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ONTARIO EXPROPRIATION ASSOCIATION

Pinning Down Section 22 of the Expropriations Act - Giving Notice of IA

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Section 22 of the Expropriations Act imposes a critical limitation period – Claimants must provide the authority with written notice of injurious affection ("IA") within one year after the damage was sustained or after it became known. If not, compensation claims for injurious affection are "forever barred." This is strong language for legislation designed to make property owners whole. At some point, however, a line in the sand must be drawn.

A plain reading of s. 22 outlines three key points: (1) notice must be given in writing; (2) notice must be given one year after the damage was sustained; and (3) if notice was not given within one year after the damage was sustained, notice may also be provided after damages became "known" to the person – this is the elusive "discoverability" principle.

On what date does a Claimant know, or ought to have known, they have a claim for IA? Even if we follow the general principle in *Grooscors v. Ottawa*, [2007] 92 L.C.R. 117 (O.M.B.), that s. 22 is triggered when the Claimant has "knowledge of the loss" as opposed to knowledge of the quantum of the loss, it is always difficult to pin down an exact date of occurrence.

When do (or should) Claimants have knowledge of their loss:

- Within one year after delivery of the Notice of Expropriation where property is taken?
- When the Claimant receives a Section 25 offer together with the authority's appraisal report setting out the proposed IA award?
- When the "reasonable person" ought to have known of the first instance of a claim?
- When the project construction starts?
- When the project allegedly causing IA is completed?
- When the Claimant suspects that a project is impacting its business?
- When the loss is quantified by an expert who provides their professional analysis that damages were actually incurred and caused by the construction/expropriation project?
- When the Claimant's financial accountant prepares year-end financial statements indicating the business incurred losses?

The case law has been generous to Claimants who have valid and unvexatious compensation claims for IA, and this is appropriate. In *Willies Car & Van Wash Ltd. v. Simcoe (County)* 2015, L.C.R. 39, OMB (upheld on appeal), the OMB noted that it is not reasonable to delay giving notice until after the full amount of the loss is calculated. Instead, the Board found that s. 22 notice was due one year after the Claimant knew that a road closure was the alleged cause of its income losses – the Board held that notice was due, at the latest, 12 months after a road closure was finalized and losses began to mount. The Board also noted that "the Claimant is also required to act diligently to inform itself of any loss giving rise to a claim."

Section 22 seems to provide two possible pegs for notice: one year after damage was sustained, or one year from when damage became known to the Claimant. The more generous limitation period seems to expire when damage becomes known and not one year after damage was sustained – arguably, it is possible to sustain damage without knowledge of that damage. In my experience, many prospective Claimants are unaware of limitation periods and receive misinformation that compensation for IA is insurmountable, further delaying notice.

Authorities can successfully bar IA claims with helpful facts; they need not wait until the final hearing to bring a motion to strike to the OMB. A Rule 21 or summary judgment type motion could be brought under Rule 34 of the OMB *Rules of Practice and Procedure* striking out the claim as statute-barred or for lack of jurisdiction. If the Claimant is a sophisticated party with access to legal counsel, had previous negotiations or made inquiries to the authority regarding construction impacts early on in the project, was situated in a heavy construction zone or should have truly known a project was impacting its business, the OMB might find that the Claimant knew or ought to have known of their claim sooner than the last possible date. For losses spanning across several years, the authority could bring a motion striking out claims for years that Claimants failed to provide s. 22 notice. Section 38 of the *Ontario Municipal Board Act* provides that powers of the Superior Court of Justice are exercisable by the Board, which should permit a motion striking the claim in its early stages.

However, in partial taking scenarios, IA claims for business damages can also be validly and distinctly claimed as disturbance damages under s.13(2)(b) and s.18. There is no statutory requirement to give the authority notice of disturbance damages where there is a taking. However, the ultimate 15-year limitation period set out in the *Limitations Act* would apply.

In summary, it is best practice to give notice of IA as soon as possible to preserve the rights of the property owner, until claims are further particularized and more information becomes known.

The Expropriation Clause in Commercial Leases - The Hidden Killer

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Although it has been accepted since *Dixon and Toronto (City)*(Re) (1924) 56 O.L.R. 167 that a landlord and a tenant have separate and distinct compensable interests in expropriated land, many commercial tenants unwittingly jeopardize their entitlement under the *Expropriations Act* when they enter into a commercial lease agreement.

