Publisher's Note

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Coates and Waqué

New Law of Expropriation

This release features updates to the statutory provisions in Ontario, Alberta, New Brunswick, Nova Scotia, and British Columbia.

Statutory Highlights

- **Ontario *Expropriations Act* – Subsections 27(7), (8), (9) – Board of Negotiation – Protection from Personal Liability** – Provisions effective December 15, 2009 protect members of the board of negotiation and other specified persons from personal liability for the good faith performance of their duties under any Act.
- **British Columbia *Expropriation Act* – Expropriation Proceeding Costs Regulation – Section 5 – Expenses and Disbursements** – Section 5 of the Regulation deals with a claim for a reasonable amount for expenses and disbursements that were incurred in the conduct of proceedings before the Expropriation Compensation Board. An additional amount may be claimed for tax payable in respect of legal costs or real estate appraisal costs. Subsections 5(4) and 5(5) are amended to refer to Part IX of the *Excise Tax Act* (Canada), rather than the "goods and services tax", in recognition of the implementation of the harmonized sales tax (HST) of 12 per cent in British Columbia as of July 1st, 2010. The B.C. provincial sales tax is eliminated and the B.C. rate of 7 per cent is combined with the 5 per cent goods and services tax to create a total HST rate of 12 per cent.
- **Alberta *Expropriation Act* – Section 19** – The expropriation authority may register the certificate of approval in the land titles office and, subject to the

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COMBINED INQUIRIES

(7) The inquiry officer may combine two or more related inquiries and conduct them in all respects and for all purposes as one inquiry.

PARTIES

(8) The expropriating authority, each owner who notifies the approving authority that the owner desires a hearing in respect of the lands intended to be expropriated and any owner added as a party by the inquiry officer are parties to the inquiry.

POWERS AND DUTIES OF INQUIRY OFFICER

(9) The inquiry officer,

(a) may add any owner whose land would be affected by the expropriation of the lands concerned in the inquiry or any modification thereof as a party to the inquiry;

(b) shall give every party to the inquiry an opportunity to present evidence and argument and to examine and cross-examine witnesses, either personally or by a person authorized under the *Law Society Act* to represent the party;

(c) is not bound by the legal rules of evidence; and

(d) may inspect the lands concerned either alone or in the presence of the parties. 2006, c. 21, s. 1, Sched. C, s. 109.

COSTS

(10) The inquiry officer may recommend to the approving authority that a party to the inquiry be paid a fixed amount for the party's costs of the inquiry not to exceed $200 and the approving authority may in its discretion order the expropriating authority to pay such costs forthwith.
2006, c. 21, s. 1, Sched. C, s. 109.

§1.0 Inquiry into Proposed Expropriation

§1.1 *History*

Section 7 is the fourth of five sections introduced in 1968 expanding on the approval procedure first introduced, in a limited way, in 1966: see notes following section 4. Whereas the 1966 Act, in the situation to which it applied, required the approval of the local county or district court judge, subsection 7(1) provides for the appointment of "inquiry officers" for the purpose of conducting the inquiry under subsection 7(5). Under the 1966 legislation, subsection 1a(5), the inquiry was to determine whether the expropriation was "reasonably necessary for the purpose of the applicant." Under subsection 7(5) of the present Act, the inquiry officer is directed to inquire whether the taking is "fair, sound and reasonably necessary in the achievement of the objectives of the expropri-

ating authority." Former section 1a, while subject to an appeal to the Court of Appeal, constituted an absolute prohibition against expropriation without the prior authority of a judge: subsection 7(6) of the present Act requires only that the inquiry officer report to the approving authority and the decision to expropriate or not to expropriate is then the decision of the approving authority under section 8.

On November 26, 2002, several amendments to the hearing of necessity process in section 7 came into force through Bill 179, the *Government Efficiency Act, 2002*, S.O. 2002, c. 18. Subsection 7(6) was re-enacted by S.O. 2002, c. 18, s. 1(1), Sched. A, s. 9(2). The most significant change requires the inquiry officer to give a copy of his or her report not only to the approving authority, but also to the parties to the hearing. This amendment was intended to remedy a significant problem which frequently arose where landowners could not obtain the inquiry officer's report and make submissions, if so advised, to the approving authority, until after the approving authority had considered that report and issued its decision to approve the expropriation. The amendments also require the approving authority to serve its reasons for approving, approving with modifications, or not approving the proposed expropriation on all parties to the hearing and on the inquiry officer: see section 8.

