HEARINGS OF NECESSITY—AN OVERVIEW

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Introduction

A Hearing of Necessity can be the first significant procedural step in an expropriation proceeding, so understanding what they are and how they work is critically important. This paper discusses the purpose of Hearings of Necessity; when they should be requested; the functions and roles of the parties; their downsides; practical tips; and possible outcomes.

The Purpose of Hearings of Necessity

In 1968, the Royal Commission's Inquiry into Civil Rights (the McRuer Report) examined the state of Ontario's expropriation law.[1] A future Associate Chief Justice of Ontario, John W. Morden, authored the McRuer Report's section on expropriation, and his findings formed the basis of the revised *Expropriations Act, 1968–69*, which the Legislature passed later that year.[2] With a few changes, the *Expropriations Act* (the Act) remains largely the same today.[3]

One of the McRuer Report's recommendations was to introduce Hearings of Necessity as part of the pre-expropriation procedure.[4] The intent behind Hearings of Necessity is seen in the situations that plagued land owners under the former legislation. The Report highlighted cases where land owners—farmers in particular—had been inconvenienced and financially strained by expropriations that proved unnecessary and were later abandoned.[5] There had also been situations

[1] Ontario, Royal Commission Inquiry into Civil Rights, *Part III Safeguards Against Unjustified Exercise of Certain Special Powers*, vol. 3 (Toronto: Frank Fogg, Queen's Printer, 1968) (Chair: Hon. James C. McRuer, LL.D.) [The McRuer Report].

[2] *Expropriations Act, 1968–69*, S.O. 1968–69, c. 36.

[3] *Expropriations Act,* R.S.O. 1990, c. E. 26.

[4] The McRuer Report, *supra* note 1 at 1001–09.

[5] *Ibid*. at 1001.

where an expropriating authority had misapprehended vital facts. In one instance, the expropriating authority's map did not show essential details about the property it planned to expropriate—such as a lake.[6] Providing land owners with a pre-expropriation right to be heard before a neutral third party was the recommended way to avoid these burdens and mishaps at an early stage.

The hearing takes place before an Inquiry Officer, whom the Attorney General appoints.[7] The land owner(s) and the expropriating authority attend. There is flexibility in how a hearing can take place. They range from informal discussions without professional representation[8] to multi-week proceedings with evidence, argument, witness examinations, cross-examinations, and site visits.[9] After the hearing, the Inquiry Officer provides the parties and approving authority with a non-binding recommendation on how and whether it should proceed with the expropriation,[10] which the approving authority then considers in determining whether to proceed with the expropriation.[11]

Requesting a Hearing of Necessity

The Right to Be Heard

Under Ontario's Act, only *registered owners* and *owners* have a right request and attend to a Hearing of Necessity.[12] The terms *registered owner* and *owner* have separate definitions under the Act,[13] and the procedure for providing notice to a

[6] The McRuer Report, *supra* note 1 at 1002.

[7] *Expropriations Act,* R.S.O. 1990, c. E. 26.

[8] *Kowal* v. *Ontario (Ministry of Transportation)* (2000), 70 L.C.R. 70 at 72.

[9] *Marvin Hertzman Holdings Inc.* v. *Toronto (City)* (*sub nom. Re Yonge Street Regeneration Project*) (1999), 65 L.C.R. 180 (Ont. Div. Ct.) [*Marvin Hertzman Holdings Inc.*].

[10] *Expropriations Act,* R.S.O. 1990, c. E. 26, s. 7(6).

[11] *Ibid*., s. 8(1).

[12] *Ibid*. s. 1(1).

[13] *Ibid*., ss. 6(2), 7(8).

registered owner versus an *owner* differs, impacting possible timelines for making a hearing request.[14]

A *registered owner* "means an owner of land whose interest in the land is defined and whose name is specified in an instrument in the proper land registry or sheriff's office, and includes a person shown as a tenant of land on the last revised assessment roll",[15] whereas an *owner* "includes a mortgagee, tenant, execution creditor, a person entitled to a limited estate or interest in land, a guardian of property, and a guardian, executor, administrator or trustee in whom land is vested".[16]

For present purposes, they will collectively be referred to as "land owners", except where distinctions need to be emphasized.

