
6. Registration of Certificate of Approval
 - The Certificate of Approval must be registered by the City at Land Titles within 120 days of the registration of the Notice of Intention to Expropriate, unless an Extension Order is granted.

7. The Proposed Payment must be made within 90 days of the registration of the Certificate of Approval.
 - The Proposed Payment shall reflect the compensation due to a property owner including severance damage.
 - A written appraisal report shall accompany the funds.
8. Possession Date
 - Within 30 days of registration of the Certificate of Approval the City shall serve on a property owner a Notice of Possession that states the effective date for the change in possession of the property.
 - Date specified shall be:
 - 7 days from service of Notice of Possession if land expropriated is for Utility Right of Way(URW); or
 - 90 days from service of Notice of Possession in all other cases.
 - Possession cannot be taken until the proposed payment is tendered.
 - Possession cannot be taken prior to 30 days after the Proposed Payment has been paid.

1.5 Land Compensation Board

Once the expropriation process is completed, the land owner can file for additional compensation if he/she is not satisfied with the amount provided in the expropriation process. The *Expropriation Act* specifies the process. Ultimately the application is reviewed by the Alberta Land Compensation Board. This is a quasi judicial administrative board which means a decision of this board can be appealed to a court on a question of law or fact.

There are multiple forms of compensation which are considered:

1. Market Value – This is the loss of market value of the land expropriated, or in the case of the Bowness barrier (if treated in the same manner as Inglewood), the easement surface area. The expropriated Inglewood resident and the City both calculated market value as a linear calculation of land value. i.e. estimate the value of the land only as a parcel, then calculate the percent being expropriated, and multiply the two to arrive at the market value loss. There were additional factors. The reader is encouraged to read the full “Inglewood Report” available on the BRFM website, as well as the summary provided later in this document.
2. Injurious affection -Severance – The simplest way to think of this is when a farmer’s cows can no longer reach a grazing field because the province expropriated the middle of his land. However, the Inglewood resident successfully argued at the LCB the wall (with a gate) was severance to some degree.
3. Injurious affection -reduction in market value of remaining land – when the taking of part of the land or easement causes the remaining land to be of less value. This was also compensated for in the Inglewood case as a 20% reduction in market value.
4. Special Economic Advantage – If the applicant can prove there is a loss of economic value not considered in any of the other categories herein, the LCB will consider “special economic advantage” as well. An example is

where the Expropriating Authority severs access to a public road. For riverside residents, legal counsel should be consulted to determine if there is any special economic advantage which will be diminished. A possibility may be if you have an out building which you use to conduct business.

5. Damages due to disturbance – damage of adjacent land during construction.

The following are believed not to be considered but have been negotiated outside of the LCB process with the expropriation authority:

Damages –The Inglewood case references damages negotiated with the City. It is unclear if these were brought about as part of the statutory damages or on their own. The wording in the decision would seem to indicate the latter.

1.6 Relevant Cases

1.6.1 Antrim Truck Centre Ltd v Ontario (Transportation), 2013 SCC 13

“Injurious Affection,” in expropriation law, means an injury to land. When a portion of a landowner’s land is taken by expropriation, the remainder of the land can be “injured”. The owner of the land may be compensated for this injury, by the expropriating authority. Significantly, injurious affection may also arise where no land was taken.

In *Antrim Truck Centre Ltd v Ontario (Transportation)*, 2013 SCC 13, the Supreme Court of Canada stated at paragraph 4 that injurious affection occurs when a defendant’s activities interfere with a claimant’s use or enjoyment of land. It was noted that such interference may occur where a portion of an owner’s land is expropriated with negative effects on the value of the remaining property. Alternatively, it may arise in cases where no land is expropriated, but the lawful activities of a statutory authority on one piece of land interfere with the use or enjoyment of another property. The distinction is important, as in either scenario, the type of injury for which the landowner may be compensated differs.

