



Should contamination remediation costs be deducted from an expropriation compensation payment?

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When a person has his or her property interests expropriated, should the expropriating party be able to deduct actual or estimated costs to remediate contamination? American courts have arrived at different conclusions on the question. It appears that Canadian courts have not yet expressly considered the point. The purpose of this article is to describe the competing positions, but the discussion begins with the underlying intent of expropriation compensation in Canada.

Interpreting expropriation legislation

In *Toronto Area Transit Operating Authority Ltd. v. Dell Holdings Ltd.*, 1997 CarswellOnt 79, [1997] 1 S.C.R. 32 [S.C.C.] [Dell], a land developer sought compensation under Ontario expropriation legislation for financial loss suffered when the expropriating authority delayed its decision regarding which parts of the developer's 40-acre land holding would be expropriated. The issue was whether compensation for the loss was obtainable under the expropriation legislation. The Supreme Court of Canada held that it was.

At paragraph 23, Cory J. stated that expropriation legislation is to be read in a broad and purposive manner, in order to

comply with the aim of the legislation to fully compensate a landowner whose property is taken. At paragraph 27, he wrote of the need to indemnify an expropriated owner.

Dell was recently followed in *Caven v. British Columbia Hydro and Power Authority*, 2016 BCSC 122, 2016 CarswellBC 173 [Caven] where, at paragraphs 102 to 104, Sharma J. wrote the following:

102 The starting point for a discussion of disturbance damages is *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority*, [1997] 1 S.C.R. 32 [S.C.C.] ...

103 The Supreme Court of Canada emphasized the importance of a broad and liberal approach to the interpretation of expropriation legislation because it is "one of the ultimate exercises of governmental authority" which represents a "severe loss and a very significant interference" with private property rights. This justifies strictly construing the statute in favour of those whose rights have been affected (at paragraphs 20 and 22). The legislation was enacted after a commission made recommendations, one of which was to create a statute that provides "sufficient flexibility to allow for indemnification in various circumstances" and to "do justice" (at paragraph 18).

104 Although the Court was interpreting the Ontario statute in force at the time, the legislation at issue in that case contains phrasing similar to the *Act [British Columbia Expropriation Act]*, providing for compensation to owners for "such personal and business damages, resulting from the construction or use, or both, of the works ... " The Court noted that the objective of the compensation was to avoid double recovery but not to overlook legitimate claims (at paragraph 26).

No deduction of estimated remediation costs – American case law

Bearing in mind the Canadian intent to make an expropriated party financially whole, we turn now to the American discussion of contamination remediation costs in expropriation proceedings. Of course, Americans refer to expropriation proceedings as "eminent domain" proceedings and expropriated properties as "condemned" properties.

There is a split in American courts between those jurisdictions that do not allow evidence of contamination remediation costs ('exclusion approach') and those jurisdictions that allow such evidence ('inclusion approach'). In *Moorhead Economic Development Authority v. Roger W. Anda, et al.*, 789 N.W.



2d 860, 2010 Minn. LEXIS 534 (Supreme Court of Minnesota) [*Moorhead*], the court described the competing approaches.

Commercial property was expropriated by the Moorhead Economic Development Authority for a redevelopment project. The property was contaminated with fuel oil and it was remediated. In the trial to deal with compensation, it was held that the property was worth approximately \$450,000 unimpaired, but, taking into account the contamination, the value of the property was zero. An appeal to the Minnesota Court of Appeals was dismissed and the owner appealed to the Supreme Court of Minnesota. The Supreme Court of Minnesota reversed the Court of Appeals decision holding that, in expropriation proceedings, evidence of the cost of remediation is not admissible.

The court explained that, under the inclusion approach, state courts allow evidence of environmental contamination on the basis that environmental contamination affects the fair market value of property and, therefore, is relevant in determining just compensation. Courts following the

inclusion approach fear that exclusion of contamination evidence will result in condemnation [expropriation] awards that force the government to pay more for the condemned property than it is worth.

However, in the exclusion approach, courts hold that valuing condemned property as contaminated is unfair to the property owner. Some courts exclude all evidence of contamination. Other state courts make evidence of remediation costs inadmissible, but then hold that expropriated property should be valued as remediated as opposed to being clean (never contaminated).

The Supreme Court of Minnesota adopted the exclusion approach with certain modifications:

After having analysed the two primary approaches utilized by other courts, we conclude that the exclusion approach with certain modifications is the better approach. While evidence of contamination and remediation may be admissible for the limited purposes later discussed, evidence of remediation costs should not be admissible in an eminent domain proceeding and property taken under the government's

eminent domain power should be valued as remediated. We adopt this approach because we conclude that property owners will be justly compensated and made whole when the power of eminent domain is used to take their property. The approach has the greatest likelihood of placing the owner "in as good a position pecuniarily as if his property had not been taken," ... but will also provide a mechanism to prevent the condemning authority from paying more for the property than it is worth. Several reasons support our choice of a modified exclusion approach, including fairness and due process concerns.

