

# **NEW TRENDS IN EXPROPRIATION: AVOIDING EXPROPRIATION**

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## **Introduction**

Despite the best efforts of governmental authorities in implementing non-invasive planning measures, the acquisition of privately held land for public undertakings is an unavoidable necessity. However, expropriation is avoidable in many instances. Recent trends have been observed where authorities have avoided the undesirable repercussions of formal expropriation through the fair treatment of owners, proactive negotiations, financial incentives and “Section 30 Agreements”.<sup>2</sup>

This paper begins by highlighting the undesirable aspects of expropriations from the perspective of owners and expropriating authorities. It then discusses measures which assist authorities in avoiding unnecessary expropriations, while paying particular attention to the distinction between small-scale and large-scale owners (such as property developers). This paper’s final segment addresses the benefits of Section 30 Agreements, which are one of the more universally applicable and successful means for avoiding formal expropriation.

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<sup>2</sup> The term “Section 30 Agreement” is often used by municipalities and professionals dealing in land acquisitions to describe an agreement between an authority and an expropriated owner made pursuant to Section 30 of the *Expropriations Act*. A Section 30 Agreement generally contemplates that lands are consensually transferred to the expropriating authority while the parties reserve the right to have compensation determined by the Ontario Municipal Board as though the lands were expropriated.

## **Expropriation is Undesirable to Owners**

Land ownership is often considered sacred. Although not an entrenched constitutional right<sup>3</sup>, land ownership is nonetheless regarded as a fundamental right in Canadian society. Land ownership is also frequently linked to sentiments of prestige and self-autonomy. Historically, land ownership has been a necessary prerequisite for voter eligibility<sup>4</sup> and to this day, it serves to qualify individuals for Senate eligibility.<sup>5</sup> It follows that landowners generally feel that the alienation of property should occur as a result of the owner's prerogative and on terms favourable to the landowner.

In *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority*, the Supreme Court of Canada characterized the power of expropriation in the following manner:

[t]he 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.<sup>6</sup>

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<sup>3</sup> The framers of the *Canadian Charter of Rights and Freedoms* expressly excluded the word "property" from Section 7 of the *Charter*, which protects the right to "Life, Liberty and Security of Person". The courts have generally interpreted this section of the *Charter* to exclude the protection of property rights while leaving open the protection of property only as it relates to the "security of the person". See *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 at 632-633.

<sup>4</sup> See Wayne Brown, "Electoral Insight," online: Elections Canada [http://www.elections.ca/res/eim/article\\_search/article.asp?id=110&lang=e&frmPageSize=](http://www.elections.ca/res/eim/article_search/article.asp?id=110&lang=e&frmPageSize=). At the time of Confederation, only men who met certain property requirements were eligible to vote in federal elections.

<sup>5</sup> Section 23(4) of the *Constitution Act, 1867* states that to qualify for the Senate, a senator's real and personal property "shall be together worth four thousand dollars over and above his debts and liabilities."

<sup>6</sup> *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority*, [1997] 1 S.C.R. 32, 1997 CarswellOnt 78 at para. 20.

It is not uncommon for owners to feel threatened or violated when faced with the prospect of expropriation. This may lead to owners becoming defensive towards the expropriating authority and advancing positions that are counter-productive to the overall process. Such action can manifest itself in unreasonable conduct or even in extreme instances, civil disobedience. R. B. Robinson summarized this position in his *Report on the Expropriations Act* when he stated that “since expropriation involves the power to acquire land without the owner’s consent, it will always be met with resentment.”<sup>7</sup>

Whether expropriation is *always* met with resentment is perhaps an overstatement; however, it is fair to say that expropriation is *often* met with resentment, particularly when owners have a special attachment to their land, as they often do.

