

Expropriation in Canada: Discretion Masquerading as Law

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Introduction

When Niccolò Machiavelli advised his Prince to “abstain from taking the property of others,” he warned that “pretexts for confiscation are never wanting, and he who begins to live by rapine will always find some reason for taking what is not his.”¹ The Princes of today have strayed far from his advice, with the predicted results. The slimmest of pretexts – a big box store, a cinema, a parking lot – now excuses many a taking of private property.

Although expropriation – the taking of private property without the consent of the owner – is one of the most extreme uses of government power, Canadian governments have almost complete discretion over when they resort to it. Governments often justify this violation of their citizens’ common-law property rights as being necessary to carry out public purposes. But concepts so nebulous as necessity and public purpose provide no protection for landowners. Expropriations that serve private rather than public interests, and those that are unnecessary, have become commonplace. Expropriation is used as a convenient tool to reduce property acquisition costs for favoured industries. Legislation leaves citizens with little recourse against arbitrary, unfair, and unjustified expropriations.

This study provides an overview of the considerable rights and very limited restraints that federal, provincial, and territorial laws confer on expropriating authorities. It examines the forums that give landowners only an illusion of meaningful participation in the expropriation process. It looks at a number of disputed expropriations, and at how the courts have grappled with them. And it suggests reforms to better balance the needs of government with the property rights of landowners.²

The common law: A man’s home is his castle

In the 17th century, the famous English jurist Edward Coke wrote that “a man’s house is his castle,” adding (in Latin), “one’s home is the safest refuge to everyone.”³ Coke’s legal treatises are foundational documents of the common law, and this particular maxim continues to influence modern courts. Canadian Supreme Court justice Claire L’Heureux-Dubé wrote in 1991, “Both the legislator and society as a whole recognise the truth of Edward Coke’s adage ... [P]roperty rights are considered fundamental in our democratic society.”⁴

Property rights long shielded homeowners not only from assaults by their fellow citizens but also from assaults by governments themselves. In a speech to the British House of Commons in 1763, William Pitt vividly illustrated the strengths of the property rights protection: “The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail – its roof may shake – the wind may blow through it – the storms may enter – the rain may enter – but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement!”⁵

But in fact, the forces of the Crown could expropriate the ruined tenement. While expropriation is not part of the common law, it has existed for as long as kings and parliaments have decreed it. References to expropriation can be found in the Old Testament, in inscriptions from ancient Greece, and in special statutes of the Roman Empire.⁶ The practice became commonplace in England with the expansion of railways in the mid-19th century, and Canada quickly adopted England’s laws.⁷

Federal and provincial parliaments can confer the power to expropriate on whomever they please. A 19th century work on expropriation explained that, under the principle of parliamentary supremacy, “the only guide to what Parliament may do is what Parliament has done.”⁸ Or, as one law lord famously wrote, “The Legislature is supreme, and if it has enacted that a thing is lawful, such a thing cannot be a fault or an actionable wrong.”⁹ An Ontario justice was even more pointed: “The Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine....The prohibition ‘thou shalt not steal’ has no legal force upon a sovereign body.”¹⁰

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Nonetheless, no entity can expropriate without being explicitly empowered to do so by federal or provincial legislation. As one BC justice explained, “The right to seize and enter upon another’s land is a *legislative* concept. It runs against the general common law principle colloquially stated to be that ‘a man’s home is his castle.’ It is the deprivation of proprietary rights.”¹¹ Justice L’Heureux-Dubé made the same point, citing a weighty tome on expropriation: “[T]he right to expropriate, being an unusual and exorbitant right, must be found in the express words of a statute for the right is never implied.”¹²

Early statutes

Unfortunately, in Canada, there has been no shortage of statutes conferring the power to expropriate. Nor have those statutes placed meaningful limits on what those powers can be used for. As lawyer John Morden (who would later become Associate Chief Justice of Ontario) explained, “In Canada, few hurdles have been put in the way of expropriating authorities exercising their powers as they see fit.”¹³

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The first federal *Expropriation Act* was passed in 1886. It embodied provisions that had been in the 1881 *Government Railways Act* and the 1867 *Public Works Act*.¹⁴ The *Expropriation Act* was revised over the years, but remained, in the words of Mr. Morden, “badly drawn and ostensibly arbitrary.”¹⁵ In 1930, the Exchequer Court of Canada noted that “the powers granted to the Minister by the [Expropriation] Act seem to be unlimited” and that the Minister’s judgment that private land was necessary for a public work was not open to review.¹⁶ The court made a similar finding in 1946: The mere filing of an expropriation plan “shall be deemed to indicate that in the Minister’s judgment the land is necessary for the purpose of a public work.... [H]is judgment is not open to review by the Court.”¹⁷

The court addressed the issue again in 1948, in a case concerning the expropriation of land which was turned over to a Crown company for the construction of rental housing. The court dismissed the objection that the land was not required for a public work, saying that the deposit of the expropriation plan indicated that the Minister considered the land necessary for the purpose of a public work; the public could not call this into question.¹⁸

Provincial laws likewise left much to the discretion of the government. This was confirmed by the Supreme Court of Canada in a 1958 case launched by an Alberta rancher who objected to the Minister of Agriculture’s approval of a utility’s proposal to expropriate a right-of-way for a transmission line. Justice Martland wrote:

The Minister is given sole authority to decide whether or not lands or any interest therein are necessary for an authorized undertaking. There is no provision for an appeal from his decision. His decision is as a Minister of the Crown and, therefore, a policy decision, taking into account the public interest, and for which

he would be answerable only to the Legislature.... His decision was ... to be guided by his own views as to the policy which, in the circumstances, he ought to pursue.... The question as to whether or not the respondent's lands were "necessary" is not one to be determined by the Courts in this case. The question is whether the Minister "deemed" them to be necessary.¹⁹

Courts and administrative bodies assessing proposed expropriations had little guidance in defining public works and public purposes. Occasionally, they cast a wide net for assistance. In 1953, an Ontario judge hearing a case about the provincial power commission's right to expropriate land looked back to a 1914 Indian decision that discussed the phrase "any public purpose." The Indian court had cited a still-earlier finding that the phrase "must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned." The Ontario judge used this construction to illustrate "the broad scope of the possible meaning of the words 'for the public purposes of Ontario.'"²⁰

The federal *Expropriation Act* came in for sharp criticism from the president of the Exchequer Court in 1959. Justice Thorson wrote:

I have frequently called attention to these provisions of the law and stated that Canada has the most arbitrary system of expropriation in the whole of the civilized world. I am not aware of any other country in the civilized world that exercises its right of eminent domain in the arbitrary manner that Canada does. And, unfortunately, the example set by Canada has infected several of the Canadian provinces in which a similar system of expropriation has been adopted.²¹

Justice Thorson pointed out that, under the federal act,

a man's land can be lawfully taken from him without his consent, and even without his knowledge or any notice to him, merely by the deposit of record in the proper land titles or land registry office of a duly signed plan and description of the land. This may be done whenever the Minister of the department charged with the construction and maintenance of the public work for which the land is to be taken deems it advisable to do so. On such deposit the expropriation of the land is complete without any further act by anyone.... All that is left to the former owner of the land ... is a claim to compensation ... And I might add here that the settlement of claims to compensation is frequently unconscionably delayed.²²

Justice Thorson's criticism did not go unnoticed. It was quoted in speeches in the House of Commons and the Senate. It was also quoted by those working for reforms at the provincial level, including the Honourable James McRuer, the former Chief Justice of Ontario who served as Commissioner of Ontario's Royal Commission Inquiry into Civil Rights.²³ In his 1968 report, Commissioner McRuer, sometimes referred to as "Canada's greatest law reformer," charged the Ontario government with granting expropriation powers lavishly: "the power to expropriate land has been conferred in Ontario with reckless and unnecessary liberality, without sufficient control over the exercise of the power." He criticized the expropriation legislation of the day for not clearly setting out the purposes for which lands could be expropriated, or the grounds for approval: "When no clear purpose is expressed and no grounds for approval are stated the power to expropriate is uncontrolled." He recommended that legislation granting expropriation powers clearly state permitted purposes in order both to furnish guidance and to limit the power. And he went further: The power to expropriate should be conferred only when "inescapably necessary in the interest of good government.... Powers of expropriation constitute far too great an infringement on civil rights to be handed out as convenient tools."²⁴

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Commissioner McRuer pointed to another "defect" of the legislation then in effect: Property owners rarely had the right to contest an expropriation decision before it was made. Although he acknowledged the political nature of the decision to expropriate, he insisted that "safeguards should be provided to control the way in which the decision is arrived at." Without a public airing of the issues, "ill-conceived," "arbitrary," and "unnecessary" expropriations had occurred. "In such cases, if the expropriation plan had been more thoroughly considered by the authority before it was implemented, much injustice would have been averted."²⁵

Commissioner McRuer was by no means a lone critic. In the 1960s and 1970s, expropriation was the subject to considerable scrutiny across the country. In 1960, Ontario appointed a Select Committee to review land expropriation and compensation. A year later, British Columbia established a Royal Commission on Expropriation. In 1967, the Ontario Law Reform Commission released a report focussing on compensation for expropriation. The following years saw reports from both the Law

Reform Commission of British Columbia and the Alberta Institute of Law Research and Reform.

The reports spurred new legislation. Ontario enacted a new expropriation law in 1968. A new federal law took effect in 1970. In 1971, Manitoba brought in a new law. Nova Scotia, New Brunswick, Alberta, and Quebec soon followed. Most of the laws provided for fairer expropriation procedures – such as prior notice and more public participation – and better compensation.

Despite the extensive reforms, few federal or provincial laws addressed the essential question of when expropriation is legitimate and should be permitted. Although many – but by no means all – laws require that expropriation be for a public purpose, few define the term. In the intervening years, the meaning of public purpose has been given a very broad scope. Some expropriations have served unambiguously public purposes, such as defence. But other expropriations have served private ends. In the name of economic development, governments have expropriated private property for the benefit of a foreign-owned gold mine, a large grocery store chain, a car manufacturer, and a private housing developer, to name but a few examples. Such expropriations raise troubling questions about when expropriation is legitimate, and when it constitutes an abuse of government power.