Subsection 7(6) formerly read as follows:

> REPORT
>
> (6) The inquiry officer shall report to the approving authority a summary of the evidence and arguments advanced by the parties, the inquiry officer's findings of fact, and his or her opinion on the merits of the application for approval with the reasons therefor.

Clause 7(9)(b) was amended by S.O. 2006, c. 21, s. 1, Sched. C, s. 109, by striking out "by counsel or agent" and substituting "by a person authorized under the *Law Society Act* to represent the party".

§1.2 *Judicial Review*

§1.2.1 *Bias*

In *Legoyeau Holdings Ltd. v. Windsor (City)* (1993), 52 L.C.R. 241 at 241 1993 CarswellOnt 3889 (Ont. Div. Ct.), at page 241, affirmed (1994), 52 L.C.R. 241, 1994 CarswellOnt 4790 (Ont. C.A.), the applicant alleged bias on the part of an inquiry officer as grounds for attacking the validity of the respondent's Notice of Application for Approval to Expropriate. The Divisional Court (at page 244) applied the "reasonable apprehension of bias" test set out in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, 89 D.L.R. (4th) 289, 4 Admin. L.R. (2d) 121, 1992 CarswellNfld 170, 1992 CarswellOnt 179, [1992] S.C.J. No. 21, as follows:

> To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

In concluding there was no reasonable apprehension of bias, the Divisional Court took into account the reasons of the inquiry officer, the alternatives considered by the officer, and the inquiry officer's recommendations.

§1.2.2 *Scope of Inquiry*

The court has accepted a supervisory role in the conduct of hearings of necessity: *Investex Holdings Ltd.* v. *Peel (Municipality)* (2006), 91 L.C.R. 227, 42 R.P.R. (4th) 282, 2006 CarswellOnt 1959 (Ont. Div. Ct.).

Judicial review is available to challenge actions taken by an inquiry officer that do not comply with the duty of procedural fairness. In *Bezic Construction Ltd.* v. *Ontario (Minister of Transportation)* (2006), 88 L.C.R. 317, 46 Admin. L.R. (4th) 139, 2006 CarswellOnt 480 (Ont. Div. Ct.), the applicant (owner) alleged that the inquiry officer's refusal to grant a request for an adjournment and the manner with which the inquiry was conducted amounted to a denial of procedural fairness. Although the court found no breach of the obligation, the Divisional Court held that there is no "standard of review" for an alleged breach of the duty of procedural fairness. Simply put, the court held that "[d]ecisions which do not comply with the rules of procedural fairness and natural justice cannot stand," quoting *Kalin v. College of Teachers (Ontario)* (2005), 75 O.R. (3d) 523, 254 D.L.R. (4th) 503, 2005 CarswellOnt 2095 (Div. Ct.), at para. 9.

On the issue of an adjournment, the Divisional Court in *Bezic* confirmed that a tribunal which denies a request for an adjournment must give reasons to show that it considered the reasons for the request, the impact on the party requesting it, and the competing interests at stake. In circumstances where the request for the adjournment was based upon the alleged need to inspect documents requested under the *Freedom of Information and Privacy Act* two days before the commencement of the long-established date for the hearing, and which the inquiry officer held would amount to a fishing expedition, the Divisional Court found no breach of the obligation of procedural fairness. Junior counsel for the moving party who attended at the hearing had no witness prepared to testify, despite the fact that the date for the hearing had been agreed upon well in advance. This did not compel the Divisional Court to find the duty of procedural fairness had been breached in the denial of the request for the adjournment, given the inquiry officer's offer to reconvene the hearing the next day.

Judicial review of an inquiry officer is also available where the inquiry officer fails to do his or her statutory duty. In *Karn v. Ontario Hydro* (1977), 11 L.C.R. 1, at page 9, 16 O.R. (2d) 737 at 743, 79 D.L.R. (3d) 256, 6 C.E.L.N.