From an objective perspective, expropriating authorities may believe that a hostile reaction from an owner facing an expropriation is not warranted under a fair system of compensation. However, the likelihood of fair compensation at the end of the process does not necessarily make expropriation an agreeable experience for owners, especially when many owners may not even be aware of their rights and entitlements under the *Expropriations Act*.<sup>8</sup> Arriving at fair compensation pursuant to the *Expropriations Act* is often a complicated process which entails a substantial sacrifice of an owner’s time and the commitment of resources to the pursuit of compensation. The process also usually entails intangible effects on owners such as feelings of stress, anxiety and uncertainty.

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<sup>7</sup> Ontario, Ministry of the Attorney General, *Report on the Expropriations Act* by R.B. Robinson (Toronto: Ministry of the Attorney General, 1974) at 1.

<sup>8</sup> R.S.O. 1990, c. E.26 (hereinafter referred to in this text as the “*Expropriations Act*”).

Although the *Expropriations Act* is intended to make owners whole, the *Act* does not contemplate compensation for stress and personal anxiety.<sup>9</sup>

Once compensation is attained, complete satisfaction and relief do not necessarily result for the owner. Quite often, the subjective value of property to an owner is considerably higher than its actual market value. Landowners and in particular landowners who reside on their property frequently attach sentimental value to their property and enjoy unique features that are not considered in objective approaches to determining compensation.

There are rare occasions where owners are pleased to have their lands expropriated. The most frequent example of this exceptional situation occurs when an owner is already considering selling land that is required by an expropriating authority. In this scenario, the owner can be spared the cost of a real estate commission and other transactional costs. Outside of this unique circumstance, expropriations are rarely viewed by owners as a welcome expression of governmental authority.

### **Expropriation is Undesirable for Government**

Governments generally do not expropriate because it is the easiest path to acquiring lands necessary for a public purpose. Rather, expropriation is often the only remaining option available to an authority for acquiring privately held lands in a fiscally responsible manner. One of the primary reasons for governmental aversion to expropriation is that expropriations are politically unpopular.

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<sup>9</sup> The *Expropriations Act* does not explicitly contemplate these types of damages. In *Hewitt v. Ontario (Minister of Transportation & Communications)*, 1984 CarswellOnt 1875 at para. 75 (O.M.B.), the Ontario Municipal Board recognized that damages for stress and anxiety have generally been considered as too remote to warrant compensation under the *Act*.

The word “expropriation” is unsavoury to ordinary citizens. When reflected upon in a historical context, the word summons images of oppressive regimes arbitrarily confiscating private property. As expropriation is rarely viewed in a positive light, political bodies will often avoid using powers of expropriation unless absolutely necessary. So averse are some politicians to initiating expropriation proceedings that certain governments have in the past bluntly refused to expropriate lands where a need for acquiring those lands has been identified.

Expropriations become even more politically sensitive when owners who are unhappy with the process decide to contact elected officials to voice their concerns. This type of activism may be accompanied by media involvement, which tends to make the predicament of elected officials even more difficult to manage. Quite often, media coverage of an expropriation is negative, and focused exclusively on the plight of individual expropriated owners without regard to the broader public benefits underlying the project at issue.

Beyond the political level, expropriation can be a cumbersome process involving numerous onerous and unforgiving legal requirements. The mere identification of all registered owners and the mandatory service of notices under the *Expropriations Act* require a great deal of resources from the expropriating authority. Added to this process

is the strain caused by the legal reality that at the early stages of an expropriation, even technical errors can void an expropriation and set back construction plans.<sup>10</sup>

The procedural rights granted to owners under the *Expropriations Act* may result in delay to an authority's ability to take possession of required lands. In particular, the inquiry process<sup>11</sup> under the *Expropriations Act* into whether an expropriation is fair, sound and reasonably necessary can take a significant period of time to schedule and complete. This process can result in a delay to the intended land acquisition.

Such delays can be costly to authorities as construction contracts linked to expropriation works often contain provisions for significant liquidated damages where delay is attributable to the authority. In addition, public projects requiring expropriation often benefit from funding from upper tiers of government conditional on funds being disbursed by the lower tier authority within a limited timeframe. The receipt of this type of funding can be jeopardized by delays precipitated by the procedural requirements under the *Expropriations Act*.