Canada

The federal *Expropriation Act* authorizes the Crown to expropriate any interest in land that “*in the opinion of the Minister, is required by the Crown for a public work or other public purpose.*”²⁶ This power has been

described as “virtually all-encompassing,” since it is expressed in subjective terms and since the Act defines neither public work nor public purpose. Nor does the Act provide any other standard by which a proposed expropriation can be evaluated.²⁷

Leaving so much to the discretion of the Minister makes it difficult to mount a

legal challenge to a proposed expropriation.²⁸ Indeed, one federal judge called provisions in the Act “an absolute bar to the judicial review of the ... Minister’s

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determination.”²⁹

Although the meaning of public work is unclear, it is clear that a public work need not be publicly provided, since the Act permits the Crown to expropriate land for private railway companies.³⁰ Similarly, the *National Energy Board Act* allows private companies to expropriate for pipelines.³¹ In 1976, the Law Reform Commission of Canada noted that “Parliament has been very generous” in conferring the right to expropriate. It reported that at least 1,234 companies had been granted expropriation powers.³²

When giving notice of its intention to expropriate, the federal government must indicate the public work or purpose for which expropriation is required, unless the purpose is “related to the safety or security of Canada or a state allied or associated with Canada and it would not be in the public interest to indicate that purpose.”³³ That exception for security aside, the Act encourages the government to make available additional information with respect to the public work or purpose if requested by those who object to a proposed expropriation.³⁴

In the event of such an objection, the Act requires the Attorney General to appoint a hearing officer to conduct a public hearing into the proposed expropriation. The Act does not specify the issues to be canvassed at the hearing, and does not rule out objections to the merits of the public work or purpose.³⁵ But the hearing carries little weight. The expropriating authority need not attend the hearing, make its case for expropriation, or submit to cross examination. Although the government must consider the hearing officer’s report on the parties’ objections, it need not heed the parties’ concerns. It can confirm its intention to expropriate, as long as it states its reasons for not giving effect to the objections.³⁶

Critics of the hearing process are legion. Because the Act provides no guidance on the scope of the hearing, does not require the expropriating authority to present any evidence, and confers no power on the hearing officer, Eric Todd, the author of a comprehensive book on expropriation law, described the process

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as producing “more heat than light.”³⁷ Dismissing the hearing as a place “to let off steam,” lawyer Gaylord Watkins called it inherently wasteful and “a frustrating experience for most participants.”³⁸ Municipal lawyer Stephen D’Agostino went further.

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Asserting that a proposed project is for a public work or purpose may meet the requirements of the *Expropriation Act*, but is not sufficient to confer legitimacy on a project in the public mind. One of the most controversial takings in Canada in recent years involved defence, which is arguably the most public of purposes. Few would likely challenge the House of Lord's assertion, in 1920, that "the King, as *suprema potestas* [supreme power] endowed with the right and duty of protecting the Realm, is for the purpose of the defence of the realm in times of danger entitled to take any man's property."⁴⁰ But in less dangerous times, the military cannot count on public support for its takings.

Canada's 2012 expropriation of Frank Meyers's prime Ontario farmland for a training facility for the Joint Task Force 2 prompted vigorous public protest, including demonstrations, petitions, and a critical web site that attracted more than 58,000 "likes." Many objected that the expropriation was unnecessary, and that the government had failed to explore viable alternatives to it. Furthermore, although the project's stated purpose was military, governments at all levels also widely portrayed it as a unique economic development and job creation opportunity, leading many to question whether it qualified as a legitimate public work. "Jobs? Since when should expropriation be used as a job creator?," one critic asked.⁴¹

In fact, job creation and broader economic development goals frequently drive expropriation. As long as the government deems the economic development to be a public purpose, it meets the requirements of the *Expropriation Act*. Such permissive legislation allows governments to operate virtually unchecked. It is, in the words of one lawyer, "discretion masquerading as law."

Ontario

A public interest presumption permeates discussions – legal and academic – of expropriation in Ontario. That expropriation should occur only if in the public interest is assumed. For example, a frequently cited 1970 Law Society lecture on Ontario's then-new expropriation legislation referred to "a balancing of the public interest allegedly being advanced by the expropriation with that of the private interest of the owner."⁴²

Writing for the Ontario Court of Appeal in 1978, Justice Mackinnon referred to “the conflict between private and public interests which exists in every expropriation.”⁴³ In a 1997 Supreme Court of Canada decision, Justice Cory wrote that Ontario’s *Expropriations Act* had been “enacted for the specific purpose of adequately compensating those whose lands are taken to serve the public interest.”⁴⁴

That said, Ontario’s *Expropriations Act* does not actually include any public interest requirement. “Public purpose” and “public use” appear nowhere in the Act. “Public works” and “public interest”

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are each mentioned once, but not as necessary conditions for expropriation. Just two Ontario laws conferring the power to expropriate require a public purpose. The *Ontario Energy Board Act* requires expropriation for electricity transmission lines to be in the “public interest.”⁴⁵ The *Ministry of Infrastructure Act* empowers the Minister to expropriate any land considered “necessary for the use or purposes of the Government or [a] public sector organization,” or “necessary for the benefit of the public.” But this hardly limits the government’s discretion: Such takings are permitted if the Minister or the Lieutenant Governor in Council considers them necessary.⁴⁶

Be it an implicit or explicit requirement, public interest is not to be confused with public use. Public bodies may expropriate on behalf of private parties to further private developments. Expropriation has been used to smooth the way for many a business venture in Ontario. In 1980, St. Thomas expropriated five homes in order to build a parking lot to facilitate the development of a private residential and commercial complex next door. Four affected homeowners went to court, objecting that the city by-law permitting the expropriation was not passed in the public interest, but was instead intended to benefit a private developer, and was therefore invalid. “With a great deal of reluctance,” the judge concluded that the development served a public interest. Although the private developer was “the activating force behind the by-law” and would “receive a primary direct benefit from its provisions,” the judge could not say that the by-law had been passed *only* for these reasons and therefore not in the public interest.⁴⁷

The most notorious example of expropriation for a private purpose involved Toronto, which in 1998 expropriated six properties at Yonge and Dundas Streets in the downtown area for a private development featuring a multi-screen cinema, shops, restaurants, and offices. Several owners complained bitterly about their land being

taken for the benefit of a developer and cinema owner. As one explained, “We object to the City expropriating our property for the purpose of completing a commercial transaction which will have no other effect than to transfer wealth from one commercial landowner to another.”⁴⁸ The Ontario Municipal Board did consider whether it was appropriate for the city to expropriate for the private development. It found no prohibition in the *Expropriations Act* against a city expropriating a property and then re-selling it to private interests.⁴⁹ Indeed, it pointed to two precedents, one involving urban renewal in Toronto, and the other involving the expropriation of land for the privately operated casino in Windsor – a purpose the court ruled was legitimate redevelopment, even if not “to everyone’s taste.”⁵⁰ In that case, the court had set a disturbingly low bar for when expropriation is legitimate: “What is proposed is entirely legal. Being legal, there is no impediment to the City using its power to expropriate for that purpose.”⁵¹

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Two Ontario expropriations have benefited car manufacturers. In 1999, Windsor expropriated a block of historic buildings for an office tower that houses the headquarters of Daimler-Chrysler. In 2005, Oxford County expropriated land for a Toyota plant in Woodstock. The company had been looking for 1,000 acres near a major highway. The county, anticipating \$1.1 billion in investment and the creation of 2,000 new jobs, was happy to help by acquiring 28 properties and selling them to the company. The owner of one property – on which a shopping mall stood – refused to sell, prompting the county to expropriate the land. The mall owner didn’t have an opportunity to challenge the proposed expropriation at a public hearing – at the county’s request, the province waived the hearing in order to expedite approval of the car plant. But the mall owner and its mortgage company did take their fight to court. In a 2006 decision, the court endorsed economic development – and the jobs and tax revenues it creates – as a public purpose: “The expropriation of the Mall Lands and the development of the Toyota Plant will enable Oxford to provide for stable and marketable employment and industrial lands to meet short and long-term needs for both jobs and assessment, which is acknowledged to be a valid and proper public purpose supported and endorsed by the Province of Ontario.”⁵² The court case dragged on until 2014, when the court confirmed, “It is clear that Oxford expropriated the mall lands for a valid public purpose,” i.e., “to promote economic development.”⁵³

If expropriation need not be for a strictly public purpose, what *are* the requirements? Rather than a public purpose, the *Expropriations Act* refers to an expropriating authority's "objectives." Nowhere does it offer guidance as to what objectives might justify expropriation, nor does it require an expropriating authority to defend its objectives. Instead, the legitimacy and merit of the objectives are strictly off-limits to those who wish to challenge an expropriation. When an owner of land slated for expropriation requests a hearing, the inquiry officer appointed to conduct the hearing looks into whether the taking of the land is "fair, sound and reasonably necessary *in the achievement of the objectives of the expropriating authority.*"⁵⁴

The inquiry officer is not empowered to look at the objectives themselves. An inquiry officer's report written shortly after Ontario's Act came into effect explained that approving a proposed expropriation

"becomes a political rather than a judicial decision ... [T]he inquiry officer must accept the 'objectives' of the expropriating authority."⁵⁵ More recently,

the Ontario Municipal Board has confirmed that the objectives are the stuff of elections rather than of hearings into proposed expropriations. In its decision regarding the Yonge-Dundas

cinema development, it wrote, "The objectives of the public authority [are] not to be questioned by the Inquiry Officers. The objectives are presumed to have been appropriately determined by elected officials and the remedy for any complaint is to replace the policy-making elected officials at the ballot box."⁵⁶

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Depriving landowners of the opportunity to challenge an expropriating authority's objectives stands in contrast to the federal practice of permitting such challenges (however ineffectual the process). It also runs contrary to the long-established British tradition of providing landowners with a forum that will weigh the personal costs of a proposed expropriation against the alleged public benefits. As an 1846 work on expropriation for railways explained:

On every ground of justice then, A. has a right to be heard in opposition to a measure which, if it pass into law, will rob his property of its peculiar charms for him, and to prove, if he can, to the tribunal which has the power of recommending to Parliament the adoption of such measure, that the amount of

damage which will be inflicted on him in the event of a Railway being formed as proposed, exceeds the amount of advantage that will accrue to the public from its formation.⁵⁷