The landowner may be compensated for a reduction in market value caused to the remaining lands caused by either the acquisition or the construction of the works for which the land was expropriated, or the use of those works (for example, the construction and use of a highway near someone’s land). The landowner may also be compensated for other personal and business losses resulting from the construction or use, or both, of the works.

Where no land is taken, the landowner may also be compensated for a reduction in market value caused to their lands. The difference is that while compensation may still be paid for personal and business damages resulting from the construction of the works (e.g. a highway), the owner may not be compensated for personal and business damages caused by the use of the works.

At paragraph 5 of the Antrim decision, Justice Cromwell summarized the three statutory requirements for a claim for damages for injurious affection where no land is taken as the requirements of “statutory authority”, “actionability”, and “construction and not the use”. These requirements mean that (i) the damage must result from action taken under statutory authority; (ii) the action would give rise to liability but for that statutory authority; and (iii) the damage must result from the construction and not the use of the works. Notably, if land is taken, the third element is not required.

So, for example, in a situation in which no land of Mr. Doe’s farm is taken to build a highway, Mr. Doe may be compensated for loss of business during the construction of the highway, but not for any subsequent loss of business caused by noise arising from the use of the highway by motorists.

On the other side of the coin, if a statutory authority takes some of Mrs. Doe’s farmland to build a highway, Mrs. Doe may be compensated for business losses caused by the subsequent use of the highway by noisy motorists.

Each case is different, and the compensation to which a particular landowner is entitled may be influenced by subtle nuances in the law.

1.6.2 Citation: Riebel (Estate) v Alberta (Environment), 2007 CanLII 81377 (AB LCB)

File number: 10874.0; 10875.0; 10876.0; 10877.0; 10878.0; 10879.0; 10880.0

This case involves expropriation of strips of land and the effect is to potentially deny access to a lakeshore

The Board acknowledges that there is more than one approach to an assessment of compensation when a partial taking is involved. The Board also notes the challenge in assessing value of an acquisition of the strips of land. A strip such as the one taken here may have only a modest value simply because these shapes of land are not normally sold or purchased in the market. In situations such as this it is the Board’s view that market value of the strip alone will be elusive. Therefore it is reasonable to start where the ratio of the acreage of the part expropriated to the acreage of the whole should be equal to the ratio of the market value of the part to the market value of the whole parcel.

In the same case and with respect to injurious affection and incidental damage:

Access to the lake appears to be a critical feature of this land. Without access, a parcel of land may not have the same utility. The lack of access would have a significant impact on the value of the remaining land. Loss of access in this case was caused by expropriation. Currently all Claimants are continuing to exercise access to the lake over the Expropriated Lands, although this access has not formalized in the form of a Lease. The Crown has the right to restrict access any time.

It is a complex task to determine the compensation available in this case where the access has been taken away or interfered with in some way. In assessing appropriate compensation the Board must consider the surrounding facts, and whether there is any continuing right of access as well as any other relevant factors. The amount of compensation depends on the actual loss to the Claimants.

What is the right of access? As the owners of lands adjoining a lake prior to the expropriation, it appears that the Claimants were entitled to access to Buffalo Lake at any point where the land touches the lake and the reasonable enjoyment of this right. These Landowners had enjoyed this access for many years.

In considering the extent of the loss or interference with access from the expropriation the Board must consider the proposed Lease and whether access is completely extinguished, or only partially removed or restricted.

It is the Board's view that in this situation the right of access is completely extinguished by the expropriation. The expropriation of the land abutting the lake at the boundary of the subject property has effectively landlocked the subject property in the absence of any other lake frontage or a private agreement for access.

A permanent loss occurs when the elimination of access is intended by the authority to last indefinitely. An expropriation is permanent. This interest in land is taken without the consent of the owner. The owner is therefore entitled to compensation determined in accordance with the Expropriation Act.

Having found that the loss is permanent the Board must also consider the ongoing use of the land by the Claimants and the proposed Lease and undertakings.