The Expropriation Clause in a commercial lease is commonly overlooked during lease negotiations. This neglect is not surprising given the number of contentious business and legal issues encompassed in a lease which are far more tangible than the remote possibility of expropriation. Typically, tenants are not willing to spend their limited bargaining power arguing over the Expropriation Clause when matters such as rent, operating costs, renewal rights and allocation of responsibility are at stake. As a result, Expropriation Clauses tend to heavily favour the landlord, and left unchecked, could be ruinous for an unsuspecting tenant.

Pursuant to the *Expropriations Act*, where an expropriation adversely affects a tenant's leasehold interest, a tenant may be entitled to compensation for: (1) the value of its leasehold interest; and (2) disturbance damages.[1] In determining the value of an interest to a tenant, all advantages which the leasehold interest provides, present and future, are to be taken into consideration. Market value, being the present value of the difference between the economic rent and the contract rent, may be the sole determinant, but it may not be.

"Expropriation Clauses tend to heavily favour the landlord, and if left unchecked, could be ruinous for an unsuspecting tenant."

Where the position of the tenant vis-à-vis the lease is not different from that of any purchaser at large, the market value is the appropriate measure; however, where the tenant enjoys a special relationship to the land or the land possesses extraordinary features, the price a prudent tenant would pay rather than be dispossessed will exceed the market value of the interest. This additional value also represents goodwill of location to the business.[2]

For example, in *Gagetown Lumber Co. v. R.*[3], the timber rights leased to the tenant were determined to have special value to the tenant because its mill was located nearby. Other special features which are said to increase the value of a leasehold interest include the existence of an established business, a non-transferable license with respect to leased premises, or tax benefits arising out of the nature or use of the premises.[4]

A typical Expropriation Clause in a lease provides the landlord the option to terminate the lease as of the date the expropriating authority takes possession of all, or any portion, of the lands, and assigns compensation for the value of the tenant's leasehold interest in the leased premises to the landlord. It is envisioned that landlords can further extend their advantage by expanding the breadth of the Expropriation Clause to include any sale to an expropriating authority made in contemplation of an expropriation or threatened expropriation, and not just events of expropriation.[5]

A landlord's basic right to terminate the lease in the event of expropriation is by in large unnecessary. Section 34(2) of the *Expropriations Act* provides for frustration (termination) of a lease where all of a tenant's interest has been expropriated or if there is a partial taking which renders the remainder of a tenant's interest unfit for the purposes of the lease.[6] By contrast, the Expropriation Clause typically enables the landlord to terminate all leases, not just those directly affected by the expropriation, in order to provide the landlord with flexibility to mitigate its damages with an alternate use of the remaining land.

Although the acquisition of land negotiated by an Agreement of Purchase and Sale with the property owner is considered a friendlier, less expensive, preferred option, municipalities should bear in mind the potential inequity to leasehold owners.

From the perspective of the landlord and an expropriating authority, the Expropriation Clause enables the expropriating authority to buy unencumbered lands, without having to involve or compensate tenants, and without triggering their right to entitlement under the *Expropriations Act*. However, although attractive, this outcome goes against the intent and purpose of the *Expropriations Act* which is premised on the belief that the government is required to fairly compensate owners, inclusive of tenants, for the taking of land.

Beyond loss of compensation to the tenants and unjust enrichment to the landlord, this approach also denies tenants the opportunity to participate in the inquiry and consultation process. Without an expropriation, tenants are denied opportunity to request an inquiry hearing as to the necessity of the expropriation and its intended purpose. Without consultation, tenants don't have an opportunity to share ideas on the timing or the design of the public project in order to help diminish the adverse impact the scheme will have on the tenant.

As well, the benefit of a private sale to the expropriation authorities may be hyperbole. The transfer of property outside of the *Expropriations Act* is subject to all other statutory requirements. By section 2 of the *Statute of Frauds* and section 9 of the *Conveyancing and Law of Property Act*, no lease interest shall be assigned, granted or surrendered unless it is by deed or note in writing, signed by the party so assigning, granting or surrendering the same.[7] In other words, the written consent of all leasehold owners is necessary without a registered plan of expropriation vesting title.[8] Even though a landowner can enter into an Agreement of Purchase and Sale to sell land, notice to all tenants, as leasehold owners, may still be required either within the provisions of the *Expropriations Act*, or by the grace of another statute.