Six years into Ontario's new legislation, a report commissioned by the Attorney General noted that landowners found it difficult to accept that a public hearing provided no opportunity to challenge an expropriating authority's objectives. They attempted to challenge the objectives at almost every hearing, and the limitations on their doing so did "nothing to lessen antagonism to the process." The report, known as the Robinson Report, stressed the need for some form of early public involvement in planning major projects and hoped that the "possibility of not proceeding at all" be considered.⁵⁸

In comments directed in part at the Ontario hearing process, the Law Reform Commission of Canada explained in 1976 that depriving landowners of the right to challenge the necessity of a project – a key element of the expropriating authority's objectives – inevitably leads to

frustration: "How can a consideration of necessity be excluded when people have not been able to express their views publicly before?"⁵⁹ In a discussion paper released prior to its final report, the

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Commission proposed that, at the pre-expropriation hearing, the "expropriator should present the reasoning behind the proposed project that has caused the need for land. People opposing the proposed expropriation should be able to ask questions about this reasoning at the hearing, and present their own views. These views would normally encompass both necessity and location."⁶⁰

Having to accept an expropriating authority's objectives will often limit a landowner's opportunities to propose alternatives to a project. In his 1968 report, Commissioner McRuer had tried to strike a balance between accepting the general policy behind an expropriation and allowing landowners to propose alternative sites or routes, or other modifications to an expropriation plan.⁶¹ But expropriating authorities can avoid a thorough canvassing of alternatives by narrowly defining their objectives – limiting them to putting a particular project in a particular place. For example, when Toronto expropriated properties for the Yonge-Dundas cinema development, its objectives involved putting an urban entertainment complex on that particular corner during that particular business cycle.

According to the 1974 Robinson Report, the law regarding consideration of alternatives was unsettled, with some but not all inquiry officers hearing evidence on alternative locations.⁶² The report recommend that public hearings consider alternative sites and routes, or other requests to modify expropriation plans.⁶³ Including a thorough assessment of alternatives would be consistent with the recommendation by the Law Reform Commission of Canada that pre-expropriation hearings should be “somewhat of an inquiry” in which “[a]lternative sites or routes should be major issues.” Such hearings would help test a bureaucratic plan to expropriate “by the people who know the proposed locale best.”⁶⁴

At least one court case has concluded that the inquiry officer’s assessment of “fair, sound, and reasonably necessary” should include an examination of alternatives. In 1977, the Ontario Court of Appeal rejected Ontario Hydro’s argument that a hearing into a proposed expropriation for a transmission line should not hear evidence regarding alternative routes. Ontario Hydro maintained that the taking of the specific lands in question was an objective of the expropriation authority, and therefore outside of the scope of the inquiry. The court disagreed, finding that the objectives were more general. “To ascribe any meaning whatever to this section and particularly the words ‘fair, sound and reasonably necessary,’ it must follow that the inquiry includes the issue of alternative routes. To eliminate this question from the inquiry would almost negate the inquiry.”⁶⁵

The standard of “fair, sound, and reasonably necessary in the achievement of the objectives of the expropriating authority” has been applied somewhat loosely in the province. Inquiry officers and courts have often substituted the more general standard of “reasonably defensible.” This follows the advice set out in a 1970 lecture by John Morden on Ontario’s then-new expropriation legislation published by the Law Society of Upper Canada:

In a sense it seems somewhat unrealistic and pointless to analyze each adjective [fair, sound, and reasonably necessary] in the formula separately, either in the abstract or in relation to an actual case, to determine its “meaning.” Having regard to the political context in which the ultimate expropriation decision is made I suggest that it may be more realistic to regard the statutory formula as conveying one broad standard – “having regard to the objectives of this authority is this expropriation reasonably defensible?” I refer back to the observation that the issues relating to a decision to expropriate are not justiciable. Therefore any finely-spun elaboration of the meaning of the words would seem to me to be

indulging in a form of theoretic exercise having no relevance to realities respecting the exercise of governmental power.⁶⁶

Inquiry officers wasted no time in applying this shorthand test of reasonable defensibility, and the courts offered no resistance. In 1971, the court hearing a challenge to the expropriation of part of a farm for a new secondary school in Essex County noted without criticism that the inquiry officer had adopted the new standard.⁶⁷ In a 1974 Divisional Court case involving Ontario Hydro's taking of land for a transmission line, Justice Van Camp wrote, "It is only required to show the taking is reasonably defensible, to show the case the owner must meet."⁶⁸ Three years later, in an Ontario High Court decision regarding the expropriation of land in St. Thomas for the construction of an expressway, Justice Cory approvingly cited that decision and the advice earlier offered in the Law Society lecture: "I agree that it is pointless to analyze each adjective. The [reasonably defensible] test ... is in my opinion one that can and should be considered and applied by an inquiry officer."⁶⁹

Inquiry officers continue to use the standard today. For example, Gillian M. Burton used it in the 2013 hearing into Toronto's proposed expropriation of homes for the expansion of a city park. The hearing, Ms. Burton wrote, was held to determine whether the proposed taking was "'fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority' as the Act states, or is 'reasonably defensible' as the courts have interpreted this test."⁷⁰

Regardless of which standard is used, the protection is ultimately of limited worth to landowners. An inquiry officer's determination that a proposed expropriation is not fair, sound, or reasonably necessary – or that it is not reasonably defensible – does not bind the party responsible for approving the proposed expropriation. Although the "approving authority" must "consider" the inquiry officer's report, it need not abide by the officer's recommendations. It may approve the proposed expropriation, even if the inquiry officer recommends against doing so, provided it gives written reasons for its decision.⁷¹

In many cases, those facing expropriation cannot be confident that the approving authority will impartially assess the inquiry officer's report. Under the *Expropriations Act*, the approving authority is generally a provincial

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minister. But there are two important exceptions: Municipalities and school boards are their own approving authorities. They apply to themselves for their own approvals of their proposed expropriations. In other words, they are the judges in their own causes.⁷²

As a consequence of all of the above factors, hearings and the inquiry officers' reports that come out of them have little impact on plans to expropriate. Lawyer Stephen D'Agostino has "never seen an expropriating authority decide not to expropriate based on the hearing."⁷³ Because aggrieved owners can so rarely successfully challenge expropriations, an article in the Ontario Expropriation Association newsletter described the hearing process as "more window dressing than real."⁷⁴

An approving authority's blessing of an expropriation leaves landowners with little recourse. As the Supreme Court of Canada's Justice Laskin noted in the above-mentioned decision concerning the expropriation of part of a farm for a new secondary school, the Ontario Legislature has

left little room for judicial supervision of an approving authority's discharge of its duty to approve or disapprove an expropriation ... The Court is given no role to review the merits of an expropriation proposal ... [The approving authority] is invested with the widest discretionary power to determine, subject only to considering the inquiry officer's report, whether an expropriation should proceed. The sanction for a wrong-headed decision (absent bad faith), having regard to its duty to give reasons, is public obloquy not judicial reproof.⁷⁵

This decision was cited by the Ontario Divisional Court the following year. The environment minister had approved Ontario Hydro's application to expropriate land for a transmission line, despite the inquiry officer's findings that the utility had not considered all reasonable alternative routes, and that the application was neither fair, sound, nor reasonably necessary. The court found that the minister had "acted within his statutory authority" and that "the Court has almost no part to play in reviewing his actions.... So long as the Minister considers the report of the inquiry officer and approves the proposed expropriation in the manner provided in s. 8(1) of the *Expropriations Act*, the Court has no concern with the wisdom or lack of wisdom of what the Minister has done."⁷⁶

The Supreme Court's decision on an approving authority's wide discretion was also cited in a 1978 case concerning Windsor's expropriation of lands for a housing project to be developed by a private corporation. The city believed "it would be too costly and

time consuming for private entrepreneurs to assemble” the relatively small lots in the area it wanted to see developed. In fact, a substantial number of the lots belonged to one developer, which objected to losing its lands. After a public hearing, the inquiry officer concluded that it would not be fair to take “lands from one group of private citizens to deliver the serviced inventory of lands to another [less well established] private group.” The officer also concluded that the proposed expropriation was not necessary to meet the city’s housing objectives. Following a by-now familiar pattern, Windsor considered the officer’s report, ignored his conclusions, and confirmed its intention to expropriate. The court hearing the dispute made an astonishing finding: “Much was made in argument that the lands in question were not expropriated for public purposes. The short answer is that once the power to expropriate is conferred *it would seem inconsequential whether or not it was for a public purpose.*”⁷⁷

“Once the power to expropriate is conferred it would seem inconsequential whether or not it was for a public purpose.”

Ontario’s *Expropriations Act*, introduced in 1968, served as a model for expropriation legislation elsewhere in Canada.⁷⁸ The following brief survey of other provinces and territories will highlight some of the key similarities and differences, with a focus on whether a public purpose is required, how it is defined, and what options landowners have to challenge proposed expropriations.

British Columbia

BC’s *Expropriation Act*, like its Ontario counterpart, includes no requirement that a project be for a public purpose or in the public interest – nowhere does it state that the power of expropriation is to be exercised only for public uses or public works. As is true in Ontario, a public inquiry may be held “for the purpose of inquiring into whether the proposed expropriation of the land is necessary to achieve the objectives of the expropriating authority.” (Unlike Ontario, BC does not require the proposed expropriation to be fair or sound.) Although the inquiry may look at whether those objectives could be better achieved by using an alternative site, or by varying the amount of land to be taken, it may not consider “the necessity for the project or work for which the expropriation is sought.”⁷⁹

Even this limited right to challenge a proposed expropriation is not automatic. An owner whose land will be expropriated for a “linear development” (a highway, railway, power line, pipeline, or water or sewage pipe) may not request a public inquiry.⁸⁰

An owner whose land will be expropriated for a “linear development” (a highway, railway, power line, pipeline, or water or sewage pipe) may not request a public inquiry.