The costs involved in the expropriation process can also be a difficult and uncertain burden for expropriating authorities to bear. At the end of the expropriation process,

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<sup>10</sup> See e.g. *Metcalf Realty Co. v. Ottawa-Carleton (Regional Municipality)*, 1974 CarswellOnt 1297 (Div. Ct.). In that case, the authority failed to register its plan of expropriation within the time period prescribed by the *Expropriations Act* and the Divisional Court determined that as a result, the required lands did not vest in the authority. The Court noted at paragraph 3 of its decision that the municipality was "free to initiate a new expropriation".

<sup>11</sup> Pursuant to Section 7 of the *Expropriations Act*, a registered owner who receives a Notice of Application for Approval to Expropriate Land has the option of requesting an inquiry to determine if the taking of the lands is "fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority."

authorities not only find themselves having incurred their own costs, but they also usually find themselves assuming the owner's reasonable costs associated with the determination of final compensation, as provided for under the costs provisions of the *Expropriations Act*.<sup>12</sup> Authorities are cognizant of the reality that in extreme circumstances, the costs of proving the fair compensation to be provided to an expropriated owner at a hearing before the Ontario Municipal Board can be equal to or greater than the compensation determined at the hearing.

Finally, expropriations are largely unattractive for governments because they can entail a high degree of uncertainty. When an expropriation takes place and the compensation process is triggered, it is very difficult for authorities to achieve any degree of certainty with respect to the cost of the land acquisition and the timeline of the required project. Although representatives of government with expertise in the property acquisition process may understand this uncertainty, project managers, engineers and accountants involved in the overall project may not like hearing "we do not know" as an answer. In these circumstances, representatives of expropriating authorities frequently find themselves plagued by feelings of stress and uncertainty much like the expropriated owners.

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<sup>12</sup> Section 32(1) of the *Expropriations Act* provides that where an owner's compensation is determined by the Ontario Municipal Board and the amount awarded by the Board is 85% or more of the amount offered by the expropriating authority, the Board is compelled to make an order directing the authority to pay the owner's "reasonable legal, appraisal and other costs actually incurred by the owner for the purposes of determining the compensation payable". Where the amount of compensation awarded by the Board amounts to less than 85% of what was offered by the authority, Section 32(2) of the *Act* simply dictates that the Board must make an order as to the payment of costs "as it considers appropriate". See also Shane Rayman, "Recovery of Costs in Expropriations: Policy and Reality" (Paper presented to the Ontario Expropriation Association, October 2005).

## **How Governments Avoid Expropriation**

Although it may be easy for an expropriating authority to arrive at the conclusion that expropriation should be avoided, developing a means to avoid the process can be challenging. The simplest measure to avoid expropriation is to foster a process where property requirements are purchased on an amicable basis. This section of the paper explores various useful means that can be employed by expropriating authorities in achieving an early amicable purchase of lands that would otherwise be subject to expropriation.

### ***Proactive planning to permit sufficient time for amicable purchases***

The “amicable” character of negotiations between authorities and owners is often a direct function of the time available to the parties to arrive at a settlement prior to the commencement of expropriation proceedings. Proactive planning typically involves the authority making direct contact with impacted owners as soon as a need to acquire land is identified.

Owners require time and often become defensive and uncooperative if forced to make a hasty decision with respect to the sale of their land. Providing owners with additional time and information to satisfy themselves that fair market value is being offered encourages the amicable purchase process. Additional time can also afford owners the opportunity to consider alternatives for relocation and minimize disturbance. Moreover, owners sometimes require additional time to come to terms with the reality of this

process in order to make rational and reasoned decisions. This “cooling off period” often assists in productive negotiations.