1 *Expropriations Act , R.S.O. 1990, c. E.26. Sections 1, 14, and 18(2)*

2 *Gagetown Lumber Co. v. R, [1957] SCR 44 and Julie Robbins and Michael Toshakovski, How an Expropriation Can Impact A Lease, paper written for the Law Society of Upper Canada's Six-Minute Commercial Leasing Lawyer program, February 16, 2011.*

3 *[1957] S.C.R. 44, 6 D.L.R. (2d) 657*

4 *Eric Todd, The Law of Expropriation and Compensation in Canada, 2nd ed. (Scarborough: Carswell Thomson Professional Publishing, 1992) pg. 417*

5 *Julie Robbins and Michael Toshakovski, How an Expropriation Can Impact A Lease, paper written for the Law Society of Upper Canada's Six-Minute Commercial Leasing Lawyer program, February 16, 2011*

6 *Section 34(2) of the Expropriation Act , R.S.O. 1990, c. E.26*

7 *Samad v. Samad, [2008] O.J. No. 2582 (Ont. S.C.J.), paras. 23-25*

8 *Sofos v. 1088084 Ontario Inc., 2009 CarswellOnt 481 at para 58-61*

Stratified Conveyances and Value Optimization

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"The potential valuation pitfalls in the context of infill development, planning for higher order transit and optimal use considerations"

I know it seems like a mouthful, but the proposition that is inherent in the above statement is the simple reality that the determination of land valuation and optimal use considerations offered in an urban context has increasingly become complex in light of the shift towards an emerging development consideration that is stratified conveyances.

This article outlines the relationship between what is an emerging trend in land development and community building and its impact on the optimization of lands, in particular what may be the uncharted territory of valuating lands that are the subject of stratified conveyances. This is particularly relevant in the context of the pressure for intensification and more compact urban development throughout GTA communities.

I suppose this shift may have started around the same time that the Province, in its wisdom, decided to inject greater influence into the planning of communities throughout Ontario through the Provincial Policy Statements, the Growth Plan for the Greater Golden Horseshoe, and the Greenbelt Plan. Among the many planning principles enunciated in the pages of provincial policy is one that supports intensification.

The effect of such provincial policies has resulted in higher densities and more compact communities in greenfield areas, urban settlement areas, and along higher order transit corridors. Policy makers, politicians, professional planners, and developers have responded to this framework, giving way to a multitude of creative solutions to address intensification and implement a provincial mandate that requires nothing less than a measure of consistency with its policies.

One creative solution that has emerged in recent years is the shift towards stratified conveyances of public lands for which private lands are retained below in a stratified condition. In its first few applications, the prospect of a public road or park not being conveyed from the "centre of the earth" to the "upper atmosphere" seemed to be counter intuitive and fraught with peril. In traditional land development scenarios throughout the past several decades, the value of land and the prospect of conveyances without the need or desire for stratified conditions was the norm and land economics did not stand in the way. However, what has emerged are the economic realities that have provided the fuel towards this ever-growing trend. I proffer that this specific shift in land development has the potential to impact land valuation propositions and contribute to yet another factor in the determination of optimal use for the purposes of expropriations and land valuations. As of the writing of this article my research has not identified any specific recent examples of a land valuation or expropriation that has considered the impact lands taken by a public authority in a stratified conveyance scenario. Therefore, perhaps this uncharted territory may spurn some careful thought and critical analysis of these factors in the near future, for planners, appraisers, politicians and landowners.

Picture the intersection of Highway 7 and Jane Street in the City of Vaughan as it was in centuries past. The existence of farm fields and pastures covering the landscape with little more than a farmhouse for every 100 acre farm was the condition. The standard 66 foot public road allowances meeting at each lot and concession set the framework for a future system of public roads and infrastructure corridors that would consume land, and I suggest this framework was not laid out with the foresight to predict the emergence of a future metropolitian centre, comprised of 40 storey buildings, thousands of people and a future subway connection to Union Station only a century or so later.

Inasmuch as high density mixed use metropolitan centres have emerged from what were pastures only decades ago, planning policies, infrastructure and transportation planning have kept pace with such dramatic and rapid change. What is by no means an exhaustive or prioritized list, are observations which have led to the use of stratified conveyance for securing of public lands in high density development settings.