The province’s decision to exempt linear developments from public hearings reflects the ambivalence of the Law Reform Commission of British Columbia’s 1971 report on expropriation. The Commission acknowledged the value of providing owners with an opportunity to be heard. It argued that a hearing creates “a much healthier relationship” between a landowner and an expropriating authority. It reported that in Ontario “the very existence of the inquiry procedure is making expropriating authorities more careful in the preparation of their plans and has resulted in more consideration being given to the position of owners.”⁸¹

The Commission drew extensively from Ontario’s *Inquiry into Civil Rights* report. In that report, Commissioner McRuer treated a public inquiry as a necessary safeguard of a landowner’s civil rights: “The right to a hearing is fundamental justice. In addition to reasons based on fundamental justice, a right to be heard will tend to produce expropriation decisions which will reflect more consideration for the rights of the owner.”⁸² The Commissioner also argued that hearings “produce better plans.” They allow for “a better understanding of all the relevant facts” and guard against oversight. They may even “reveal circumstances that would reduce costs.”⁸³

Despite its nods to the McRuer report, the BC Commission mused that inquiries – especially for projects involving land assembly or for rights-of-way for roads, transmission lines, or pipelines – may “come too late in the day to have any real meaning.” If project proponents have been able to acquire some land through negotiation, “it may be impractical to make a change” once expropriation proceedings for the remainder of the land have begun. The Commission shied away from recommending that the inquiry be held before any lands are acquired for a particular project, calling this an ideal but extreme position.⁸⁴

Alberta

Alberta's *Expropriation Act* does not spell out a public purpose requirement. The two sections of the Act that refer to the "public interest" serve to expedite, rather than curb, expropriation. One section specifies that an expropriation can proceed without a public inquiry if the expropriating authority urgently requires the land and if a delay "would be prejudicial to the public interest." Another empowers the Lieutenant Governor in Council to direct an approving authority to approve a proposed expropriation if its refusal to do so "is contrary to the public interest."⁸⁵

In most cases, an Alberta owner facing expropriation may request a public hearing to inquire into "whether the intended expropriation is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority."⁸⁶ In his report on the hearing, the inquiry officer shall express his "opinion on the merits of the expropriation." But that said, "No person may in any proceedings under this Act dispute the right of an expropriating authority to have recourse to expropriation."⁸⁷

As in other provinces, public hearings into expropriations in Alberta are of limited value. After considering the inquiry officer's report, the approving authority may approve, disapprove, or modify the proposed expropriation. The only requirement is that it give written reasons for its decision.

A sports and entertainment centre proposed for Fort McMurray was examined in a four-day inquiry in 2013, after which the provincially appointed inquiry officer concluded that necessary studies had not yet been conducted, and that "there is no reasonable assurance that the project will ever proceed." But the officer's report did not deter the municipality. The director of the downtown redevelopment project explained that the report was not legally binding and that the administration did not agree with its conclusions. He defended the city's right to ignore the report, suggesting that doing so is commonplace: "It isn't unusual for an inquiry officer to raise these issues, brought forward by the people opposing the change. Our legal counsel is one of the most experienced in the province, and her statement was that in every case, notwithstanding an officer who had raised some concerns, council had moved forward to complete the expropriation."⁸⁸ The municipality therefore proceeded with its plans.

"In every case, notwithstanding an officer who had raised some concerns, council had moved forward to complete the expropriation."

Saskatchewan

Saskatchewan's Ministry of Justice defines expropriation as "the taking of land for public purposes without the consent of the owner of the land."⁸⁹ But the province's *Expropriation Procedure Act* leaves much wiggle room with a circular interpretation of a "public improvement" as "anything for the purpose of which an authority may expropriate land."⁹⁰

The province's expropriation of farm land for a one-million-square-foot Loblaws warehouse and distribution centre illustrated how broad the definition of public purpose can be. The Loblaws facilities are part of a larger project called the Global Transportation Hub – an "inland port" just west of Regina that, its promoters said, would connect Saskatchewan to the rest of the world. According to John Law, the CEO of the Global Transportation Hub Authority, Loblaws would not have considered building in that location if it had had to negotiate with landowners. "We had to make the land available or lose \$200 million in investment and 1,500 jobs," Law said.⁹¹

Saskatchewan's *Expropriation Procedure Act* gives landowners the opportunity to challenge some expropriations. A landowner may apply to the Public and Private Rights Board for a review "of the route, situation or design of the public improvement." The investigation is informal and occurs at the discretion of the board. The board sees its primary role as dispute resolution – managing negotiations and reaching mutually acceptable solutions.⁹² The Act gives it no power to impose solutions.

Most of the issues dealt with by the Public and Private Rights Board concern communications infrastructure, power facilities, and highways. The *Municipal Expropriation Act* creates no similar body to hear challenges to municipal expropriations. Nor does the *Expropriation Act*, which applies to takings under *The Conservation and Development Act* and *The Water Power Act*, provide owners any forum in which to challenge expropriations.

Manitoba

Manitoba's *Expropriation Act* provides little guidance on the purposes permitting expropriation. The provincial *Land Acquisition Act* authorizes the government to empower a minister to acquire lands for the purposes of any work or program to be

constructed or carried on by the government.⁹³ The *Public Works Act* goes further, authorizing a designated minister to expropriate any property “*that he deems necessary* for any public work or purpose connected therewith, or for any public purpose of the government.” Ensuring that the government has very broad discretion, the Act’s definition of public work includes any property or work “that has been proclaimed by the Lieutenant Governor in Council to be a public work.”⁹⁴

The *Expropriation Act* includes the by now familiar language about the objectives of the expropriating authority. At a public hearing, an inquiry officer will examine “whether the intended expropriation is fair and reasonably necessary for the achievement of the objectives of the expropriating authority.” Here too, the Act limits how deeply the officer can probe: “an inquiry officer shall not consider any matter or question relating to ... the advisability, expediency, legality or necessity of the objectives of the expropriating authority for the achievement of which the land to be expropriated is being acquired.”⁹⁵

“An inquiry officer shall not consider ... the advisability, expediency, legality or necessity of the objectives of the expropriating authority for the achievement of which the land to be expropriated is being acquired.”

However, the government’s discretion to take land is not unlimited. A 1978 case challenged the right of the Minister of Public Works to expropriate fossil-rich farmland in order to transfer it to the federal government to compensate for the flooding of fossil-rich federal parkland some 20 miles away, on a different river. The landowners argued that their land was not required for the purpose of the government work – i.e., the dam that would flood the federal land. The government argued that “the decision to expropriate was by way of exercise of ministerial discretion and so beyond reach of the Court.” It argued that the Minister could “take land when and where he will.”

The Court of Queen’s Bench replied that this “might be viewed as tantamount to the re-introduction of feudalism, softened only by the requirement to pay for what is taken.” It acknowledged that “the supremacy of the ministerial decision to expropriate has been repeatedly affirmed.” Nonetheless, it insisted that the power to expropriate “is not absolute.” There “should exist at least a reasonably direct relationship between the objective sought [and] the means employed to obtain it.” In this case, “the decision to take the applicants’ lands can only be regarded as arbitrary.” If the decision was taken arbitrarily, “then in law that decision cannot be looked upon as one taken in good faith.” And so the court set aside the expropriation. The headnote to the case drew this lesson from it: The Minister’s “wide power does not mean ... that land can [be] taken by the

Minister when and where he pleases.”⁹⁶

The same Manitoba court seemed to distance itself from this decision a decade later, citing the findings on ministerial discretion and ignoring those on its limits. That case involved an urban revitalization plan in Winnipeg. As part of the plan, the Canadian National Railway Company agreed to transfer some of its land in the targeted area to a government-owned development corporation, in exchange for some other land that the it (CNR) could use for its own purposes, including development or sale. The replacement land was already privately owned, and would have to be expropriated. The province dispensed with a public inquiry, and the city went ahead with the expropriation, leading to a court challenge.

The landowners argued that their land was not required for any public work – that CNR would use it for its own private purposes. The judge disagreed, saying that civic purposes included the sponsorship of land development. The land exchange was a component of the city’s development plans. The *City of Winnipeg Act* empowered the city to take any lands it deemed necessary for its purposes, and to dispose of any lands acquired to any person for the purpose of development. The expropriation, the judge found, “was essentially a policy decision taken in what the Council of the City of Winnipeg perceived to be the broad public interest, namely to facilitate the development of and ... ‘to revitalize a neglected and underused area of the City.’ No doubt the City had to act within the bounds of its authority, but as long as it did so, and did not otherwise abuse its discretion, the expropriation could not be questioned.”⁹⁷

Quebec

Quebec’s *Charter of Human Rights and Freedoms* enshrines property as a fundamental right: “Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.”⁹⁸ The province’s *Civil Code* goes further, specifying that “No one can be compelled to give up his property, except for public utility and in consideration of a just indemnity previously paid.”⁹⁹ Thus, although the provincial *Expropriation Act* does not itself require expropriation to be for public utility, both the courts and the government assume a public interest requirement. Supreme Court Justice L’Heureux-Dubé wrote, “In Quebec, no one can be deprived of property unless it is in the public interest and for just compensation.”¹⁰⁰ Likewise, on its web site, the Tribunal Administratif du Quebec explains that a department, agency, or municipality has the right to expropriate “for reasons of public interest.”¹⁰¹

In practice, however, public interest is defined so broadly as to render the restriction meaningless. This became apparent in a case heard by the Supreme Court of Canada in 1991. The town of Val-Bélair had expropriated land for a “land reserve” – defined by one judge as “a bank of land the use of which is not yet known.” The court was divided over whether an undetermined use could qualify as a public purpose. In their dissenting opinion, Justice L’Heureux-Dubé and two colleagues argued that “If a land reserve is defined by its lack of purpose, it is presumptively impossible to conclude that its creation is for the betterment of the collectivity. It is not self-evident that expropriation for the sole purpose of creating a land reserve is in the public interest, which is what our law requires.” Allowing a municipality to expropriate “for no other reason than the creation of a land reserve ... would facilitate the abuse of the expropriation power,” the dissenting justices continued. If a municipality need not demonstrate why a proposed expropriation is in the public interest, “there is no check on a municipality’s power to expropriate, and no basis on which to challenge its decisions.”¹⁰²