97, 1977 CarswellOnt 1090, the Ontario Court of Appeal held that the essential meaning of the Act required that a person whose land was expropriated be able to make submissions as to the route of the project, reversing the decision of the Divisional Court, which upheld the inquiry officer's refusal to receive evidence respecting alternate routes. At the Divisional Court, Ontario Hydro challenged the jurisdiction of the court to review the function of the inquiry officer. However, the Divisional Court held that the relief requested was subsumed by the *Judicial Review Procedure Act* and that, therefore, the court had power to grant a remedy where the inquiry officer failed to do his or her statutory duty. Moreover, the power of review was not confined to the exercise of a quasi-judicial function. This decision implicitly overrules *Ball v. Ontario Hydro* (1975), 8 L.C.R. 217, 6 O.R. (2d) 631, 53 D.L.R. (3d) 519, 1974 CarswellOnt 375 (Div. Ct.), at page 228 L.C.R., which held that the conduct of an inquiry officer cannot be reviewed unless it can be said that he or she has failed to conduct the inquiry judiciously, i.e., fairly, impartially and honestly in accordance with the objectives of the statutes. The authors caution that failure to seek judicial review of the decision of an inquiry officer may preclude an owner from arguing successfully, at a later date, that an expropriation was approved in bad faith: *Barbay Holdings Inc. v. Barrie (City)* (1991), 46 L.C.R. 81, 52 O.A.C. 291, 1991 CarswellOnt 682 (Ont. Div. Ct.).

§1.3 *Duties of Inquiry Officer*

For a discussion of the duties of an inquiry officer under subsections 7(4), (5) and (6), see the judgment of Laskin, J. in *Walters v. Essex (County) Board of Education* (1973), 5 L.C.R. 144, at page 145, [1974] S.C.R. 481, 38 D.L.R. (3d) 693, 1973 CarswellOnt 233, 1973 CarswellOnt 233F (S.C.C.). See also *Parkins v. R.*, *infra*, §2.0, at page 316.

§2.0 Inspection of Documents

Subsection 7(4) provides the only machinery for production or discovery of documents by the expropriating authority on hearings before the inquiry officer. The section requires the authority to present only those documents upon which it intends to rely, not all relevant material. Thus, where the authority failed to disclose a long-range planning report which was material to the issues upon the inquiry and was critical to one of the two grounds on which the approving authority based his decision, an application to set aside the approval to expropriate was dismissed: *Ball*, *supra*, §1.2. In a case involving an expropriation for an expressway, a report which considered an alternative alignment of the expressway came into existence after the expiration of the five days required by subsection 7(4). When it became apparent that the authority intended to "use" this report at the hearing, a copy was served on the owner who was a party to the inquiry; the hearing was then adjourned for six weeks. An application to have the expropriation proceedings declared void on the grounds that

the authority had failed to comply with the notice requirements of subsection 7(4) was dismissed. "When one looks at the statute as a whole and the place the inquiry occupies in the overall expropriation proceedings it is apparent that the inquiry should not be a technical proceeding if the expropriated party and the Minister are to obtain the best results from it": *Parkins v. R.* (1978), 13 L.C.R. 306, 1977 CarswellOnt 1245 (Ont. H.C.), at page 319, affirmed (1978), 14 L.C.R. 327, 19 O.R. (2d) 473, 85 D.L.R. (3d) 581, 1978 CarswellOnt 1755 (Ont. C.A.).

In one case, an inquiry officer found he did not have the jurisdiction to order production of documents which the expropriating authority did not propose to rely on at the hearing despite a specific request by an owner: *Ontario (Ministry of Transportation) v. Gjos* (1999), 67 L.C.R. 154, 1999 CarswellOnt 5252 (Ont. Bd. of Inquiry) (Inquiry Officer Doig). However, the weight accorded to this decision must be considered in light of the fact that no one for the owner appeared before the hearing officer since counsel for the owner waived the hearing of necessity the day before the actual hearing was to take place. Nonetheless, counsel for the Ministry of Transportation persuaded the inquiry officer to hold a hearing of necessity in the owner's absence and make findings related to the jurisdiction to order production of documents.