A longer timeframe also helps to create a context in which the authority can provide better analyses and justifications for its offer to purchase a property. When an owner does not feel pressured and defensive, he or she is permitted to think rationally and may comprehend the utilitarian nature of a taking. Under such conditions, the parties have greater ability to negotiate in a productive, fair and orderly manner.

***Consistent and transparent policies and fair treatment of all owners***

Expropriation often involves the need to acquire more than one property for an undertaking. In some circumstances, dozens or even hundreds of adjacent properties are required by authorities for the construction of a public work. In these circumstances it is common for impacted owners to communicate with one another with respect to their dealings with the expropriating authority. This is particularly true in smaller communities and rural settings.

When approaching owners to achieve early resolutions, expropriating authorities should be aware that the information that owners convey to one another is not always accurate. It is not uncommon for an owner to boast to his or her neighbours about the favourable terms of his or her settlement while inflating the compensation figures. This type of questionable information, combined with the stress and anxiety caused by the spectre of expropriation, frequently causes owners to avoid an early amicable settlement for fear that their neighbours may have received or will receive greater compensation for a similar parcel. Thus, owners are reluctant to be one of the first owners to settle with an authority. When doubts as to fair and consistent treatment arise, owners may favour a process where they

truly have the ability to “test” what they are being offered (i.e. before the Ontario Municipal Board), and will forego the early amicable stages of negotiations.

Consistent and transparent policies engender greater confidence in the process, and create the context for development of a favourable rapport between authorities and owners in negotiating early settlements. A lack of transparency and consistency is often detrimental to an authority’s reputation, and can seriously undermine the possibility of purchasing impacted properties at an early stage on an amicable basis. The perceived lack of fair treatment can also breed hard feelings that risk complicating the compensation process at later stages.

Consistent and transparent policies do not necessarily require that an authority apply a uniform rate per acre to every impacted owner, because parcels of land are often unique and have different features affecting value. A uniform approach would likely result in unfair or indefensible compensation to many owners. Consistent and transparent policies require an authority to be forthcoming, to provide as much information to owners as possible and to apply consistent methods of valuation with respect to all impacted properties involved in a project.

***Fair and well supported offers***

It is not only critical to ensure that offers are fair and representative of market value, but it is also necessary to ensure that owners know that offers made by the authority are fair and objectively supported. This can often be achieved by offering owners clear and thorough analyses provided by independent experts such as accredited appraisers. These

analyses are often complemented by a clear in-person explanation of the means of determining fair value. At times, this is achieved through a meeting between a knowledgeable representative of the authority and/or the authority's experts and the impacted owner to answer the owner's questions and to explain the method of valuation and estimated market value in clear and concise terms.

When explaining to an owner the basis for the authority's opinion of the value of the owner's lands, it is important to show the owner that he or she is being afforded the benefit of the doubt. In other words, explaining to owners that they are being offered compensation at the higher end of the range they would receive on the open market is more likely to compel owners to seriously consider accepting an early amicable offer. If an owner understands that he or she is being offered compensation equal to or greater than what would be achieved by awaiting expropriation, the rational owner is encouraged to enter into the amicable settlement offered by the authority.

### ***Showing respect and diligence to owners***

For many owners, as soon as they become aware that their property risks being expropriated, they begin to feel they are no longer in control of their property and that they will have no input into the manner in which their land will be acquired. To a large extent, showing respect and diligence to owners requires expropriating authorities to allow owners to maintain as much control as possible over the pre-expropriation negotiations process. This can be achieved, when possible, by involving owners in decisions respecting the timing of the acquisition, access by the authority, and how best to mitigate the damages caused by the taking (in the case of a partial taking). This

approach can also result in significant savings for the expropriating authority, as owners often know the features of their properties better than anyone, and can be invaluable in suggesting means of reducing negative impacts or mitigating damages. The mere act of consulting with owners also helps them to feel respected and that they are not simply being told what to do by the government.