The Supreme Court’s majority did not share these concerns, and approved the expropriation. In its decision, it noted that expropriation is sometimes allowed for private purposes that are consistent with public purposes. Specifically, a municipality can expropriate land for purposes contemplated in or consistent with a “special planning program” and then sell or lease the expropriated property. In effect, the court noted, municipalities can act as land developers. They can acquire land “for the purpose of resale or leasing, and what is more, those operations can be carried out for the benefit of third parties.”¹⁰³

Quebec’s *Expropriation Act* provides those facing expropriation more meaningful opportunities to protest – in terms of both the forum for objections and the nature of the objections – than do most other provincial Acts. It empowers those facing expropriation to “contest the right of the expropriating party to expropriate.” Furthermore, the objection is made to the Superior Court rather than to an inquiry officer or other administrative body.¹⁰⁴

But Quebecers are not always able to challenge the right of the expropriating party to expropriate. In response to the July 2013 railway disaster in Lac-Mégantic, the province passed a law facilitating expropriation, not only of properties damaged by the explosion but also of properties slated for redevelopment elsewhere in the town. The Act eliminated an owner’s right to contest the town’s right to expropriate before the Superior Court.¹⁰⁵

New Brunswick

New Brunswick's *Expropriation Act* is unique in that it explicitly allows expropriation for private purposes. The Act permits the government to expropriate for any work or enterprise it considers to be "in the public interest," or for carrying out any public, commercial, industrial or utility purpose. It then goes further. It permits "any person, other than an expropriating authority, who requires an expropriation for commercial, industrial or utility purposes" to "file with the [Expropriations Advisory] Officer an application for an expropriation by the Lieutenant-Governor in Council."¹⁰⁶

New Brunswick's Expropriation Act is unique in that it explicitly allows expropriation for private purposes.

Expropriation does indeed occur for private purposes. One case that reached the courts concerned Fredericton's expropriation of an easement for water and sewer pipes in order to accommodate the needs of a private housing developer. The property owner objected to the city expropriating land to financially assist a developer, and called the expropriation evidence of an "unhealthy relationship" between the city and the developer. The judge disagreed, saying that "municipalities often exercise their powers of expropriation so that private developments can proceed." She warned that if the city did not get involved in such matters, "development would come to a halt in any case where a landowner refused to grant an easement for infrastructure."¹⁰⁷

The line between a public and private purpose may be blurry. In 2006, 14 owners whose property was expropriated by Saint John for the construction of a road charged that the expropriation was for the benefit of Irving Oil and should have been treated as a private expropriation, which would have been subject to more rigorous challenges. The road, paid for by Irving, would allow the company to transport heavy equipment to a proposed liquified natural gas terminal. Although the city admitted that the new road was not a priority for it, it insisted that the road would offer the public a secure alternative to an older road that was threatened by erosion. The court sided with the city.¹⁰⁸

A landowner facing expropriation, be it for a public or a private purpose, may file an objection to a proposed expropriation. In the event of a private application for expropriation, *any* person may file an objection. The Expropriations Advisory Officer will normally arrange for a public hearing, although the government may proceed with expropriation without a hearing if it is in the public interest to do so. The officer will

consider whether the proposed expropriation is “reasonably necessary to accomplish the objectives of the expropriating authority or applicant” and is “fair, balancing the objectives of the expropriating authority or applicant against the interests of the owner.” In the case of a private application, the officer will also consider whether the proposed expropriation “is consistent with the public interest.”¹⁰⁹

The officer’s report is advisory only. The expropriating authority may, after considering it, confirm its intention to expropriate. In a 1986 decision, one judge wrote, “an expropriating authority is in no way bound by the report of the expropriations advisory officer and may, in effect, elect to ignore its findings, recommendations or other content.”¹¹⁰ Ultimately, the government has complete discretion over whether to allow an expropriation. In a 1989 case, the New Brunswick Court of Appeal ruled that the decision is “made by the Lieutenant-Governor in Council for policy considerations. In my view, such a decision is final and not reviewable in legal proceedings.”¹¹¹

“An expropriating authority is in no way bound by the report of the expropriations advisory officer and may, in effect, elect to ignore its findings, recommendations or other content.”

Prince Edward Island

PEI’s *Expropriation Act* allows for expropriation of “any land for any purpose relative to the use, construction, maintenance, or repair of a public work.” In the term “public work” it includes “highways, roads and bridges, public buildings, and all other works and property for the acquisition, construction, repair, extending, enlarging, or improving of which any public money is or has been appropriated by the Legislature, and every work required for those purposes, but not any work for which money is appropriated as a subsidy only.”¹¹²

The courts have taken seriously the public work requirement. In a case regarding the extension of a provincial park, the expropriating authority neglected to state the purpose in the expropriation plan or in the notice to the landowner, as required. The landowner objected that there was no indication that the purpose of the expropriation was a public work. The judge agreed that the documents failed to comply with the requirements in the statute and declared the expropriation proceedings to be invalid.¹¹³

Unfortunately not all of PEI's expropriating authorities are bound by a strict public work standard. Municipalities require only a broader "municipal purpose" to expropriate. Under the *Municipalities Act*, a municipal council can expropriate "for the purpose of providing any municipal services it is authorized to provide under this Act." Authorized municipal services include not only traditional responsibilities – such as the provision of roads, public transit, water and sewage services, and parks – but also the more general "industrial or commercial development and promotion."¹¹⁴ Expropriating for commercial development may be indistinguishable from expropriating for private purposes.

PEI's *Expropriation Act* makes no provisions for a public hearing into a contested expropriation. An unhappy landowner can request only that compensation be arbitrated by a judge. Similarly, the *Municipalities Act* provides for arbitrated compensation, but not for an inquiry into the expropriation itself.

Nova Scotia

Nova Scotia allows expropriation for a variety of purposes, including "any public work" (a highway, road, bridge, public building, or other property belonging to or financed by the province, except those for which money is appropriated as a subsidy only) or "any purpose that is a public purpose." It also permits the province to expropriate land to implement a publicly financed agreement between two levels of government.¹¹⁵

These permitted purposes were explored in a 1978 court case involving the development of the Halifax waterfront. The federal and provincial governments had entered into an agreement to bring new commercial and retail space, housing, parking, ferry terminals, and recreational and cultural facilities to the harbour area. The governments would acquire lands, plan for their use, and install infrastructure, but they would not carry out the development. Instead, the plan was "to provide a package attractive enough for the private sector to invest in."¹¹⁶ Ultimately, the governments hoped the plan would generate private investment of \$150 million.

Those whose property was expropriated for the project argued that the federal-provincial agreement "contemplated investment by the private sector and, therefore, the expropriation was not for a public purpose."¹¹⁷ The judge dismissed this claim, deciding that the expropriation was related strictly to the public part of the project – the acquisition of lands and the construction of infrastructure – and that the agreement itself, if not the development, was financed from public funds.

The landowners also protested that the expropriators had not finalized the planning and had not determined any specific use for their properties. But the judge was not troubled by the question of how an unknown use could be known to be a public use: “The ultimate use of the lands was not really a necessary consideration at the time of expropriation.” He admitted that “The Court does not know exactly why the plaintiffs’ lands were necessary,” but explained that the Minister of Development had stated that the lands were required to implement the Agreement. There being no evidence to the contrary, “it is a reasonable inference from the Minister’s statement that the lands were, in fact, required.” To erase any doubt, he later added, “it is surely not necessary to have a specific use in mind for each particular property that is subject to expropriation.”¹¹⁸

“The ultimate use of the lands was not really a necessary consideration at the time of expropriation.... it is surely not necessary to have a specific use in mind for each particular property that is subject to expropriation.”

Ultimately, none of this mattered. The *Expropriation Act* permits the province to expropriate land to implement an agreement entered into between the province and Canada if the agreement is financed from public funds. The judge was satisfied that the “true purpose” of the expropriation was to implement such an agreement.¹¹⁹ Furthermore, the judge did not think that the government’s decision to approve an expropriation was reviewable by the court. When drafting the Act, the legislature left the decision to the government of the day. It “intended to confer wide powers of expropriation” and did not encumber it in exercising its discretion.¹²⁰

The highest profile expropriation case in Nova Scotia in recent years involved the taking of part of a Christmas tree farm for an open pit gold mine to be developed by an Australian mining company. The taking occurred under the *Mineral Resources Act*, which allows the Minister of Natural Resources to grant a “vesting order” transferring ownership of land from one party to another.

The landowner objected that the Minister considered inappropriate factors, such as the effects of the proposed mine on the economy. But the courts disagreed. The purpose of the *Mineral Resources Act*, they noted, includes encouraging, promoting and facilitating mineral exploration, development and production. The proposed mine would be a boon to the area, employing up to 300 people during construction and 150 during operations. The Minister had a responsibility to promote mining “and the public interest at stake.”

The land was “of great importance” to the owner. “It must be remembered, however, that the Minister’s decision to divest him of his land was also important to DDV [the mining company, and] ... to other people in Nova Scotia.”¹²¹

The landowner also objected that the process was not fair, and should have involved a hearing. But the *Mineral Resources Act* does not set out any process for the government to follow when depriving someone of his land. As the Court of Appeal explained, “The MRA does not prescribe any procedure for the Minister to follow in granting vesting orders, leaving this to the Minister to determine. The Minister is not required to decide issues of fact or apply law in making his decision. His decision is a policy decision, that must take into account the public interest and for which he is only answerable to the Legislature.”¹²² In 2014, the Supreme Court of Canada refused to hear an appeal of this decision.

“The Minister is not required to decide issues of fact or apply law in making his decision. His decision is a policy decision, that must take into account the public interest and for which he is only answerable to the Legislature.”

Like the *Mineral Resources Act*, Nova Scotia’s *Expropriation Act* contains no provisions for public hearings into expropriations. Instead, it focusses on compensation. Indeed, the stated purpose of the Act is “that every person whose land is expropriated shall be compensated for such expropriation.”¹²³ Landowners who are unable to negotiate satisfactory compensation may request a hearing in front of the Nova Scotia Utility and Review Board.