Mr. Lore in his report identifies a damage claim for severance damages. The argument advanced is that the primary severance is the severance of the Riparian rights and the resulting damages arising from such severance.

The parties have been attempting to negotiate and it appears that the Respondent has put forth several offers of undertakings to minimize the impact of the expropriation. Attempts have been made to provide assurances that an alternate water supply will be provided if required and fencing will not be required.

The Claimants acknowledge that to date they have not been required to remove their cattle from the Expropriated Lands and they have not been denied access to the lake. The parties have been involved in negotiations however there are several outstanding issues and a great deal of uncertainty from the Claimants' perspective.

The Board is faced with a difficult task. On the face of it if the Claimants continue to pasture the cattle on the Expropriated Lands and the lake levels do not flood the pasture; the actual loss is nominal. On the other hand, if the Claimants lose this access to pasture land and the lake they may need to find alternate pastures, or reduce the cattle herds to accommodate the loss.

The Claimants argue that the Respondent's proposed undertakings are too uncertain and contingent on too many unknown factors. There was some discussion regarding the Board having a role in imposing conditions on a resultant agreement in the terms of the Compensation Order. The Board's role is solely to determine compensation for the loss; not to impose a Lease or terms of access to the Expropriated Lands.

In assessing damages the Board has taken into account the opportunity given to the Claimants to enter into a Lease with the Respondent with respect to the lands taken. Mr. Steel confirmed that the Respondent offered to make any of the Expropriated Lands available to the Claimants in the form of a Lease. The Lease offered would be from the take line to the water's edge. The area would fluctuate as the water's edge is constantly in flux.

If the Claimants decide not to enter into the Lease, they would, according to the undertakings from the Respondent still retain a right of first refusal in the event that the Respondent were granting an agricultural disposition to anyone on those lands. The term of the Lease proposed was 10 years, which Mr. Steele advised is a standard term for a Grazing Lease.

The evidence indicates that the undertaking presented by the Respondent does not apply to any additional areas beyond the section quarter or legal subdivision boundary. The Respondent's explanation for this is that the land to which the Claimants were entitled, were those lands up to the edge of the quarter section line, that they could not accrete lands across the quarter. This approach to the Lease was to prevent the situation where there were two competing Landowners for the same piece of land. Ultimately the proposal was a Lease which would include everything up to the edge of the quarter section with any additional land requiring a further application to the Province for a Lease.

Although the Claimants continue to use the lands, there is no ability for the Respondent to provide for the automatic and the perpetual renewal of the Lease. However, the evidence presented is that a Lease as the one proposed to the Claimants could possibly continue as any other Grazing Lease, which leases extend any time from 60, 70, 80, to 100 years.

The Board has also carefully considered the relevance of the animal unit months that are allocated with the proposed Lease and how that figure is determined. The Claimants expressed concern about a difference between the Crown permitted figure for animal units and how it translates into carrying capacity as opposed to their current actual usage of the Expropriated Lands. The Board must take into account whether the Claimants would possibly be restricted to the number of animal unit allocation should they ultimately lease the lands.

The Board can envision a situation where without a fence separating the pasture lands under Lease from the deeded lands, it would be difficult if not impossible to ascertain the number of animals grazing on that particular piece of land. Currently the Province does not have a system that consists of intense daily monitoring to ensure compliance with provincial regulations. Mr. Amundsen indicated in his evidence that this is not a practical approach, and it is not the current approach used to monitor Public Lands. The monitoring involves simply looking at the management of the property. When private lands are contiguous with leased land, Mr. Amundsen indicated that providing that the Lease has been properly stewarded, Leases are renewed, and have been in many

cases for 50 to 100 years. This is reflected in the current policy of the department as it applies today and according to Mr. Steele for the last 100 years.

The Board is of the view that there is the risk for the Claimants that at some point in the future, official limits on carrying capacity may be imposed. These limits could differ from what is current and may not be practical or workable for the Claimants' farming operation. A regulation restricting cattle on leased land could lead to the decision to require a fence on the deeded lands separate from the Expropriated Lands, and result in further damages to their farming operation. The Board will take this into account in the determination for compensation.