In dealing with owners at this early stage, there is also value in explaining to owners the necessity of an acquisition and providing a detailed justification as to why a particular project is being undertaken. Impacted owners are likely to view a project in a more rational light following frank discussions with government or municipal staff as to the inevitability of a project and related land acquisitions. Whatever the case may be, showing respect and diligence is best achieved by the authority's staff by simply expressing sympathy and understanding on a human level with respect to the doubts and frustrations of owners.

***Simplifying the process and compensation, where possible***

Over time, documents such as appraisal reports, purchase agreements and notices have become longer, more complex, and more difficult for laypeople (as well as seasoned professionals) to read and understand. When presented with impenetrable legal documents and appraisal reports, owners are likely to withdraw from early negotiations and unnecessarily turn to consultants to assist with simplifying complex and foreign issues. Simplified and straightforward agreements and appraisal reports, provide a clearer indication of the rights of the parties and give owners confidence that they

understand the expropriation process sufficiently to negotiate an early settlement. Preparing a clear, detailed and understandable summary sheet may also assist owners.

In its efforts to simplify the acquisition process, an authority should not discourage owners from seeking professional assistance to provide guidance throughout an expropriation. Actively discouraging owners from seeking legal or appraisal advice may undermine the amicable character of negotiations. When an authority acts in good faith and makes a reasonable offer of compensation, appropriate legal and appraisal advice often assists in arriving at an early amicable resolution.

***Providing a monetary bonus for amicable settlements (when appropriate)***

Providing monetary bonuses to achieve early amicable settlements is a somewhat controversial practice, but it has taken place on a more frequent basis in Ontario in recent years. In certain circumstances, the practice has proven to be a useful means of avoiding formal expropriation proceedings. However, if it is not applied prudently, the practice risks skewing fair compensation, creating confusing situations, and manipulating the market in the case of large scale expropriations. One must also ensure caution is exercised when using the term “bonus” and “public funds” in the same transaction.

In order to be effective, bonuses must be fair, justifiable, and proportionate. They should not appear as uncontrolled windfalls for those whose lands are required by public authorities. The provision of bonuses should also be consistent so that the integrity of the process is preserved. There should also be a business rationale for any bonuses paid to owners.

### ***Identifying a “build around” option***

Identifying alternatives to acquiring an owner’s lands early on in the acquisition process affords expropriating authorities a degree of flexibility in their negotiations with owners. Identifying alternatives, or “build around” options gives the authority the choice of either taking the property or building around it, thereby presenting the owner with a “take it or leave it” scenario, where the owner may be left with little recourse should the lands not be acquired.

Build around options are also conducive to owners adopting a more proactive and optimistic approach to early negotiations, as the presence of a build around option transforms what would typically be a demand by an authority into an option presented to the owner. Although the build around option may seem appealing in principle, it is often impractical for large scale projects, and can result in bad planning.

### **Agreements with Larger Scale Owners / Developers**

The successful approach for achieving an amicable purchase of development lands usually differs from the approach employed in purchasing smaller scale parcels of property. Residential landowners are often offended by having public works encroach onto their property; land developers on the other hand quite often identify construction of municipal infrastructure in proximity to their lands as a catalyst for development and intensification. In this scenario, the impacted development land benefits from new infrastructure works. Additional compensation for the value of the lands acquired by the authority may make the transaction even more favourable to the owner.

Although at first glance the prospect of acquiring lands from developers may seem completely unfavourable to municipalities, many developers are in fact willing to make sacrifices in order for public infrastructure to be constructed on or near their lands. In many circumstances, developers welcome the construction of infrastructure works as much as the municipality seeks to construct them. Accelerating the timeframe for municipal infrastructure to spur intensification is often an objective with which developers are happy to assist.

Over the course of early negotiations, this mutual benefit can assist a municipality in the land acquisition process. If the municipality does not seize this leverage early on in the process, the advantage may become diminished as the process advances. In certain instances, the mutual benefit is no longer acknowledged once the matter proceeds to an expropriation.