Consequently, the right to be heard at a Hearing of Necessity is limited.[17] Other parties that could have an interest in an expropriation, such as conservation groups, have no right to request, attend, or object to a Hearing of Necessity.[18]

Notice & Timelines for Requests

Under s. 4, an expropriating authority requires the approving authority to approve an expropriation before it can proceed.[19] The expropriation authority may or may not be the same body as the approving authority.[20] The expropriating authority starts the expropriation process under s. 6(1) by serving a Notice of Application for

[14] *Expropriations Act,* R.S.O. 1990, c. E. 26, s. 6(2)(a)–(b).

[15] *Ibid*. s. 1(1).

[16] *Ibid*.

[17] Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2d ed. (Scarborough: Carswell, 1992) at 46 [Todd, *The Law of Expropriation and Compensation in Canada*].

[18] *Ibid*.

[19] *Expropriations Act,* R.S.O. 1990, c. E. 26, s. 4.

[20] See *ibid*. s. 5.

Approval to Expropriate on the registered owner(s), and by publishing the Notice in a local newspaper once a week for three weeks.[21]

Notice triggers a 30-day deadline for the land owner to request a Hearing of Necessity. The timelines may start at different times for registered owners compared to owners. Under s. 6(2)(a), if a registered owner is personally served with the Notice or is served with it by registered mail, then the 30 days runs from the date service is effected. However, where the registered owner receives the Notice by publication in a newspaper, then the deadline runs from the first publication.[22] Under s. 6(2)(b), the 30-day timeline for owners runs from the first date of newspaper publication.[23] This subsection only refers to newspaper publication, rather than other forms of service, leading to an inference that there is no need to serve owners personally or by registered mail. Expropriating authorities may, however, consider it prudent to do so to avoid later objections, given the long-term declining role of newspapers.

The 30-day deadline in s. 6(2) may sound somewhat harsh, but normally the expropriating authority will have contacted the land owner to negotiate informally, or there will have been rumours about a pending expropriation that reach the land owner.

If a land owner is served under s. 6(1) and does not request a hearing, then it may be legitimately held without the land owner present, or not held at all if no land owners request one. Although an Inquiry Officer has the power to add such a party to hearing under s. 7(9)(a), there is no requirement for the Inquiry Officer to do so.[24]

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[21] *Expropriations Act,* R.S.O. 1990, c. E. 26, s. 6(1).

[22] *Ibid*., s. 6(2)(a).

[23] *Ibid*., s. 6(2)(b).

[24] *Magic Meadows Ltd.* v. *Regional Municipality of Peel* (1976), 11 L.C.R. 290 at 298 (Morden, J., as he then was).

Inquiry Officers

Under s. 7(1), the Attorney General appoints a Chief Inquiry Officer and other Inquiry Officers as needed.[25] After a land owner requests a Hearing of Necessity within 30 days under s. 6(2), an Inquiry Officer is assigned to preside over the hearing. Typically, Inquiry Officers are lawyers or other professionals who are familiar with expropriation and the issues that may need to be raised for the approval authority's later consideration.

Hearing Procedure Under Section 7

Section 7 of the Act contains the hearing's procedure. The McRuer Report set the framework for the issues that a Hearing of Necessity should examine:

- The necessity of the work should be assumed and treated as being beyond comment.
- The main issue will be the soundness and fairness of taking the particular piece of land described in the proposed expropriation plan.
- The public interest and the land owner's private interests must be considered.
- Other relevant issues include the feasibility of the modification of the expropriation plan, alternative sites or routes, or the taking of a greater or lesser estate or interest in the land.[26]

This rubric is reflected in s. 7(5) of the Act, which states:

> **Hearing by means of inquiry**
> (5) The hearing shall be by means of an inquiry conducted by the inquiry officer who shall inquire into whether the taking of the lands or any part of the lands of an owner or of more than one owner of the same lands is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority.[27]

As suggested, the focus is on whether the expropriation is "fair, sound and reasonably necessary." Determining fairness "involves a balancing of the public interest allegedly being advanced by the expropriation with that of the private

[25] *Expropriations Act,* R.S.O. 1990, c. E. 26, s. 7(1).