With respect to considerations of fairness, the court pointed out the possibility of what it referred to as a "double liability" or a "double take:"

... Admitting evidence of contamination and remediation costs during the condemnation proceeding encourages a jury to value the property as contaminated, often times reducing the condemnation award dollar-for-dollar by the actual or estimated cost of remediation ... At the same time, the

property owner may be held liable for contamination under environmental law ...

... The exclusion approach, in contrast, acknowledges that environmental contamination of a condemned property necessarily involves environmental liability laws and avoids subjecting an owner of condemned property to double liability. If remediation costs are not admissible in condemnation proceedings, the property owner will not be forced to surrender his property to a condemnor at a reduced price, thus avoiding any risk of double liability.

For the Supreme Court of Minnesota, the fact that the expropriating party did not sue the property owner for the contamination of his property did not matter; what is important is that the expropriator could have done so, and excluding remediation cost evidence from a trial to determine compensation for the market value of the property removes the possibility of double liability.

The court observed that the fair market value of contaminated property is often difficult to find because of the unique nature and extent of the contamination. Finding comparable properties is usually not possible. The court concluded this thought with the following passage:

... Because the fair market value of contaminated property is "difficult to find" ... and subjecting a property owner to double liability is a "manifest injustice," we believe that excluding remediation-cost evidence in condemnation proceedings is appropriate.

The court wrote that it is open to the expropriating party to seek redress from responsible property owners, including the expropriated party, through a separate court proceeding. A logical extension of this observation is that such a proceeding would adjudicate all responsibility for the contamination rather than effectively resting all liability on the expropriated party through a deduction in compensation.

The Supreme Court of Minnesota observed that an expropriation proceeding does not have the same procedural

safeguards as an environmental contamination action, including the opportunity for the property owner to contest liability for the contamination, bring third party actions against former owners, assert certain defences or recover from any insurance coverage. Allowing a deduction for remediation costs – estimated or actual – allows the expropriator to avoid the procedures established under the environmental legislation for recovering remediation costs. In *Moorhead*, this meant that, even though the owner was not held liable for the contamination through an environmental action, he was forced to pay for the contamination through a reduced compensation award.

Aladdin, Inc. v. Black Hawk County

In *Aladdin, Inc. v. Black Hawk County*, 562 N.W. 2d 608; 1997 Iowa Sup. LEXIS 136 (Iowa S.C.) [Aladdin], the Supreme Court of Iowa affirmed a lower court decision that held that an expropriation compensation board illegally reduced the value of the expropriated land by the estimated cleanup cost of existing groundwater contamination.

Aladdin operated a laundry business on property that was expropriated for construction of a county jail. In the lower court proceedings, it was held that an expropriation lawsuit is not the proper forum to assess liability for environmental contamination and that deduction of remediation costs from compensation was illegal.

The court found that:

The compensation awarded in an eminent domain proceeding becomes a substitute for the property taken. Before condemnation, the property owner holds the property at a certain fair market value, and the landowner, if the land is contaminated, has possible legal liabilities for the contamination. However, before a landowner is held responsible for cleanup cost in Iowa, an action must be brought by the DNR ... To hold a property owner

responsible for cleanup cost, the DNR or citizen must prove the owner generated the contamination ... If this procedure is not followed and the value of the property condemned is reduced by the estimated cost of cleanup, the landowner will not receive just compensation because the award will be less than full value. In addition, the property owner will still have the same legal liability for cleanup cost as before.

The court also found that a property owner has the right to have its liability for contamination remediation costs established in a proceeding in which the owner has the opportunity to show that the owner did not cause the pollution. The liability for remediation costs is something to be established following the expropriation in the appropriate legal proceeding.

Concluding remarks on American case law

It is important to note that those American courts adopting the exclusion approach do so by relying upon the requirement for "just compensation" under American constitutional law. These courts hold that, in the right circumstances, the requirement for "just compensation" supercedes the usual market value standard of expropriation compensation.

There is no constitutionally embedded principle of "just compensation" in Canada. Canadian courts direct that expropriation compensation is dependent upon the words of the expropriation legislation. The question is whether the exclusion approach has application under the *Expropriation Act* so that effect can be given to the intent of such legislation – to indemnify and effectively hold the property owner harmless so far as money can.

This article is provided for the purposes of generating discussion and to make practitioners aware of certain challenges presented in the law. It is not to be taken as legal advice. Any questions relating to the matters discussed herein should be put to qualified legal and appraisal practitioners.