The Board is of the view that the compensation must be awarded for permanent loss of access and the rights associated with ownership of the lands expropriated. The Board will address the loss in the context of the claim for damages and injurious affection which will measure the loss in market value of the remaining land. In considering the damages, the Board will also consider whether the parties are already compensated in the market value of the land.

1.6.3 Citation: Ruppert v Calgary (City), 2011 CanLII 95383 (AB LCB)

File number: DC2008.0001

NOTE: See the Inglewood report on the BRFM website for more detail on this property

This case involves the only landowner in Inglewood whose property was expropriated by the City for the purposes of building a flood wall. It should be noted this is a very unique property where the landowner has a private sewer line, in which the City put an easement overtop.



7.1 Severance Damage

It was Durant’s opinion (*Durant is the City’s land appraiser*) that there is no severance. He stated that while the “contours of the land will be changed, there is no severance.” In doing so, Durant makes no reference in his report to the flood wall. Instead, he refers to a “protective berm”. A berm had been built on some of the other Bow River properties in Inglewood, including a very small portion of the subject lands, instead of a flood wall. In the case at hand, the issue is whether the flood wall severed the land at 10 New Place SE and Durant did not address that issue in his report.

In argument, Counsel for the Respondent argued that severance had not occurred because the Claimant could still access the portion of his land adjacent to the river which is north of the wall via a gate in the wall, over a berm which had been built up at the western end of the property and over a mound which is built near the mid-point of the wall.

The berm, which is depicted in the lower photograph on page 37 of Exhibit 7, does allow a person to climb up and over the wall. The gate in the wall is located towards the east property line and when open provides access to a sitting and fireplace area north of the wall. The gate is designed with the intention that if water levels rise it can be closed by the Respondent's employees to create continuous flood protection.

Counsel for the Claimant submitted that the gate and berm were not specifically referenced in the Expropriation Easement as part of the defined works and could, therefore, be removed by the Respondent at any time. Vania Chivers, the Respondent's Project Engineer, testified that she considered them permanent features.

Access to the area adjacent to the river has clearly been limited by the flood wall. While there may be an argument that the Respondent could at some time in the future remove the berm or lock the gate, the Panel considers either of those steps unlikely. The facts in *Riebel v. Alberta*, Board Order No. 445, June 28, 2007 are distinguishable. In that case the question was whether a "promise" to provide water access if the need arose could be relied upon to avoid severance damage. In the present case, the Respondent on its own accord included the gate and berm in the construction. No reason to support the possibility it would now change that access was provided. In the absence of such a rationale, the Panel finds that it is not probable that it will occur.

The circumstances in *Barritt v. Alberta*, [2005] A.W.L.D. 1363 are analogous to the present situation. The Board found that a restriction of access which limited but did not stop cattle from crossing a ditch was sufficient to be severance. In other words, it is not necessary for severance to occur such that the expropriation and resulting works make access physically impossible. The Panel considers the extent of the restriction and the consequences arising from it to be matters to consider when assessing compensation. The Panel finds that there is a restriction to access. The compensation which flows from the severance was then assessed.

Telford (*Telford is the Claimant's property appraiser*) proposed that compensation be based on 100% of the market value of the area north of the easement. He premised this on there being "no guaranteed permanent physical access short of climbing the wall".

While access is clearly limited, it needs to be borne in mind what access would be used for if the wall was not there. The severed area is within the Flood Way and can only be developed for aesthetic or recreational enjoyment. The use of the severed area has not changed, it is simply more difficult to get to it. Any reduction in market value would not be a consideration in compensation for severance but rather for pure injurious affection. As such, basing severance compensation on a loss of market value is inconsistent and has the potential to result in double compensation if an award is also made for the reduction in market value of remaining land.