[26] The McRuer Report, *supra* note 1 at 1007.

[27] *Expropriations Act,* R.S.O. 1990, c. E. 26, s. 7 (5).

interest of the owner."[28] It is not necessary for the Inquiry Officer to consider the words "fair, sound and reasonably necessary" separately.[29]

The onus is on the owner to demonstrate that the proposed expropriation is unfair, unsound, or unnecessary.[30] The expropriating authority, on the other hand, only needs to show that the expropriation is "reasonably defensible."[31] The "reasonably defensible" burden of proof is a lower threshold than proving a case on a balance of probabilities.[32]

When the McRuer Report stated "The necessity of the work should be assumed and treated as being beyond comment", it meant that the objectives of the expropriation are not within the scope of a Hearing of Necessity. For example, if land were taken for an LRT in Mississauga, the role of mass transit in the GTA would not be an item of debate. The hearing must focus on whether the specific taking is required for the project, whether it should be modified, and the available alternatives. Justice Morden expanded on this in his 1969 expropriation treatise:

> The Act does not open up "the *objectives*" of the expropriating authority for consideration. The objectives are to be treated as an unalterable fact. What is alterable, at least potentially, is the decision as to the "taking of the lands", or any part of them, in furtherance of the objectives. However, it seems that counsel for persons who face an expropriation might well be within the realm of relevance at a hearing in on dwelling on the words "objectives" and "necessary" in that order.[33]

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[28] *Re Parkins and The Queen* (1978), 13 L.C.R. 306 at 315 (Corey, J. as he then was) citing John W. Morden (as he then was), *Law Society of Upper Canada Special Lectures*, 1970: Recent Developments in Real Estate Law (Toronto: Richard De Boo, 1970) at 248, aff'd (1978), 19 O.R. (2d) 473 (Ont. C.A.) [*Parkins*].

[29] *Ibid*.

[30] *Investex Holdings* v. *Peel (Municipality)* (September 14, 2005) (Inquiry Officer Freidin), aff'd (2006), 91 L.C.R. 227 (Epstein, J. as she then was).

[31] *Parkins*, *supra* note 28 at 315.

[32] *Ibid*.

[33] John W. Morden (as he then was), *An Introduction to The Expropriations Act 1968–69 (Ontario)* (Toronto: Canada Law Book, 1969) at 9.

Document Production

Before the hearing takes place, the expropriating authority is required under s. 7(4) to serve on each party a notice outlining its grounds at the hearing, and will allow the parties to inspect documents, including maps and plans, that the expropriating authority intends to rely on. Thus, this section sets out abbreviated pleading and discovery obligations on the expropriating authority. It should also be noted that "an Inquiry Officer has no authority to order the production of documents."[34]

However, *Ontario (Ministry of Transportation)* v. *Sinclair* demonstrates that there are limits and consequences to s. 7(4)'s otherwise relaxed standards of production. This was an expropriation to improve a highway. In *Sinclair*, the Claimant's lawyer had requested specific documents about specific topics weeks before the hearing.[35] Rather than sending copies, the MTO made the documents available for inspection in North Bay, knowing that the land owner's counsel was in Toronto.[36] Furthermore, the MTO did not bring any of the requested documents to the hearing even though it knew that information contained in the documents would be the subject of cross examination.[37] The MTO's only witness candidly testified that he did not bring some of the documentary information based on his counsel's instructions.[38]

Part of the hearing focused on whether one of the proposed ramps was "premature". An Inquiry Officer will recommend that an expropriation is "premature" if there is "uncertainty about whether the project would proceed at all."[39] Concerning the building of this ramp, the MTO relied on an Environmental Assessment that concluded, "Ultimate ramp configuration shown as dashed lines will be

[34] *Ontario (Ministry of Transportation)* v. *Sinclair* (2007), 92 LC.R. 53 at 61–61 [*Sinclair*].