CONTEXT FOR LAND DEVELOPMENT CHANGES

1. There is continued pressure for high density development and more compact urban form and the objective of achieving minimum densities
2. Land values continue to rise
3. Demand for housing continues in the GTA
4. Investment in transit is a key infrastructure priority for all levels of government
5. The cost of infrastructure continues to increase
6. Changes to building codes have resulted in higher building costs
7. Auto dependency continues to dominate zoning regulations for parking supply
8. Land supply continues to diminish
9. Trends and policy directives towards development inside existing urban areas vs. urban sprawl.

The above context has led to a myriad of changes in the land development industry and has resulted in the need for creative ways to balance the need for public lands and the building and land development industry's role in providing viable, sustainable and affordable communities for residents and workers.

As appraisers and land use planners assess the prospects of optimal use and valuations for their clients, the complexities and variables contributing to the precision of these opinions has increased. The characterization of optimal use and the reasonable basis for assumptions concerning land value and economic viability have now an additional variable to consider. How does one determine optimal use and land valuation in Planning District A where stratified conveyances are permitted, vs. in Planning District B, where they are not? All things being equal, the valuation difference between a project of the same size, proportion, mix of uses, etc. in District A vs. District B should be significantly different based on whether there are policies that support stratified conveyances. For example, consider the resultant land economic picture for a high rise project that contains a below grade parking structure beneath a public park thereby providing fewer underground parking levels to support the development in contrast with the inefficiency of below grade parking

"One creative solution that has emerged in recent years is the shift towards stratified conveyances of public lands for which private lands are retained below in a stratified condition"

structures that has to be placed around the perimeter of a public park and is not permitted below the public park. Similarly, in the context of high rise development precincts where private parking structures below new public roads are permitted, the efficiencies of the below grade parking structures is significantly improved and the possibility of eliminating levels of parking is often the result, thereby significantly reducing hard costs associated with the project. This is particularly important in market areas, where there continues to be a high auto dependency and where the prospect of cost/revenue neutrality for below grade parking structures is not achievable. It is this precise condition that has the potential to influence land valuation considerations where authorities are seeking expropriation in a more cost effective manner. The use of stratified conveyances as a policy tool could assist in valuation discussions in high density areas, where infrastructure needs may justify expropriation, yet the cost of lands present significant financial impediments to the expropriating authority. In addition, the possibility exists to have the provision of stratified conveyances used as a tool to secure public lands or infrastructure in a manner that has less negative impact to the landowners' interests and development yield potential. In addition, the use of this tool could ultimately reduce the cost of infrastructure projects and transit projects as land acquisition components of a project's costs would be reduced. Finally, the prospect of utilizing stratified conveyances as a strategy for negotiation in settlements or mediation of issues could prove to be a valuable tool for authorities and landowners alike.

In the context of the ever increasing intensification of urban areas and the redevelopment of planning districts, brownfields, greyfields as well as the general trend away from traditional greenfield development, I expect that we will see an increase in the use of stratified conveyances in land development, which will, as a result, layer yet another factor onto the valuation platform associated with expropriations. Based on the above considerations, it is also recognized that there continues to be a healthy debate amongst stakeholders in professional practice concerning the pros and cons of stratified conveyance as a land development tool. Notwithstanding the debate, what is clear is that the potential for this trend to influence expropriations, land valuation and land economics for development in the GTA is very real.

The resiliency of the GTA land development industry in partnership with authorities and professionals has demonstrated continued creativity and ingenuity in response to intensification, which has yet come again through the use of this tool. What remains to be determined in the coming years is its ultimate impact on the ever-changing development landscape in GTA communities.

Prejudgment Interest under the Ontario *Expropriations Act*

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Section 33 of the *Ontario Expropriations Act*[1] sets out a system for awarding Pre-judgement Interest ("PJI") in cases of expropriation. It calls for a fixed[2] interest rate of 6% to be paid "on the portion of the market value of the owner's interest in the land and on the portion of any allowance for injurious affection to which the owner is entitled…at the rate of 6 percent a year calculated from the date the owner ceases to reside on or make productive use of the lands".