Of course, even when the acquisition of land for infrastructure purposes proceeds to an expropriation, the *Expropriations Act* contemplates that injurious affection claimed by expropriated developers can be set off by the specific betterment caused by the construction of infrastructure works.<sup>13</sup> For instance, the value of a commercial plaza is improved when the entrance to a new subway station is connected to it.

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<sup>13</sup> Section 23 of the *Expropriations Act* states that “[t]he value of any advantage to the land or remaining land of an owner derived from any work for which land was expropriated or by which land was injuriously affected shall be set off only against the amount of the damages for injurious affection to the owner’s land or remaining lands.” For a summary of the basic principles of “set off” under section 23 of the *Act* see *Tanenbaum v. Ontario (Minister of Transportation & Communications)*, 1992 CarswellOnt 4728 at para. 72 (O.M.B.).

The acknowledgment of the overall benefit (as opposed to specific benefits in the context of set off for injurious affection) of the new infrastructure can occur through negotiations before an expropriation is completed. For this to take place, negotiations must occur at an early stage, when flexibility with respect to planning is still available to the parties. When this type of flexibility is present, the authority is afforded the opportunity to negotiate an overall agreement that can involve issues such as dedication of lands for works in exchange for the benefit the works will have on the remaining development. This type of planning must be carried out by authorities in a careful and transparent manner, while openly acknowledging the benefit to both parties, as the improper execution of such negotiations can be perceived as high handed dealing.

Municipalities should take into account that negotiations with developers in the early stages often require the assistance of different levels of government, as often the proponent of a project is not the party with the power to regulate land use. As a result, it is also necessary to have all involved levels of government committed to the process as early as possible to further the achievement of this mutually beneficial goal.

### **Section 30 Agreements**

In many cases, both expropriating authorities and impacted owners acknowledge that land must be acquired by the authority, but both parties desire to maintain the greatest degree of control over the process as is possible. As already discussed in earlier portions of this paper, the uncertainty and loss of control sometimes engendered by the expropriation process can be problematic to owners and authorities alike.

The need for owners and authorities to have a degree of control over the expropriation process and set some of their own terms for land acquisition is implicitly acknowledged in Section 30 of the *Expropriations Act*, which reads as follows:

**Arbitration where no expropriation**

**30.** Where the owner of land consents to the acquisition of the land by a statutory authority, the statutory authority or the owner, with the consent of the other, may apply to the Board for the determination of the compensation to which the owner would be entitled by this Act if the land were expropriated, and the Board may determine the compensation and the provisions of this Act and the regulations respecting the determination of compensation, hearings and procedures, including costs and appeals, apply thereto in the same manner as if the land had been expropriated and for the purpose, subject to any agreement of the parties, the compensation shall be assessed as of the date on which the consent to the acquisition is given.

An agreement made under Section 30 of the *Act*, or a “Section 30 Agreement”, is an agreement between an expropriating authority and an owner whereby lands are consensually transferred to the authority, with the parties reserving the right to apply to have compensation determined by the Ontario Municipal Board as though the lands were expropriated. In *Ontario v. 1223578 Ontario Ltd.*, the Ontario Municipal Board determined that there are three prerequisites to the use of Section 30 of the *Act*:

1. The owner of the land must consent to acquisition by the Statutory Authority;
2. Either party, the landowner or authority, may apply to the Board;  
and
3. The other party must consent to the application to the Board.<sup>14</sup>

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<sup>14</sup> *Ontario v. 1223578 Ontario Ltd.*, 2002 CarswellOnt 5229 at para. 9 (O.M.B.).

In other words, a Section 30 Agreement cannot be unilaterally imposed by an owner or by an authority. Such an agreement can only be made on the consent of the parties.