[35] *Ibid*. at 57.

[36] *Ibid*. at 56.

[37] *Ibid*. at 58.

[38] *Ibid*.

[39] *Ibid*. at 62.

implemented *when traffic volume warrants*."[40] The Inquiry Officer found that "In the present case there is no evidence when, if ever, the traffic counts will warrant the proposed west to east ramp",[41] and therefore "MTO has not established that the proposed expropriation of the northeast quadrant meets the test under section 7(5) of the Act." The Inquiry Officer further found that "because of issues related to production of documents a fair hearing was not possible."

The case stands for the proposition that "a hearing can be unfair or invalid when documentary evidence necessary for a witness to answer relevant questions is not available at the hearing, particularly when the documents belong to the witness or the party leading the evidence."[42]

Example Hearings

The following cases show some of the results that may be achievable:

Re St. Clair Regional Conservation Authority and Aarssen, et al. (No. 1)[43]

This case involved proposed takings to build a dam and floodway. The expropriating authority wanted to acquire properties in fee so it could remove the buildings for the project. The owners asserted that an easement with permission to remove the buildings was sufficient, and that the expropriating authority's right to flood should be restricted. The Inquiry Officer agreed with the owner, and the approving authority largely accepted the Officer's recommendations, reducing the expropriation from fee takings to easement takings.

York (Regional Municipality) v. *Gill*[44]

Here, the property was on a triangular parcel between two roads, and the taking would remove the screening vegetation from one side of the house, leaving it exposed to the road on that side. The land owner contended that the taking of the

[40] *Ibid*. at 60 [emphasis original].

[41] *Sinclair*, *supra* note 34 at 63.

[42] *Ibid*. at 58.

[43] *Re St. Clair Region Conservation Authority and Aarssen, et al. (No. 1)* (1983), 26 L.C.R. 111 (Ont. H.C.).

[44] *York (Regional Municipality)* v. *Gill* (heard April 3–4), 1985) (Ont. Bd. of Inquiry).

proposed strip from her property was not "fair, sound and reasonably necessary", because it was not extensive enough. The Inquiry Officer recommended that the entire property be expropriated to which the approving authority agreed.

Verdiroc v. *Toronto (City)*[45]

The property was in a prime development area of the City of Toronto. The authority proposed to expropriate several small pieces of land and interests of various kinds, including permanent rights-of-way and strata fee takings, from the owners to accommodate a new subway station and bus loop.

The land owners did not contest the need for the project, but argued that the various small takings would, together, have such an adverse impact on the development potential and value of the remaining lands that fairness dictated that the entire parcel should be acquired. Further, they argued that if the authority were permitted to proceed with its proposed strata fee taking, their negotiating position with respect to the ultimate development of the property would be severely prejudiced. The Inquiry Officer agreed with the land owners and recommended that the authority should acquire all the property.

Joint Boards

In some situations, an appointed Joint Board may exercise the power of an Inquiry Officer. Pursuant to the *Consolidated Hearings Act*[46] and s. 7(7) of the Act,[47] Joint Boards may be established to consider applications for environmental, planning and other approvals required for public undertakings. In *Re Yonge Street Regeneration Project*,[48] a Joint Board was constituted to hear the application by the City of Toronto for expropriations pursuant to the *Expropriations Act* and approvals under the *Planning Act*[49] for the City's plan to clean up and regenerate Yonge Street at

[45] *Verdiroc* v. *Toronto (City)* (released August 1998) (Ont. Bd. of Inquiry).

[46] *Consolidated Hearings Act*, R.S.O. 1990, c. C.29, as amended.

[47] *Expropriations Act,* R.S.O. 1990, c. E. 26, s. 7(7).

[48] *Marvin Hertzman Holdings Inc.*, *supra* note 9.

[49] *Planning Act*, R.S.O. 1990, P. 13, as amended.