The *OEA's* Legislative Reform task force has raised the possibility of recommending that the fixed interest rate of section 33 be changed.[3] A fixed interest rate does not respond to changes in capital markets, and while over the long run it may prove to be "fair", in the short-term it may prove wildly distortive and unjust.

This article addresses the issue of pre-judgment interest in expropriation cases by way of a systematic analysis of the financial principles underlying awards of pre-judgment interest, as well as a selective survey of how pre-judgment interest is assessed in Canada in other types of disputes. It concludes with a tentative recommendation for changes to the *Expropriations Act*.

THE CONCEPTS

There are two ways of conceptualizing PJI in commercial litigation cases in general, and in expropriation cases, in particular:

1. The first is restitutionary which takes the point of view of the defendant/authority. PJI can be viewed as the amount the defendant/authority must disgorge to the plaintiff/land owner as a result of having, on an interest-free basis, withheld money to which the latter was rightfully entitled.

2. The second is compensatory which focuses on the plaintiff's/owner's perspective. Under this view, PJI compensates the plaintiff/owner for not having access to an amount of compensation between the time it was harmed and the time its compensation is determined.

It is important to recognize that these two frameworks will often, if not always, result in significantly different rates. Provincial and municipal governments in Canada are generally able to borrow at rates that are only somewhat higher than those paid by the federal government.[4] The rates they pay are almost always lower than residential and commercial mortgage rates.

Both sets of rates, meanwhile, have in recent years been much lower than (and in part causing) the high rates of increase in real estate values in some parts of Canada.[5]

THE OPTIONS

Below, we set out three potential approaches to setting a PJI rate in the context of expropriation, and discuss the pros and cons of each option.

1. Defendant's Cost of Borrowing: The "Forced Loan" Theory

The Theory

This is the approach endorsed in an excellent article on PJI by two US scholars, Michael S. Knoll and Jeffrey M. Colon. Knoll and Colon argue that in wrongfully holding a plaintiff's money, the defendant has effectively "coerced" the plaintiff into loaning it money. They argue that the interest rate to be charged, retroactively, on such a loan should be equal to the defendant's floating cost of unsecured debt.

This is the theory behind the approach that has been adopted by the *British Columbia Expropriation Act*, which calls for the rate to be set at "the prime lending rate of the banker to the government."[6] This sort of forced loan theory has also been advocated in other contexts. It was put forth by the plaintiff in *Merck & Co., Inc. v. Apotex Inc.*, 2013 FC 751, and received favourable comment by Snider J. in that case as being properly restitutionary; it is a sound measure of the defendant's benefit to be disgorged, in that it measures what the defendant would otherwise have had to pay in order to borrow an amount equal to the award.

Less intuitively, it can also be viewed as a measure of the plaintiff's loss, if one considers that the plaintiff has been deprived of the difference between a market rate of return on lending funds to the defendant/authority (or an entity with a similar default risk profile). To consider how this is so, consider the following example:

- Suppose that Defendant caused the Plaintiff to lose $1M in profits in the year 2000. Damages will be awarded 10 years later.

- Knoll and Colon argue that the unpaid judgment in the hands of the defendant is effectively an unsecured loan from the plaintiff to the defendant. Immediately following the date of damage, one can think of a notional "asset" (i.e. a loan receivable) accruing to the Plaintiff in the amount of $1M, and a corresponding "liability" (a loan payable) accruing to the Defendant's balance sheet.

- Knoll and Colon argue that the PJI rate should be the rate that compensates the Plaintiff for a) inflation, b) the time value of money, and c) the risk that the Defendant will not repay the Plaintiff the $1M. It is this risk that was actually borne by the plaintiff, and it is this risk for which the plaintiff should be compensated.

This is arguably the least speculative measure that can be used to calculate PJI. It looks not at what the plaintiff would have done with its money, nor at what it could have done, but at what it did. The plaintiff has "lent" the defendant money, and the defendant should pay for it at an appropriate rate.

Applicability to Expropriation Cases
This approach has some applicability to expropriation cases, but there are limitations to it.

- As Knoll and Colon acknowledge, the approach makes most sense if the plaintiff has access to other sources of capital, such that it would not have to forego other investments as a result of having its money tied up with the defendant/authority. This assumption may be appropriate if the land owner is a large real estate developer, but is less likely to be appropriate if it is a single homeowner with limited access to capital.
- Furthermore, a PJI rate based on the authority's cost of debt gives the authority little incentive to settle cases quickly, as there is no extra cost associated with delaying payment.
- A final drawback is that not all expropriating authorities hold marketable debt instruments, and it may be difficult to estimate a market interest rate.