Newfoundland and Labrador

Newfoundland and Labrador’s *Expropriation Act* sets out a long list of purposes for which land may be expropriated. It may be expropriated for public buildings, other public works, roads, airstrips, ferry landings, other transportation facilities, bridges, water supply, and sewage works. It may be expropriated for a housing development, a national or provincial park, a hospital, a school, accommodation for the travelling public, and sports and recreation facilities. It may also be expropriated for the establishment or development of an industrial enterprise, a fishing enterprise, and a land development area. For good measure, the list of permitted purposes ends with a catch-all: “the use of the Crown or of the public for another purpose.”¹²⁴

The fact that a private party will benefit from a taking does not rule out the procedure. In 2004, St. John's threatened to expropriate a dilapidated house for a proposed hotel, arguing that the development would create jobs and tax revenues and revitalize the downtown core. The owner accused the city of an improper attempt to take property for a private purpose. The expropriation, he charged, would directly support a private developer, and only indirectly benefit the public. The judge hearing the owner's request for an interim injunction wasn't persuaded that the considerable public benefits were secondary or incidental. A full hearing would be required to weigh the public and private benefits.¹²⁵

The Act includes no provisions for challenging an expropriation at a public hearing. When compensation is disputed, it will be fixed by the Board of Commissioners of Public Utilities after a hearing into the matter.

Northwest Territories / Nunavut

The *Expropriation Act* of the Northwest Territories and Nunavut authorizes expropriation when, in the opinion of the Legislature, the Government requires the land "for a public work or other public purpose." It also authorizes expropriation when, in the opinion of an expropriating authority, the authority requires the land for its "lawful purposes."¹²⁶

Anyone who objects to an intended expropriation may request a public hearing. After the hearing, a hearing officer will prepare a report on the nature and grounds of the objections. The report is not binding: After considering it, the expropriating authority may confirm its intention to expropriate. If requested to do so, the expropriating authority must state its reasons for not giving effect to the objections.¹²⁷

Yukon

Yukon permits expropriation of "any land that the Minister deems necessary for the public purposes of the Yukon" or for "the public purposes of any municipality."¹²⁸

As is true in PEI, Nova Scotia, and Newfoundland and Labrador, Yukon law includes no provisions for public hearings at which owners can contest proposed expropriations,

review proposed routes, or propose alternatives. Only compensation is open to challenge. If compensation is disputed, either the landowner or the expropriating authority may request the services of a board of negotiation. If negotiations fail, compensation may be determined by arbitration by a judge of the Supreme Court.¹²⁹

The strict interpretation of expropriation laws

As the above overview of federal, provincial, and territorial legislation illustrates, expropriating authorities have almost unlimited authority to take land for whatever purposes they wish, and citizens have very little recourse. This state of affairs is not inevitable – it exists only because governments have passed laws establishing it. As the Supreme Court of Canada explained in 2008, “By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution.”¹³⁰

The Supreme Court, alert to the extent to which expropriation violates peoples’ property rights, has repeatedly insisted on interpreting expropriation legislation strictly. As the court noted in 1997, “The expropriation of property is one of the ultimate exercises of governmental authority. To take all or part of a person’s property constitutes a severe loss and a very significant interference with a citizen’s private property rights. It follows that the power of an expropriating authority should be strictly construed in favour of those whose rights have been affected. This principle has been stressed by eminent writers and emphasized in decisions of this Court.”¹³¹

Other Supreme Court justices have likewise acknowledged that expropriation is an extreme use of government power. Justice L’Heureux-Dubé wrote in 1991:

Expropriation constitutes a drastic interference with an individual’s right to property. It allows a government to deprive a person of his or her land. In some cases this may mean that an individual loses a home, a ‘safest refuge’. In other cases, ... expropriation may lead to the loss of one’s livelihood. Because property is a fundamental legal right, and because expropriation is such an exorbitant power, Canadian

“Expropriation constitutes a drastic interference with an individual’s right to property.”

law has consistently favoured a restrictive interpretation of statutes enabling expropriation.¹³²

The justice shored up her case with a reference to an influential legal treatise: “‘Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law.’ To this right corresponds a principle of interpretation: encroachments on the enjoyment of property should be interpreted rigorously and strictly.”¹³³

In a 1983 Supreme Court of Canada decision voiding an expropriation because of Calgary’s failure to give prescribed notice, Justice McIntyre wrote, “There are many other cases of similar import which have clearly established the principle that, where a power is given by a statute to a municipal government to expropriate individual interests in land, the statutory conditions for the exercise of that power must be strictly complied with.”¹³⁴ Pointing out that this rule is of long standing, the Justice cited an 1888 Ontario decision to the effect that “It is essential to the validity of a by-law establishing ... a road, by which the property of private persons may be compulsorily taken ..., that the provisions of the statute under which it is passed shall be strictly observed.”¹³⁵ The Justice acknowledged that Calgary’s error had been a minor one. But, he mused:

how far should the courts go in relieving municipalities from following mandatory provisions regarding service where the interest of private citizens is concerned? If an error of three days is forgivable, then what about one of four, or five, or ten days? Surely, the line must be drawn somewhere to give the citizen any protection. In my view, the line should be drawn where the Legislature chose to put it and not where individual judicial discretion may fix it on a case by case basis.¹³⁶

The courts’ long history of strictly construing statutes means that simple legislative changes – in particular, those more clearly defining public purpose – could be very effective in limiting governments’ discretion over expropriation.

Expropriation powers have been granted by legislation, and can be taken away by legislation. Legislation could spell out the specific purposes for which

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expropriation could be used. It could rule out economic development, job creation, and the generation of tax revenues as justifications for expropriation. It could allow judges rather than politicians to determine if uses are truly public. And it could severely limit the transfer of expropriated property to private parties. Nowhere has the potential for reform been better illustrated than in the United States.

Limiting takings: Lessons from the United States

The last decade has seen a dramatic narrowing of expropriation powers in many states. The reforms can be traced to 2005, when the US Supreme Court issued a decision in *Kelo v. City of New London*. At the behest of the pharmaceutical giant Pfizer, the Connecticut city of New London empowered a private development corporation to expropriate homes, and to use the land for office space, parking, and retail. The landowners objected that this was not a public use, as required in the US Constitution. But the court decided that economic development would indeed serve a public purpose, since it would create jobs and increase tax revenues.¹³⁷

The *Kelo* decision was one of the most unpopular decisions the Supreme Court has ever issued. It ignited a firestorm of opposition to expropriation for private purposes. Understanding that they could no longer count on federal constitutional protections, citizens sought protection at the state level. They lobbied their legislators, introduced ballot initiatives, and went to court. The results have been extraordinary: 44 state legislatures and many state high courts have restricted expropriation. The most substantive reforms are found in constitutional amendments required by citizen-initiated referenda.¹³⁸

States have taken a number of different approaches to restricting expropriation for private uses. Some specifically prohibit the use of expropriation for economic development – although many make an exception for the elimination of blight.

Alabama forbids municipalities and counties to expropriate for “private retail, office, commercial, industrial, or residential development; or primarily for enhancement of tax revenue.”¹³⁹

Michigan specifies that “‘public use’ does not include the taking of private property

A taking “is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property.”

for transfer to a private entity for the purpose of economic development or enhancement of tax revenues.”¹⁴⁰ Virginia likewise spells out that a taking “is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property. The condemnor bears the burden of proving that the use is public, without a presumption that it is.”¹⁴¹ North Dakota, Arizona, and New Hampshire also exclude increases in the tax base, employment, and general economic health from the definition of public use.¹⁴²

At least one state now requires judges – rather than legislators – to decide whether a use is public or private, making the definition less arbitrary and political. In Arizona, “Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.”¹⁴³

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Other states have made it more difficult to transfer expropriated property to private parties – with exceptions typically made for privately owned utilities and common carriers, such as railroads. Alabama forbids expropriation for “transfer to a person, nongovernmental entity, public-private partnership, corporation, or other business entity.”¹⁴⁴ South Dakota uses similar language.¹⁴⁵ Florida requires that every transfer of expropriated property to a private entity be approved by a three-fifths vote in each house of the state legislature.¹⁴⁶ The state further requires localities to wait 10 years before transferring expropriated land from one private owner to another.¹⁴⁷ Mississippi likewise prohibits state and local governments from transferring expropriated property to a private entity for a period of 10 years after its acquisition.¹⁴⁸

Canada can learn much from such changes. Adopting similar rules strictly limiting permitted public purposes would go a long way to curbing expropriation abuse in this country.

Notes

1. Niccolo Machiavelli, *The Prince*, 1532.
2. This study owes much to the research assistance of Chris Wong, Fraser Malcolm, Ka-Wai Leung, Ryan Conrad, Caroline Wrobel, Louis Winston, Richard Owens, Lena Phillips, Sheryl Cornish, Christina Parkes, and Adrienne Glen.
3. Edward Coke, *The Institutes of the Laws of England*, 1644. This translation cited in *Leiriao v. Val-Bélair (Town)*, [1991] 3 SCR 349, para. 7.
4. *Leiriao v. Val-Bélair (Town)*, paras. 7, 8. Note that this was a dissenting opinion signed by three justices.
5. William Pitt, Speech on the Excise Bill, House of Commons, March 1763. This version cited in Wikiquote entry on William Pitt, 1st Earl of Chatham.
6. George Challies, *The Law of Expropriation*, Montreal: Wilson and LaFleur, Second edition, 1963, p. 1.
7. Eric Todd, *The Law of Expropriation and Compensation in Canada*, Toronto: Carswell, 1976, pp. 3-4.
8. Challies, p. 3, citing C. F. Randolph, "The Eminent Domain," 1887.
9. Lord Halsbury, the Lord Chancellor, in *Canadian Pacific Ry. Co. v. Roy* (1901), CR [12] AC 374 at 389 (PC).
10. Mr. Justice Riddell, Ontario Court of Appeal, *Florence Mining Co. Ltd. v. Cobalt Lake Mining Co. Ltd.* (1908), 18 OLR 275 at 279 (CA).
11. BC Supreme Court Justice McColl, *Horton v. British Columbia (Ministry of Transportation and Highways)* (1991), 53 BCLR (2d) 121, 45 LCR 171, (BCSC). Emphasis added.
12. *Leiriao v. Val-Bélair (Town)*, para. 12, citing Challies, p. 12.
13. John W. Morden, "The New Expropriation Legislation: Powers and Procedures," in Law Society of Upper Canada, *Special Lectures, 1970: Recent Developments in Real Estate Law*, Toronto: Richard de Boo Limited, 1970, p. 240.