Evidence was not provided of extra time and costs that may have been or will be incurred as a result of the reduced access. The Claimant did not testify about how the reduced access affects his use of the area north of the easement area. The Panel is left to make a determination of the compensation on what it considers to be a non-pecuniary basis. On balance, compensation of \$75,000.00 is determined to be reflective of the severance damage disclosed by the evidence.

7.2 Reduction in Market Value of Remaining Land

Telford provided an opinion that the market value of the remaining land, that is the portion of the parcels outside the Easement Area, had been reduced because of the expropriation and resulting works. He concluded that the value of area to the south of the Easement Area on 10 New Place SE (2,251.68 square feet) was reduced by 10% because it was no longer river front. He testified that the value of the remaining land in all of the parcels was reduced by a further 25% because of the Easement Area overlapping the Claimant's private water and sewer system, which he concluded would "impede the repair, reconstruction or redevelopment of the lots." (See Exhibit 7 at page 68)

The Respondent relied on Durant's evidence that there was no reduction in market value to the remaining lands or, alternatively, that it was offset by the benefit of having the flood protection in place.

A. River Frontage

The Panel accepts that the market value of the portion of 10 New Place SE south of the Easement Area has been diminished by the presence of the wall. The reduced access discussed above would negatively impact the status of that land as river front property. Both of the appraisers agree that river frontage attracts a premium. The Panel finds that the positive influence on value has been significantly reduced, if not lost.

The only direct evidence on the value of the river front premium is Telford's 10% which was not challenged by Durant. In his report (Exhibit 7) Telford described at pages 56 and 57 the information upon which he relied for his "river influence" adjustment. No contrary evidence was provided. Based on this evidence, the Panel finds that the easement and the flood wall built pursuant to the terms of the easement resulted in a 10% reduction in the market value of the 2,251.68 square feet on 10 New Place SE located south of the Easement Area.

B. Services

In cross examination, Durant was referred to the prohibition in Clause 3 of the Expropriation Easement against the owner changing the grade within the Easement Area. He acknowledged that it would be a consideration by a potential developer when deciding what price to pay. He admitted that it "might" result in a decreased market value.

Durant also testified in cross examination that it is "reasonable" that the drainage system installed as part of the works above the private water system would complicate and require extra steps in servicing the existing system.

The Panel finds that Durant's evidence amounts to an acknowledgement that the Expropriation Easement and associated works has a negative influence on the market value of the remaining land. The more problematic issue is how to determine the amount of compensation for the reduction.

Telford provided very little justification for the 25% reduction he proposed. He compared the situation to his experience where pipelines are moved in rural and urban settings and suggested that the costs and delays “could amount to a discount of 25% to 50%. If an agreement could not be worked out with the city to access these lots, the impact could be as high as 100%. On this basis a 25% impact would be reasonable based on the cities [sic] cooperation in accessing these services in the future on a timely basis.” (See Exhibit 7 at page 68)

In the absence of more persuasive evidence, the Panel finds that 25% is too high a reduction to the market value of the remaining land. While the presence of the Expropriation Easement and associated works would be a negative factor to a prospective purchaser when considering price, the Panel finds that a 20% reduction is the correct assessment.

The Respondent did not dispute the area of the remaining land presented by Telford. In the absence of any contrary evidence, the Panel accepts those calculations as being correct.

C. Set-off for Benefit

It was agreed that any set-off arising from the benefit of having the flood protection is only applicable to compensation for injurious affection (See Section 56 of the Act).

In closing submissions, it was acknowledged by the Respondent that the onus to establish both the existence of such a benefit and the value of same rests with the Respondent. While agreeing that Durant did not provide “any specific value for the betterment”, the Respondent urged the Panel to consider that because of the “uniquity” of the wall and overall circumstances, comparables for the betterment would not be available.

The Panel finds that in the absence of sufficient evidence that a betterment has been realized which is specific to the land in question, nor of the value of such a betterment, no set-off will be applied. On the issue of specific versus general benefit see Eric Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed., at pages 362 to 365.