2. Plaintiff's Return on Capital: The Alternative Investment Theory

The Theory
This theory argues that as a result of the wrongdoing and the withholding of an award that rightfully belonged to the plaintiff, the plaintiff/landowner had to forego potential investments on which it would have earned a return. It argues that the appropriate rate of interest should compensate the plaintiff/landowner for this lost opportunity.

This is an approach that has been accepted in other areas of damage quantification – see *Eli Lilly v. Apotex*, 2014 FC 1254. In other instances, the approach has been rejected due to failure of the plaintiff to provide proof as to how it would have reinvested the profits that it would have made but for the defendant's wrongdoing.[7]

Applicability to Expropriation Cases
This approach has much to recommend for expropriation cases, particularly in cases of rising real estate valuations.

Consider a homeowner with no significant assets other than a house which has been the subject of an expropriation order. The house is worth $800,000 to $900,000 (subject to competing appraisals), and there is a $700,000 mortgage.

The owner may be in no position to purchase a second house prior to receiving payment for the house.[8] If the owner waits four years to have the case adjudicated, and real estate values are rising at a rate of 10% per year, the owner will find that they are unable to purchase an equivalent house with their award unless the PJI rate matches the rate of increase in the market.
How would such a PJI regime work? A simple approach might be transferring the valuation date from that set out in section 10 of the *Expropriations Act*, deferring the valuation date to closer to the date of adjudication. This may be problematic, however, as it would be impossible to properly appraise what the property would have been worth absent the works in question, as required under section 14 of the *Expropriations Act*.

Alternatively, it could mean tying the PJI rate to something like the changes in the real estate market index. While MLS publishes a quality housing price index that tracks changes in housing valuations in major Canadian markets,[9] this approach may be more problematic for other types of real estate (e.g. industrial land) or for real estate in small communities.

Another drawback of such an approach is that it provides landowners with no incentive to settle their cases early, as they will be able to "remain in" the real estate market and benefit from any price increases even while they continue to negotiate.

3. Plaintiff's Cost of Borrowing: Paying off Debt

The Theory
This theory is similar to the previous one, but recognizing that it may be difficult to objectively assess the loss of opportunity to the land owner as a result of an expropriation, it assumes that, at the very least, the plaintiff could have paid down some of its debt and relieved itself of interest obligations on that debt.

Applicability to Expropriation Cases
This approach has several benefits:

- It will typically yield a figure that is higher than the authority's cost of debt, yet it will also tend to undercompensate landowners in a rising real estate market; it will therefore provide both sides with an impetus to settle claims.
- It considers the actual position of each landowner, and the particular levels of financial difficulties an expropriation might pose. A landowner paying 11% on a second mortgage requires a higher level of PJI to be made whole than one paying 3% on a traditional first mortgage.
- It is readily quantifiable, as most property owners carry some form of mortgage debt, and published mortgage rates are readily available.
- It is also an approach that was applied in at least one case dealing with interest owing due to the failure to make a s. 25 offer.[10]

CONCLUSIONS

For the reasons set out in the preceding section, we conclude this article by (tentatively) recommending that the PJI rate in the *Expropriations Act* be set at the greater of:

a) The actual interest rate paid by the landowner on an arm's length basis, based on corroborating documents supplied by the landowner, subject to some sort of cap;[11] or,

b) The average five-year residential mortgage lending rate over the time period beginning on the date the landowner ceases to be able to make use of the land until the date of settlement, as published by the Bank of Canada (Series V122497).