Mr. Morden was Counsel to the Royal Commission of Inquiry into Civil Rights from 1964 to 1971.
14. In fact, in some ways it resembled an even earlier Act – the 1841 *Public Works Act*. Morden, p. 228.

15. Morden, p. 228.
16. *R. v. Beech*, [1930] Ex. CR 133.
17. *Canada v. Toronto (City)*, [1946] Ex. CR 424, paras. 35, 36.
18. *The King v. North York Township et al.*, [1948] 2 DLR 381, at 386.
19. *Calgary Power Ltd. v. Copithorne* [1959] SCR 24, at 33-4.
20. *James v. Hydro-Electric Power Commission of Ontario* [1953] OR 349, [1953] 2 DLR 562.

Despite acknowledging the broad scope of the meaning of public purpose, the judge distinguished between the limited purposes of the power commission and the much wider public purposes of Ontario. The two, he concluded, could well conflict.

Others have similarly looked far afield for examples of legal reasoning on the issue. In an often-cited 1970 lecture on expropriation legislation, John Morden referred to a case from St. Lucia in his discussion of public purpose. Morden, p. 233.

21. *Grayson v. The Queen* [1956-1960] Ex. CR 331, para. 9.
22. *Ibid.*, para. 8.
23. Morden, p. 229. And the Honourable James Chalmers McRuer, Royal Commission Inquiry into Civil Rights, Report Number One, Volume 3, 1968, p. 1011.
24. McRuer, pp. 980, 990.
25. *Ibid.*, p. 1001.
26. Canada, *Expropriation Act*, RSC 1985, c E-21, Section 4. (1), emphasis added.
27. John Coates and Stephen Waque, *New Law of Expropriation*, Toronto: Carswell, 2011 edition, pp. 10-12, 23-17.
28. Morden, pp. 232-3.
29. *M.E.P.C. Canadian Properties Ltd. v. The Queen et al.* (1974), 7 LCR 31, 64 DLR (3d) 707, para. 25.
30. Canada, *Expropriation Act*, Section 4.1 (1) - (3).
31. Under Section 73 (b) of the *National Energy Board Act*, “A company may ... take and hold of and from any person any land or other property necessary for the construction, maintenance and operation of its pipeline.” Because Section 75 stipulates

that “a company shall ... do as little damage as possible,” companies usually take an easement rather than full ownership of the land.

32. Law Reform Commission of Canada, *Report on Expropriation*, 1976, pp. 5, 7.

33. Canada, *Expropriation Act*, Section 5. (1) (c), (3).

34. *Ibid.*, Section 5. (4).

35. *Ibid.*, Section 10. (1) - (4).

36. *Ibid.*, Section 13.

37. Todd, p. 44.

38. *Ibid.*, p. 429. Mr. Watkins was a consultant to the Law Reform Commission of Canada on the Expropriation Project.

39. Erika Tucker, “Elderly farmer fights for 215-yr-old land lost to feds,” *Global News*, November 28, 2013.

During the Third Reading debate on the proposed *Expropriation Act*, the Minister of Justice spoke about the intended purpose of the public inquiry: “The purpose of the hearing is to bring to the public attention the objections and the reasons for those objections.” The hearing would thus play a role in holding the Minister of Public Works politically accountable for expropriation decisions. Quoted in *Society Promoting Environmental Conservation v. Canada (Attorney General)*, 2002 FCT 236, 217 FTR 279, para. 56.

40. *Attorney-General v. De Keyser’s Royal Hotel, Limited* [1920] AC 508.

The royal prerogative to take land for such purposes was supplanted by statutes long ago. The court found that statutes had since 1708 regulated the taking of lands, with compensation, for the purpose of defence during wartime. Although statutes governing the taking of lands for defence during peacetime were more recent, they nonetheless dated back to 1803.

41. Remark by “joecanadain” in the comments on Ernst Kuglin, “QW mayor: Economic benefits outweigh one farm,” *Trentonian / Belleville Intelligencer*, January 14, 2014.

For more information on this expropriation, see Elizabeth Brubaker, “Expropriation: Inescapably Necessary, or a Convenient Tool?,” Presentation to Institute for Liberal Studies Seminar, Toronto, Ontario, March 8, 2014:
<http://environment.probeinternational.org/2014/03/11/expropriation-inescapably-necessary-or-a-convenient-tool/>

Another unpopular expropriation for military purposes occurred in 1999, when Canada

expropriated a portion of BC's seabed for a military testing and training facility. The federal government insisted the facility was necessary for the safety and security of Canada. It stressed strategic and diplomatic issues, including the importance of defence alliances, treaty obligations, and naval training. Regardless, the expropriation was controversial. More than 3,000 people filed objections to it, and 215 objectors participated in the month-long public hearing into the expropriation. The public protested to no avail; the federal government went ahead with its plans.

The Society Promoting Environmental Conservation sought judicial review of the expropriation. The hearing addressed concerns about the process, especially whether proper notice of the public hearing had been given, and whether the inquiry officer fully reported the objections he had heard. Although the judge quashed the expropriation order, the Federal Court of Appeal reversed his decision. *Society Promoting Environmental Conservation v. Canada (Attorney General)*, 2002 FCT 236, 217 FTR 279 and *Society Promoting Environmental Conservation v Canada (Attorney General)*, 2003 FCA 239, 228 DLR (4th) 693.

42. Morden, p. 248. Cited in *Parkins v. R.* (1977), 13 LCR 306 (WL Can), (ONCJ).

43. *Parkins v. R.* (1978), 85 DLR (3d) 581, 19 OR (2d) 473, (CA) .

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

45. Ontario, *Ontario Energy Board Act*, SO 1998, c15, Schedule B, Section 99. (5).

46. Ontario, *Ministry of Infrastructure Act*, 2011, SO 2011, c 9, Schedule 27, Section 10.

Under the *St. Lawrence Parks Commission Act*, the taking of land by the Commission "shall be deemed to be for the public purposes of Ontario." RSO 1990, c S24, Section 7. (1).

47. *Smuck v. St. Thomas (City)* [1981] 32 OR (2d) 698, para. 5.

48. Gary Stanuolis, Witness Statement, Joint Board Hearing into Yonge-Dundas Redevelopment Project, Exhibit 195, January 30, 1998.

For more information on this expropriation, see Elizabeth Brubaker, "Expropriation Gone Awry: A Case Study," Presentation to Exploring Rural Land Use Conference, Guelph, Ontario, May 14, 2013:

<http://environment.probeinternational.org/2013/05/14/expropriation-gone-awry-a-case-study/>

49. Joint Board, *Yonge Street Regeneration Project: Decision and Reasons for Decision*, CH-97-01, June 5, 1998, pp. 16, 28, 33, 43.

50. *Legoyeau Holdings Ltd. v. Windsor (City)*, 1994 CarswellOnt 4790, para. 5, affirmed 52 LCR 241.

51. *Ibid.*, para 4.

52. *Blandford Square Developments Ltd. v. Oxford (County)* [2006] OJ No. 1168, para. 8.

53. *Vincorp Financial Ltd. v. The Corporation of the County of Oxford*, 2014 ONSC 2580, paras. 89, 93.

54. Ontario, *Expropriations Act*, RSO 1990, c E-26, Section 7. (5), emphasis added.

Under Section 6. (3), the Lieutenant Governor in Council may direct that an expropriation shall proceed without an inquiry.

55. Morden, p. 252-3, citing *Re Hamilton Conservation Authority and Lands in the Township of West Flamborough*.

56. Joint Board, p. 41.

57. Morden, p. 239, citing Henry Riddell's *Railway Parliamentary Practice*, 1846.

58. R.B. Robinson, *Report on the Expropriations Act*, Ontario Ministry of the Attorney General, 1974, pp. 1, 4, 10.

59. Law Reform Commission of Canada, *Report on Expropriation*, p. 11.

60. Law Reform Commission of Canada, *Working Paper 9: Expropriation*, 1975, p. 103.

61. McRuer, p. 1007.

62. In addition to looking at alternatives to proposed expropriations, hearings may examine alternative methods of carrying out the expropriating authority's objectives. In a 2000 hearing into expropriation for a highway interchange, the inquiry officer considered alternative design and construction methods that would reduce the amount of land required to achieve the Ministry of Transportation's objectives. The Ministry revised its designs and took less land than originally proposed. Coates and Waque, p. 10-38, citing *Crozier v. Ontario (Minister of Transportation)*, an unreported decision heard December 4, 5 and 7, 2000.

63. Robinson, pp. 3, 5-6.

64. Law Reform Commission of Canada, *Report on Expropriation*, pp. 11, 12.

65. *Karn v. Ontario Hydro* (1977), 79 DLR (3d) 256, 16 OR (2d) 737, (ONCA), para. 7.

66. Morden, p. 248. Cited in *Parkins v. R.*, 1977 CarswellOnt 1245, 13 LCR 306.
67. *Walters v. Essex (County) Board of Education* (1971), 20 DLR (3d) 386, 3 OR 346, (H Ct J), para. 8.
68. *Ball v. Ontario Hydro*, 1974 CarswellOnt 375, 6 OR (2d) 631, 53 DLR (3d) 519, 8 LCR 217, para. 22.
69. *Parkins v. R.*, 1977 CarswellOnt 1245, 13 LCR 306.
70. Gillian M. Burton, *Inquiry Officers Report*, January 30, 2013. Appendix C of Toronto Staff Report, Expropriation of 111 and 113 Finch Avenue West for the expansion of Edithvale Park, March 13, 2013.
71. In 1976, Todd reported that in approximately 5% of the Ontario inquiries, the inquiry officers had concluded that the proposed expropriations were not fair, sound, or reasonably necessary (p. 46). But such findings were not sufficient to deter the expropriating authorities. For example, in *Walters v. Essex County Board of Education*, the school board had approved the expropriation, despite the inquiry officer's conclusion that "this expropriation is, in my opinion, both indefensible and is not fair or sound and should not be approved."
72. In contrast, in the second half of the 19th century, British municipalities were given the right to expropriate, but it was subject to the authorization of higher level government departments or boards, and to confirmation by Parliament. This procedure, "cumbrous in the extreme," may well have curbed municipal expropriations. Morden, p. 240.
73. Erika Tucker, "Fact file: Expropriation rights in Canada," *Global News*, January 13, 2014.
74. Douglas Caldwell and Paula Frederick, "Expropriation: A legal and valuation perspective," Ontario Expropriation Association Newsletter, Fall 1999. The authors were referring not just to Ontario's laws but to the many statutes that permit owners to object to proposed expropriations.
75. *Walters v. Essex (County) Board of Education* (1973), [1974] SCR 481, 38 DLR (3d) 693, paras. 10, 13.