APPENDIX A - Detailed Expropriation Process

Property Rights Related to Constructing a Berm along Bow Crescent: Potential Expropriation and Compensation

The following text may be found in “A Guide to Property Rights in Alberta, circa 2014, University of Alberta, Alberta Land Institute (ALI) is an independent, non-partisan research institute based at the that connects research and policy for better land management.

Under Canadian law as it currently stands, the outright taking of private land for public purposes ordinarily triggers a right to compensation in accordance with expropriation legislation. But if the Government does not acquire the land, but merely regulates its use, or imposes other restrictions – even if very severe and even if the result is drastic loss of value– there is rarely a right to compensation.

Expropriation

Expropriation is the taking of private land without the consent of the owner by the government or by one of its agencies in the exercise of statutory powers. Various provincial enactments authorize expropriation, including the *Municipal Government Act, Hydro and Electric Energy Act, Post-secondary Learning Act, Education Act, Irrigation Districts Act, Forest Reserves Act*, and others. Every expropriation authorized by the laws of Alberta is subject to the provincial *Expropriation Act*. The *Expropriation Act* sets out the process that must be followed strictly by any expropriating authority and prescribes how the owner must be compensated. The Act applies to the compulsory acquisition of not only the entire (“fee simple”) title, but also leases, rights of way, or other lesser estates or interests short of full ownership.

How Does Expropriation Happen?

When an expropriating authority decides to acquire private land, it must first notify every person who has an interest in the land it intends to take. The *Expropriation Act* specifies the information that must be included in the notice of intention. The notice of intention must be given either in person or by registered mail, and published at least twice in a local newspaper.

Once the notice of intention has been given, interested persons may file a “notice of objection” to the proposed expropriation. They may question whether the taking is fair, sound and reasonably necessary to achieve the objectives of the expropriating authority. For example, an owner might argue that a right of way through his or her land should be narrower than the expropriating authority demanded. They may not, however, dispute the right of the expropriating authority to resort to expropriation, or object to the project itself: a decision to construct a new highway, school, or hospital is political in nature, and is not for a court to decide.

Any notice of objection must be made to the approving authority within 21 days of receiving notice of the intended expropriation. Section 10 sets out the requirements for a notice of objection: it must include the name and address of the person objecting, the nature of the objection, the grounds on which the objection is based, and the nature of the person’s interest in the land in question. If nobody objects to an expropriation within the 21-day period, the proposed expropriation can be approved. But if the approving authority receives a notice of

objection, an inquiry officer holds a public inquiry to determine “whether the intended expropriation is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority.” The inquiry officer provides a report, which the approving authority must consider in its ultimate decision to approve, modify or disapprove the intended expropriation.

The *Expropriation Act* permits Cabinet to approve an intended expropriation without an inquiry only when Cabinet is satisfied that the expropriating authority requires the land urgently and that delay would be prejudicial to the public interest. Upon approval, the expropriating authority must register its interest and notify the owner that the expropriation will proceed.

Who Determines the Amount of Compensation and How?

The *Expropriation Act* requires the expropriating authority to propose terms of compensation to the owner within 90 days of the approval of the expropriation. The proposed compensation must be based on a written appraisal, a copy of which must also be given to the owner. The owner is entitled to obtain another appraisal and legal advice, at the reasonable expense of the expropriating authority, before deciding whether or not to accept the proposed compensation.

If the owner and the expropriating authority cannot agree on the amount of compensation, the matter can ordinarily be referred to the Land Compensation Board. The Board is a “quasi-judicial” (similar to a court) tribunal appointed by the province and has the authority to set compensation. Where the Crown is the expropriating authority, the owner may elect to have compensation set by the court instead of the Land Compensation Board. In addition, the Surface Rights Board, another tribunal, can set compensation for access to the surface of land for mineral extraction, the installation and maintenance of pipelines and telephone lines, and other prescribed activities. Property owners may appeal a determination of the Land Compensation Board to the Alberta Court of Appeal.