[1] *R.S.O. 1990, c. E.26*

[2] *Subsections 33(2) to (4) discuss situations in which the Board may vary the interest rate due to delay. There is no provision that allows for varying the interest rate due to changes in market interest rates or other market factors.*

[3] *See Piper Morley, "OEA Legislative Reform Discussion: Fixed Interest Rate", presentation to the OEA's Fall 2016 conference (October 21, 2016). Other potential changes include whether interest should be payable on losses due to disturbance damages, or injurious affection when no land has been taken; currently, no interest is payable on such losses – see the cases cited in John Coates and Stephen Waque, New Law of Expropriation, 10-238.20. This article does not address that topic.*

[4] *In the past ten years, the spread between the yields on Government of Canada debt and provincial and municipal debt have generally been in the range of 1% to 2%. See Kyle Hanniman, "A Good Crisis: Canadian Municipal Credit Conditions After the Lehman Brothers Bankruptcy", IMFG Papers on Municipal Finance and Governance, esp. Figure 1. Accessed at: http://munkschool.utoronto.ca/imfg/uploads/326/1710_imfg_no_22_online_sept_17.pdf*

[5] *That being said, the very high rates of growth in property values in the Greater Toronto Area in the late 1980s occurred at a time when nominal mortgage rates were above 10%.*

[6] *R.S.B.C. 1996, c. 125, s. 46(2)*

[7] *Teva Canada Limited v. Sanofi-Aventis Canada Inc., 2014 FCA 67*

[8] *This situation will often be mitigated by the existence of s. 25 of the Expropriations Act, which requires the authority to offer payment for the landowner's property based on an appraisal report commissioned by the authority. However, there may still be situations where the spread between the s. 25 offer and the actual fair market value of the property (as subsequently determined) is large, and the s. 25 offer is insufficient to allow for the purchase of a replacement property.*

There may also be situations where no s. 25 offer is made; s. 25(4) calls for interest to be paid on the unpaid amount, although it does not specify the rate to be applied. The analysis in this paper would be relevant to determination of the appropriate interest rate in such a case.

[9] *http://homepriceindex.ca*

[10] *See Coates and Waque, 10-175*

[11] *The cap could be set at a number of basis points above the published rate described in the next subparagraph. The reason for a cap would be to discourage landowners from taking on excessive levels of debt at high rates prior to anticipated expropriation or from otherwise propping up businesses on the verge of failure.*

The (Supposed) End of the OMB

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On May 30, 2017, the Province introduced Bill 139, Building Better Communities and Conserving Watersheds Act, 2017, which proposes significant changes to the current land use planning appeals process. Most notably, the proposed legislation replaces the Ontario Municipal Board ("OMB") with the Local Planning Appeal Tribunal ("LPAT"). Other major proposed changes include:

- Exempting provincial approvals of Official Plans, approvals of conformity exercises, and Minister's zoning orders from appeal;
- Introducing a two-step appeal process where, in first instance, the LPAT may only determine if a municipal council decision is consistent or in conformity with applicable policy. If not, the matter is returned to council for another decision, where the decision may again be appealed to the LPAT. The second decision is again tested for conformity/consistency with applicable policy, and failing that the LPAT may then replace council's decision with its own. Evidence may only be introduced at the second hearing;
- Creating a new statutory regime for hearing practices and procedures setting strict hearing timelines, requirements for written evidence and materials, and encouraging alternative dispute resolution;
- Extending the timelines for municipalities to make decisions on official plan and zoning by-law amendment applications, after which an applicant may appeal the failure to make a decision;
- Requiring mandatory case management meetings between parties to an appeal to settle issues, encourage settlement, and reach potential mediation;
- Expanding Local Appeal Body jurisdiction to include appeals of site plans in addition to their current scope of minor variances and consents
- Enacting a two-year moratorium on appeals for new secondary plans, and a one-year moratorium for new interim control by-laws; and
- Establishing a Local Planning Appeal Support Centre, an agency mandated to provide information and support to the public during land use planning appeals.

It is important to note that the proposed legislation does not provide transition provisions, and no draft Regulations are available for review.

With respect to the expropriations process, the new LPAT appears to carry on the OMB's former role. Bill 139 simply proposes amendments to the Expropriations Act updating the nomenclature to the "Tribunal" from the "Board".

So while there may be change and uncertainty ahead with respect to the land use planning appeals process, so far, it appears that the expropriation process will go largely unscathed.

We will continue to monitor and report as there are any developments.

Upcoming Events

OEA PUB NIGHT - *SEPTEMBER 14TH, 2017*

FALL CONFERENCE - *OCTOBER 26TH AND 27TH, 2017*

SKI DAY - *FEBRUARY 2ND, 2018*

We are always eager to have new contributors. Please contact us if you have a case study or paper to contribute to our next issue:

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