The previous year, the Ontario Court of Appeal had made a similar finding in *Zaichuk v. Ontario (Water Resources Commission)* [1972] 5 LCR 151: An approving authority "is answerable to the electorate but its action or its decision is not reviewable in this Court."

76. *Ball v. Ontario Hydro*, 1974 CarswellOnt 375, 6 OR (2d) 631, 53 DLR (3d) 519, 8 LCR 217, paras. 4, 5, 31.

77. *Mangin v. Windsor (City)*, 1978 CarswellOnt 506, 8 MPLR 132, paras. 12, 21, 39, emphasis added.

78. Robinson, p. 2. Peter Bowal and Rohan Somers, "Expropriating Land: A Balancing Act," *LawNow Magazine*, Centre for Public Legal Education Alberta, July 1, 2013.

Although the exact phrase "fair, sound, and reasonably necessary" appears only in Alberta's and Ontario's expropriation legislation, the concept has become something of a country-wide standard.

79. British Columbia, *Expropriation Act*, RSBC 1996, c 125, Section 14. (1) and (2).

80. *Ibid.*, Section 10. (1) and (2).

81. Law Reform Commission of British Columbia, *Report on Expropriation*, Project No. 5, 1971, pp. 86, 87.

82. McRuer, p. 1002.

The right to a public hearing for those threatened by railways had been well established in Britain by the early 19th century. "The right of an owner through whose land a [railway] line would run to be heard by a Committee of the House of Commons was virtually guaranteed." Morden, p. 238.

83. McRuer, pp. 1002-4.

The Law Reform Commission of Canada likewise maintained that fairness requires "pre-expropriation public hearings or inquiries where all people objecting or affected may be heard." Law Reform Commission of Canada, *Report on Expropriation*, p. 3.

84. Law Reform Commission of British Columbia, p. 88.

85. Alberta, *Expropriation Act*, RSA 2000, c E-13, Section 13. (1) and Section 14.

86. Alberta's Institute of Law Research and Reform recommended that, "where the expropriating authority is a municipality, but not otherwise, the owner may question the objectives of the expropriating authority." Institute of Law Research and Reform, *Expropriation*, Report No. 12, March 1973, p. 14.

87. *Ibid.*, Section 6. (1) , Section 15. (8), Section 16 (1).

88. Jordan Thompson, "Project lead hopes council will continue downtown plan," *Fort McMurray Today*, March 19, 2013.

89. Saskatchewan Ministry of Justice, "List of Summaries, Consolidations and Regulations: The Expropriation Procedure Act."

90. Saskatchewan, *The Expropriation Procedure Act*, RSS 1978, c E-16, Section 2. (i).
 91. "Sask. landowners unhappy with land sale prices," *Western Producer*, February 25, 2010.
 92. Saskatchewan Ministry of Justice, Public and Private Rights Board, *Annual Report 2012*, p. 4.
 93. Manitoba, *Land Acquisition Act*, CCSM, c L-40, Section 4. (1).
 94. Manitoba, *Public Works Act*, CCSM, c P-300, Sections 1 and 3. (1), emphasis added.
- Manitoba's *Highways and Transportation Act* likewise leaves much to the discretion of the government, providing for the expropriation of any property "that the minister deems necessary for departmental roads, airports or docks or for purposes connected therewith." CCSM, c H-40, Section 6. (1).
95. Manitoba, *The Expropriation Act*, RSM 1987, c E-190, Schedule A, Section 6. (2) and Section 6. (3) (b).
 96. *Thompson et al. and the Queen in Right of Manitoba* (1978), 89 DLR (3d) 217.
 97. *Favor v. Winnipeg (City)* [1988] MJ No. 46.
 98. Quebec, *Charter of Human Rights and Freedoms*, c C-12, Section 6.
 99. *Civil Code of Lower Canada*, Article 407.
 100. *Leiriao v. Val-Bélair (Town)*, para. 5.
 101. Tribunal Administratif du Quebec, "Expropriation: a specialized procedure," undated. Also see Tribunal Administratif du Quebec, "Expropriation: You have rights!"
 102. *Leiriao v. Val-Bélair (Town)*, paras. 41, 16, 18, 19.
 103. *Ibid.*, paras. 64, 65.
 104. Quebec, *Expropriation Act*, RSQ, c E-24, Section 44.
 105. *An Act in response to the 6 July 2013 railway disaster in Ville de Lac-Mégantic*, Bill 57 (2013, chapter 21), Section 24.
 106. New Brunswick, *Expropriation Act*, RSNB 1973, c E-14, Sections 4 and 7.
 107. *Carol Holdings Ltd. v. Fredericton (City)*, 2011 NBQB 101, 82 MPLR (4th) 61, 4 RPR (5th) 247, 961 APR 358, 372 NBR (2nd) 358, 200 ACWS (3d) 1040.

108. *Thomas Developments Ltd. v. Saint John (City)* 2006 NBQB 322, 27 MPLR (4th) 92.
109. New Brunswick, *Expropriation Act*, Sections 9 (1), 10 (2), 11 (1), and 17 (2).
110. *Hall v. New Brunswick (Attorney General)* (1986), 72 NBR (2d) 399 (NB QB), cited in *Carol Holdings Ltd. v. Fredericton (City)*.
111. *Tourbière de Lamèque Ltée v. New Brunswick (Executive Council)* [1989] NBR (2d) 287 (NBCA), 243 APR 287.
- In this case, the Executive Council of New Brunswick decided *not* to approve a proposed private expropriation. It explained that “(a) New Brunswick is the only province that has a statutory provision similar to section 7 of the *Expropriation Act*; (b) The section had been enacted by the former Government; (c) The present Government was not satisfied with section 7 and will be addressing it; (d) The Government would not get involved in a dispute between two private parties.”
112. PEI, *Expropriation Act*, RSPEI 1988, c E-13, Sections 1 (f) and 3.
113. *Minister of Industry and Natural Resources v. MacNeil*, [1964] 50 MPR 136 (PEI SC), 49 DLR (2d) 190.
114. PEI, *Municipalities Act*, Chapter M-13, Sections 51 and 30.
115. Nova Scotia, *Expropriation Act*, RSNS 1989, c 156, Section 10.
116. *Irving Oil Co. v. Nova Scotia (Attorney General)* [1978] NSJ No. 18, 35 NSR (2d) 284, para. 34.
117. *Ibid.*, para. 40.
118. *Ibid.*, paras. 30, 46.
119. *Ibid.*, para. 49.
120. *Ibid.*, para. 67.
121. *Higgins v. Nova Scotia (Attorney General)*, 2013 NSCA 106, 334 NSR (2d) 190.
122. *Ibid.*
123. *Ibid.*, Section 2 (1).
124. Newfoundland and Labrador, *Expropriation Act*, RSNL 1990, c E-19, Section 3.
125. *Murphy v. St. John’s (City)* [2004] NJ No. 395, paras. 13, 16.

126. Northwest Territories, *Expropriation Act*, RSNWT 1988, c E-11, Section 3.
127. *Ibid.*, Sections 8, 9, 13, 15.
128. Yukon, *Expropriation Act*, RSY 2002, c 81, Section 2 (1).
129. *Ibid.*, Sections 12, 13 (5).
130. *New Brunswick (Board of Management) v. Dunsmuir*, [2008] 1 SCR 190 (SCC), cited in *Carol Holdings Ltd. v. Fredericton (City)*.
131. *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 SCR, at pp. 44-45.
132. *Leiriao v. Val-Bélair (Town)*, paras. 9-10.
133. *Ibid.*, para. 10, citing P.A. Côté, *The Interpretation of Legislation in Canada*, 2nd edition, 1991.
134. *Costello and Dickhoff v. Calgary*, [1983] 1 SCR 14 (SCC), p. 26.
135. *Re Ostrom and Township of Sidney* (1888), 15 OAR 372, cited in *Costello and Dickhoff v. Calgary*.
136. *Costello and Dickhoff v. Calgary*, p. 27.
137. *Kelo et al. v. City of New London et al.*, 545 US 469 (2005).
138. The Institute for Justice has extensively documented the reforms in each state. In its judgment, as of November 2012, 23 states had made substantive reforms, while another 21 had increased protections more modestly. For commentary on each state, see the Castle Coalition Legislative Centre web site: www.castlecoalition.org/legislativecenter .

The strongest of the state reforms resulted from citizen-initiated referenda. In contrast, many of the reforms initiated by state legislatures are largely symbolic or have significant loopholes, making them less effective. Ilya Somin, "The Limits of Backlash: Assessing the Political Response to Kelo," *Minnesota Law Review*, Vol. 93, No. 6, pp. 2100-78, June 2009.

139. *Alabama Code*, Section 11-47-170.

The state makes an exception for blighted properties, but restricts the blight designation.

140. *Constitution of Michigan of 1963*, amended in 2006, Article 10, Section 2.

141. *Constitution of Virginia*, amended in 2012, Article I, Section 11.

142. *Constitution of North Dakota*, amended in 2006, Article I, Section 16. *Arizona Revised Statutes*, Section 12-1136. *New Hampshire Statutes*, Title LI, Chapter 498-A:2.

143. *Arizona Constitution*, Article II, Section 17.

144. *Alabama Code*, Section 11-47-170.

As noted above, the state makes an exception for blighted properties, but restricts the blight designation.

145. *South Dakota Codified Laws*, Title 11, Chapter 7, Section 22.1.

146. *Constitution of Florida*, amended in 2006, Article X, Section 6.

147. *Florida Statutes*, Title VI, Chapter 73, Section 13.

148. *Mississippi Constitution*, amended in 2011, Article 3, Section 17-A.