Dundas Street. The Hearing of Necessity employed all the possible powers conferred to it under s. 7(9). The hearing lasted 38 days, 48 witnesses testified, witnesses were examined in-chief and cross-examined, 296 exhibits were entered into evidence, and about 300 people attended a public session of whom 28 testified. Moreover, the Joint Board made a site visit to New York City to inspect the changes that had been recently made to Times Square.[50]

The Inquiry Officer's Report

After the hearing, s. 7(6) requires the Inquiry Officer to provide the approving authority and the parties with a report summarizing the evidence, arguments, findings of fact, and the Inquiry Officer's opinion along with the reasons for that opinion.[51] The report is a non-binding recommendation to the approval authority for it to consider.[52] It is not necessary for an Inquiry Officer to discuss his consideration of all the factors in minute detail.[53] The McRuer Report suggested using "recommendation" rather than "opinion" to emphasize the Inquiry Officer's passive role.[54]

The Approving Authority's Review

Section 8 of the Act sets out the procedure an approving authority must follow after receiving the Inquiry Officer's report. The approving authority is given the "widest discretion"[55] to consider[56] the recommendation.

In the 1974 case, *Walters* v. *Essex (County) Board of Education*, the Supreme Court of Canada held that in considering an Inquiry Officer's recommendations, an approving authority,

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[50] *Marvin Hertzman Holdings Inc.*, *supra* note 9.

[51] *Expropriations Act,* R.S.O. 1990, c. E. 26, s. 7(6).

[52] *Ibid*., s. 8(1).

[53] *Marvin Hertzman Holdings Inc.*, *supra* note 9, citing *Parkins*, *supra* note 28 at 316.

[54] The McRuer Report, *supra* note 1 at 1008.

[55] *Walters* v. *Essex County Board of Education*, [1974] S.C.R. 481 at 489 [*Walters*].

[56] *Expropriations Act,* R.S.O. 1990, c. E. 26, s. 8(1).

- Need not carry out its approving function in public;
- Is not bound by either the findings of fact or by any interpretation of the law in the Inquiry Officer's report;
- May, in the absence of bad faith on the part of its members, be briefed or counselled in advance by its lawyers or chair to a rejection of the report;
- Is not obligated to show by its written reasons that its adverse decision is reasonably founded and risk judicial review;
- Is not limited to considering the report but may also consider other material without giving the objectors an opportunity to make further representations, though in some cases it may be necessary.[57]

In a later Divisional Court case it was held that an approving authority has no obligation to notify the owner of its confirmation proceedings or to give the owner an opportunity to make submissions.[58]

The approving authority has 90 days in which to serve all the parties and the Inquiry Officer with reasons for its decision and certify its approval in the prescribed form. Should the approving authority fail to provide reasons within 90 days, then a land owner has 30 days in which to bring an application for judicial review to set aside or quash the approval under s. 43.[59]

Limited Judicial Oversight of Approving Authorities

In *Walters*, Justice Laskin (as he then was) in reviewing the actions of an approving authority, held that:

> The Legislature has, in my opinion, left little room for judicial supervision of an approving authority's discharge of its duty to approve or disapprove an expropriation; and, short of an attack upon good faith, I see no ground for enlargement of the scope of judicial supervision merely because the Legislature has seen fit to make the respondent board, "judge in its own cause."

[57] *Walters*, *supra* note 55 at 485–87; Todd, *The Law of Expropriation and Compensation in Canada*, *supra* note at 53.

[58] *Buttery Construction Ltd.* v. *Windsor (City)* (1978), 17 L.C.R. 33 (Ont. Div. Ct.) at 45.

[59] *Expropriations Act,* R.S.O. 1990, c. E. 26, s. 43.

The case illustrates the "wide discretion" approving authorities have in considering an Inquiry Officer's report.[60] It involved an expropriation by a school board. The Inquiry Officer found that the proposed expropriation was unfair and unsound. The school board's chair had been a witness and its representative at the hearing where the board had been represented by its solicitor. On receiving the Officer's recommendation, the chair instructed the solicitor to draft reasons rejecting it. The chair then convinced a majority of the board to agree to adopt the reasons.