Principles of Compensation

Where land is expropriated, the compensation to the owner is based on the market value of the land and, depending on the circumstances, damages for disturbance and for injurious affection (devaluation of the owner’s remaining land, where only part of his or her land is taken), and the value of any special economic advantage that the owner enjoyed because of occupying the land. The purpose of compensation is to make the owner, as much as possible, “whole”. The *Expropriation Act* also sets out various factors that must be disregarded when determining compensation, such as the fact that the expropriation was compulsory, how the land will be used by the expropriating authority, and any changes in the value of the land that are connected with the expropriation proceedings.

What is a “Regulatory” or “Constructive” Taking?

A public authority pursuant to its statutory powers may regulate the use of land or restrict other property rights of the owner, and although title to the land is unaffected, the landowner may feel the impact of the regulation as acutely as if the land had been expropriated. In the United States and some European countries, the law recognizes a compensable “regulatory taking” where the regulations strip the land of all economic value, or force the owner to suffer a physical intrusion into the land, or are said simply to go “too far”. This is not the law in Canada. Instead, the principle that the right to compensation must be based in statute means that an owner is not entitled to compensation unless the restrictions of the owner’s rights are so drastic that they

should properly be regarded as an effective taking of the land within the meaning of the Expropriation Act. This is known as “de facto” or “constructive” taking of land. The traditional view in Canada, however, has been that there is no expropriation unless the government acquires the title to the land from its owner. The Supreme Court reiterated this view in its 2006 decision in *Canadian Pacific Railway Co. v Vancouver (City)*. In that case it held that a de facto taking requires first, “an acquisition of a beneficial interest in the property or flowing from it”, and second, “removal of all reasonable uses of the property”. The decision leaves the law uncertain as to whether owners must be compensated for a de facto taking. The door may be open, in theory, for successful claims in the future, but the threshold is very high and will not be met in the ordinary case.

APPENDIX B - Relevant Sections of the Expropriation Act

The following Articles are taken from the Expropriation Act (RSA 2000) and may be relevant to individual property owners who might wish to challenge either the fundamental premise(s) for building a berm or if the berm is built, the compensation they may receive from the expropriating authority (City of Calgary).

Right to object

6(1) No person may in any proceedings under this Act dispute the right of an expropriating authority to have recourse to expropriation.

(2) In any proceedings under this Act, the owner may question whether the taking of the land, or the estate or interest in it, is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority.

Fixing compensation

29(1) When the expropriating authority and the owner have not agreed on the compensation payable under this Act, the Board shall determine the compensation.

(2) The Board shall also determine any other matter required by this or any other Act to be determined by the Board.

(3) Notwithstanding subsection (1), when the expropriation is by the Crown, the owner may elect to have the compensation fixed by the court and in that case the provisions of this Act relating to determination of compensation by the Board apply with all necessary modifications to the proceedings before the court.

Payment of costs

35(1) The owner may obtain an independent appraisal of the owner's interest that has been expropriated and the expropriating authority shall pay the reasonable cost of the appraisal.

(2) The owner may obtain advice from any solicitor of the owner's choice as to whether to accept the proposed payment in full settlement of compensation, and the expropriating authority shall pay the owner's reasonable legal costs for that advice.

Stated case

38(1) When the jurisdiction of the Board or the validity of any decision, order, direction or other act of the Board is called into question by any person affected thereby, the Board, on the request of that person, shall state a case in writing to the Court of Appeal setting out the material facts and the decision of the Court on the case is final and binding.

(2) If the Board refuses to state a case, the person affected may apply to the Court of Appeal for an order directing the Board to state a case.

Determination of market value

41 The market value of land expropriated is the amount the land might be expected to realize if sold in the open market by a willing seller to a willing buyer.

Principles of compensation

42(1) When land is expropriated, the expropriating authority shall pay the owner the compensation as is determined in accordance with this Act.