Under the current legislative regime, Section 30 Agreements allow parties to agree to far more than the simple transfer of land in exchange for the right to have compensation determined by the Ontario Municipal Board. Typically, a Section 30 Agreement will incorporate as many terms as the parties can agree upon while leaving the balance of the compensation issues in dispute to be adjudicated by the Ontario Municipal Board, if necessary. It is in the interest of owners and authorities to craft a Section 30 Agreement that is as comprehensive as possible, as this will assist in any future negotiations between the parties as well as in focusing and expediting the Board's examination of the issues in dispute.

At the outset, authorities seeking to produce a comprehensive Section 30 Agreement should consider inserting a clause that provides for the partial settlement or resolution of the compensation for the required lands. A comprehensive Section 30 Agreement might also include provisions that provide for the following:

1. The interim payment of the owner's reasonable legal, appraisal and other costs incurred to the date of the agreement;
2. Reasonable access to the property by the authority for the benefit of the authority's testing and engineering requirements (including terms of access) while the owner remains in possession;
3. A limitation on the time period for a claim to be advanced by the owner under the *Act*;

4. The available heads of damage under which the balance of the owner's remaining claims may be advanced (or the partial settlement of issues the parties can agree upon);
5. The resolution of procedural issues if the matter proceeds to an arbitration (such as agreeing on experts, the location of the hearing or a timeline for advancement); and
6. Wording to assist the owner with taxation issues, when appropriate.<sup>15</sup>

Agreeing on the transfer of lands pursuant to Section 30 is an ideal method for authorities to acquire lands that would otherwise need to be expropriated. Section 30 Agreements can produce the following benefits for expropriating authorities:

1. They alleviate the need for the formal expropriation process, which is often costly, cumbersome and at times uncertain due to onerous statutory requirements;
2. When an acquisition is consensual by way of a Section 30 Agreement, the “E-word” need not be used (which can be pleasing to project managers and politicians);
3. The expropriating authority has greater control over the date of the transfer of the lands and the possession date;

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<sup>15</sup> Terms within a Section 30 Agreement can address issues such as confirming that property is being acquired for an involuntary disposition in accordance with the *Income Tax Act*, R.S.C. 1985, c.1 (5<sup>th</sup> Supp.), as amended and establishing that final compensation has not yet been determined. For further discussion see: Adam Scherer and Shane Rayman, “Tax Implications of Expropriation” (2008) 56 Canadian Tax Journal 870 at 874 and 882.

4. The expropriating authority can insert terms that allow for early access and other access requirements that assist with the project and reduce costs;
5. The expropriating authority can alleviate certain requirements to serve reports in advance, resulting in reduced costs and earlier possible possession dates;
6. At times, a Section 30 Agreement can be drafted so that the rights of unaffected tenants are not triggered as they would be if an expropriation occurred; and
7. Efforts can be undertaken for both sides to mitigate damages and work cooperatively within the context of a Section 30 Agreement.

The benefits of Section 30 Agreements for owners are also considerable. These benefits include:

1. Greater certainty in a process that is often viewed as very uncertain;
2. The preservation of an owner's rights to claim compensation under the various heads of compensation contemplated by the *Expropriations Act* (these rights can be enumerated to give an owner greater certainty);
3. The advanced payment of compensation and costs, including interim payments for injurious affection and business loss that an authority would not have to advance under the *Act* until the final determination of compensation; and
4. Negotiation and consultation relating to the scope and timing of the taking.

Often Section 30 Agreements can go further and even address the mitigation of losses, which is in the interest of both parties. By law, owners have a duty to take reasonable measures to mitigate damages.<sup>16</sup> Section 30 Agreements can assist in facilitating the mitigation of damages caused by the loss or relocation of a business, and in mitigating injurious affection caused to a property by a taking. This can be achieved by agreements between the parties to outline steps that result in the reduction of damages.