The Supreme Court upheld school board's actions, finding that an approving authority was neither a judicial, nor a *quasi*-judicial process.[61] Rather, the board had been invested with the widest discretion, subject only to consideration of the Inquiry Officer's report about whether or not it should proceed. Consequently, absent bad faith, a court is not entitled to substitute its opinion for that of the approving authority's.[62]

Downsides

As described above, the wide discretion given to the approving authority to consider the recommendations, combined with limited judicial oversight are drawbacks.

In his 1992 treatise, *The Law of Expropriation and Compensation in Canada*, Eric C.E. Todd stated that owners in Ontario cases had prevailed in about 5% of Hearings of Necessity.[63] He does not clarify whether this means the expropriating authority accepted the Inquiry Officer's recommendations. Even if this figure were to have *quadrupled*—which seems improbable—it still means that expropriating authorities successfully prove that their plans are reasonably defensible 80% of the time.

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[60] *Walters*, *supra* note 55.

[61] *Ibid*. at 489.

[62] *Marisa Construction* v. *Toronto (City)* (1999), 65 L.C.R. 81 at 86 (Ont. Div. Ct.) (Sharpe, J. as he then was).

[63] Todd, *The Law of Expropriation and Compensation in Canada*, *supra* note 17 at 49 (Todd does not state the source of this statistic).

The other major concern is costs, which under s. 7(10) are limited to $200, an almost nominal sum.[64] This contrasts with the usual the s. 32 cost provisions for the recovery of all reasonable costs incurred for the determination of compensation by land owners.[65]

Practical Tips

A Hearing of Necessity may be worthwhile for a land owner seeking to increase, decrease, avoid, modify, or propose alternatives the taking. Of these, avoiding the expropriation entirely seems the least likely to succeed, unless the expropriating authority has wrong information—like not knowing about a lake.

Unintuitively, these hearings are particularly useful for land owners seeking to *increase* the taking. This is seen in the *York (Regional Municipality)* v. *Gill* and *Verdiroc* cases cited above. Likewise, in *Ontario (Ministry of Transportation)* v. *Marwick*, a road expansion would have left the land owners with an inaccessible landlocked parcel, so they convinced the Inquiry Officer, and subsequently the approving authority, to expropriate their entire property.[66] They are also helpful where the proposed expropriation is complex, as in *Verdiroc*.

Another benefit of a Hearing of Necessity is that it provides the property owner with the ability to learn more about the expropriation and the underlying process. For some owners, it may also be the only forum they may have to voice their comments and concerns with respect to an expropriation.

[64] *Expropriations Act,* R.S.O. 1990, c. E. 26, s. 7(1).

[65] *Expropriations Act,* R.S.O. 1990, c. E. 26, s. 32.

[66] *Ontario (Ministry of Transportation)* v. *Marwick* (1998), 67 L.C.R. 230.

Possible Outcomes

There are several possible outcomes to a Hearing of Necessity:

1. The expropriating authority demonstrates to the Inquiry Officer that its plan is "reasonably defensible", and the recommendation reflects this, proceeding without changes.

2. The Inquiry Officer partially agrees with the owners, recommending that some modifications be made:

    a. The approving authority rejects the Inquiry Officer's proposed modifications.
    b. The approving authority accepts all the Inquiry Officer's proposed modifications.
    c. The approving authority accepts some of the Inquiry Officer's proposed modifications.

3. The Inquiry Officer finds that the plan of expropriation is unfair, unsound and not reasonably necessary:

    a. The approving authority rejects the Inquiry Officer's proposed modifications.
    b. The approving authority accepts all the Inquiry Officer's proposed modifications.
    c. The approving authority accepts some of the Inquiry Officer's proposed modifications.

Conclusion

Approval is not the beginning of the end; it is the end of the beginning, after which the approving authority needs to register the expropriation and commence the expropriation process. This paper has provided an overview of the topic, and finer points such as dispensing with the inquiry for public necessity and document production are beyond this introduction.

The initial decision whether to request a Hearing of Necessity can be a difficult one and is most appropriate for large or complex proposed takings, or where the

expropriating authority has made a fundamental error. The choice is tough because a land owner will have to absorb the costs of the hearing.

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