(2) When land is expropriated, the compensation payable to the owner must be based on

- (a) the market value of the land,
- (b) the damages attributable to disturbance,
- (c) the value to the owner of any element of special economic advantage to the owner arising out of or incidental to the owner's occupation of the land to the extent that no other provision is made for its inclusion, and
- (d) damages for injurious affection.

Injurious affection and incidental damage

56 When only part of an owner's land is taken, compensation shall be given for

- (a) injurious affection, including
 - (i) severance damage, and
 - (ii) any reduction in market value to the remaining land, and
- (b) incidental damages, if the injurious affection and incidental damages result from or are likely to result from the taking or from the construction or use of the works for which the land is acquired.

Compensation for damages

58 When the expropriation is of an easement or right of way, the Board may determine the amount of compensation payable by the expropriating authority for

- (a) damage caused by or arising out of the operation of the expropriating authority to any land of the owner or occupant other than the area expropriated,

There are four different types of claims that may be advanced

- 1) Fair market value for the property taken.

- 2) Injurious affection, meaning severance damage or diminution in value to the expropriated owner's remaining property, including diminution in value caused by the construction or other public work flowing from the expropriation. Claims for injurious affection are also available in cases where no land or other interest was expropriated but where the construction of a public work has diminished the value of the owner's property.
- 3) Disturbance damages, meaning the losses, costs or expenses involved in the dislocation and inconvenience which the Statutory Owner has suffered due to the expropriation of his property.
- 4) Business losses where a business is affected by the expropriation including compensation for the loss of goodwill.

APPENDIX C - Injurious Affection Further Explained

The following passages are from Patterson Law Expropriation Blog

“Injurious Affection,” in expropriation law, means an injury to land. When a portion of a landowner’s land is taken by expropriation, the remainder of the land can be “injured”. The owner of the land may be compensated for this injury, by the expropriating authority. Significantly, injurious affection may also arise where no land was taken.

In *Antrim Truck Centre Ltd v Ontario (Transportation)*, 2013 SCC 13, the Supreme Court of Canada stated at paragraph 4 that injurious affection occurs when a defendant’s activities interfere with a claimant’s use or enjoyment of land. It was noted that such interference may occur where a portion of an owner’s land is expropriated with negative effects on the value of the remaining property. Alternatively, it may arise in cases where no land is expropriated, but the lawful activities of a statutory authority on one piece of land interfere with the use or enjoyment of another property. The distinction is important, as in either scenario, the type of injury for which the landowner may be compensated differs.

The landowner may be compensated for a reduction in market value caused to the remaining lands caused by either the acquisition or the construction of the works for which the land was expropriated, or the use of those works (for example, the construction and use of a highway near someone’s land). The landowner may also be compensated for other personal and business losses resulting from the construction or use, or both, of the works.

Where no land is taken, the landowner may also be compensated for a reduction in market value caused to their lands. The difference is that while compensation may still be paid for personal and business damages resulting from the construction of the works (e.g. a highway), the owner may not be compensated for personal and business damages caused by the use of the works.

At paragraph 5 of the *Antrim* decision, Justice Cromwell summarized the three statutory requirements for a claim for damages for injurious affection where no land is taken as the requirements of “statutory authority”, “actionability”, and “construction and not the use”. These requirements mean that (i) the damage must result from action taken under statutory authority; (ii) the action would give rise to liability but for that statutory authority; and (iii) the damage must result from the construction and not the use of the works. Notably, if land is taken, the third element is not required.

So, for example, in a situation in which no land of Mr. Doe’s farm is taken to build a highway, Mr. Doe may be compensated for loss of business during the construction of the highway, but not for any subsequent loss of business caused by noise arising from the use of the highway by motorists.

On the other side of the coin, if a statutory authority takes some of Mrs. Doe’s farmland to build a highway, Mrs. Doe may be compensated for business losses caused by the subsequent use of the highway by noisy motorists.

Each case is different, and the compensation to which a particular landowner is entitled may be influenced by subtle nuances in the law.