With respect to business losses, provisions in a Section 30 Agreement can encourage and foster cooperative efforts to relocate or rebuild an expropriated business in a reasonable, cost effective and controlled manner. Under a literal interpretation of the legislation, the decision as to whether to terminate or relocate a business following an expropriation falls squarely on the owner.<sup>17</sup> This dilemma often imposes a significant burden on owners and may become a barrier to relocation, as many businesses do not have the financial resources to relocate, and those that do may have difficulty recovering the costs of the relocation given the burden of demonstrating that all of their relocation and reconstruction costs were

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<sup>16</sup> See e.g. *Mikalda Farms Ltd. v. Ontario*, 2001 CarswellOnt 5105 at para. 198 (O.M.B.) and *Green-Life Proteins Ltd. v. Ontario (Ministry of Transport & Communications)*, 2002 CarswellOnt 4684 at para. 31 (O.M.B). Land compensation tribunals have also adopted the definition of an owner's duty to mitigate provided by E.C.E. Todd in his textbook entitled *The Law of Expropriation and Compensation in Canada*, 2nd ed. (Toronto: Carswell, 1992). At page 318 of that text, the author provides the following general definition of the duty to mitigate:

Damages in tort and contract are subject to the 'duty' to minimize the damage. The duty comprises three rules namely that the claimant (1) cannot recover for avoidable damage, i.e. all reasonable steps must be taken to mitigate damage; (2) can recover for damage incurred in taking reasonable steps to mitigate even if the resultant damage was greater than it would have been had no mitigating steps been taken; and (3) cannot recover for damage which is in fact avoided by mitigation.

<sup>17</sup> The *Expropriations Act* does not contemplate that an expropriating authority must assist in relocating a business. Rather, sections 18 and 19 of the *Act* provide a mechanism for compensating an expropriated business owner whether the business opts to relocate or terminate.

“reasonable”. Both scenarios risk leaving business owners injured and expose authorities to uncertainty with respect to damages and potentially complex and costly litigation.

A Section 30 Agreement in a business loss/relocation scenario can provide for the provision of advanced funds to the owner, for the supervision of construction by the authority to ensure that the owner’s reconstruction remains reasonable and for a mechanism whereby a dialogue can take place between the parties to ensure that actions remain reasonable.

In a similar vein, Section 30 Agreements endeavour to mitigate injurious affection. In simple cases, mitigation measures under an agreement may deal with the placement of landscaping in buffering the effects of a busier road. More complex measures under a Section 30 Agreement may contemplate new or improved access or grading to ensure proper access to the affected property. Even if the parties cannot agree on a lump sum settlement, a Section 30 Agreement can nonetheless allow the authority to finance mitigation measures on an interim basis to ensure proper access to the property. A Section 30 Agreement can also grant the authority permission to enter a property to restore access.

The measures discussed above can, in the appropriate circumstances, ensure that mitigation is implemented on an expedited and reasonable basis, to the benefit of both the authority and the owner with the added proviso of accountability to the Ontario Municipal Board. These provisions can also assist in fostering good faith and cooperation between the parties. Attempts to mitigate damages in agreements are not always achievable and may give rise to complicated solutions. The use of such provisions should be assessed on a case by case basis, when mutually desired by both parties acting reasonably.

## **Conclusion**

Expropriated owners and expropriating authorities often do not view the expropriation process as a positive experience. However, with the right approach, formal expropriation can be avoided in many instances if authorities embrace certain guiding principles such as proactive planning, good faith negotiation, cooperation and reasonable conduct as early on in the acquisition process as possible. When these fundamental principles are adopted by authorities, resolutions are more likely to be amicable and favourable to both parties.

The measures set out in this paper are illustrative and are not meant to be an exhaustive list. As is clear to anyone who has ever been involved in expropriating, there is no one perfect approach to the land acquisition process. Each case is unique and requires an authority to apply a unique combination of measures based on considerations such as the nature of the overall project, the scope and impact of the taking and the willingness of the property owners to respond in a reasonable manner. Professionals dealing in the area of property acquisition should constantly strive to develop better ways to foster cooperation and bring about fair and amicable resolutions with impacted owners.