On the other hand, in *Newman v. Toronto (City)* (September 15, 1997), Doc. PL 970734, 35 O.M.B.R. 475, 1997 CarswellOnt 6262, [1997] O.M.B.D. No. 1313 (O.M.B.), production of financial reports and analyses was ordered without regard to whether those documents would be relied upon by the authority at the hearing of necessity. In this case, the City of Toronto was seeking the further implementation of a "Community Improvement Plan" (CIP) under the *Planning Act*. The reports in question were an integral part of the city's decision to proceed with the CIP. The Board decided that the information contained in the impugned reports would be beneficial, not only to the other parties to the hearing, but also, to the Board itself in determining whether the proposed expropriations were "fair, sound and reasonably necessary."

Note that the Joint Board was not constrained by the limited mechanism afforded by subsection 7(4) in *Marvin Hertzman Holdings Inc. v. Toronto (City)*, *infra*, §3.5. Acting under the jurisdiction of the *Consolidated Hearings Act*, the Board enjoyed a much broader scope of powers. See the discussion under §3.5.

Arguably, it is a denial of natural justice and procedural fairness to permit an expropriating authority to limit the scope of documentary production by simply taking the position that it does not intend to "rely" on some otherwise possibly relevant documents at the hearing. Clearly, the issue of relevance ought to have some scope for application in this context, particularly in light of the trend towards full and fair disclosure in civil litigation generally. Given the importance of the private right interfered with by the expropriating authority, allowing the authority to be the sole arbiter of what documents are relevant to the process imposes a significant limit on the effectiveness of the hearing of

a particular expropriation was "fair, sound and reasonably necessary." The court quoted from Mr. Morden's lecture printed in the *Law Society of Upper Canada Special Lectures*, 1970: Recent Developments in Real Estate Law (Toronto: Richard De Boo, 1970) 225, and agreed with him that it was pointless to analyze each adjective in the formula separately, as urged by the owner. The duty of the inquiry officer is to "consider the relevant factors" and, having regard to the objectives of the expropriating authority, come to a conclusion as to whether or not the proposed expropriation is "reasonably defensible." An appeal to the Court of Appeal was dismissed. "[T]he inquiry officer did apply the proper test in this case and . . . his report was not a nullity" (1978), 14 L.C.R. 327, 19 O.R. (2d) 473, 85 D.L.R. (3d) 581, 1977 CarswellOnt 517 (Ont. C.A.), at page 332 L.C.R., affirming (1977), 13 L.C.R. 306, 1977 CarswellOnt 1245 (Ont. H.C.).

Establishing a meaningful scope of an inquiry is most difficult in the case of a lineal acquisition since the next property is inevitably the required property. For example, in *Grey County Hydro Corridor Committee v. Ontario Hydro* (1977), 12 L.C.R. 193, 18 O.R. (2d) 170, 7 C.E.L.R. 29, 1977 CarswellOnt 1049, the Divisional Court found that the objective was not only to get power from Bruce to Milton, but to get it there along a certain route. Therefore, the Divisional Court dismissed the application to set aside the inquiry officer's report wherein the inquiry officer had refused to investigate an alternative route. However, in *Karn*, *supra*, §1.2.2, Ontario Hydro unsuccessfully argued that the taking of the lands in question to form part of the transmission route was one of the objectives of the expropriating authority, and that, therefore, the route and its alternatives fell outside the ambit of inquiry as to whether the taking was "fair, sound and reasonably necessary." The Court of Appeal stated that "[t]o ascribe any meaning whatever to this Section [s. 7(5)] and particularly the words 'fair, sound and reasonably necessary,' it must follow that the inquiry includes the issue of alternative routes. To eliminate this question from the inquiry would almost negate the inquiry." (Zuber, J.A. at page 8, 11 L.C.R.)

In the case of lineal expropriations, it is obviously tempting for expropriating authorities to attempt to limit the scope of the inquiry by piecemeal expropriation. The opportunity to consider alternative locations for the public work where the current route ends in front of the objecting owner's doorstep is narrow. Should it be demonstrated that this course of action were adopted intentionally for the purpose of defeating an inquiry, one would expect that this could be successfully challenged. However, the opportunity for proceeding in a piecemeal fashion is practically limited by the requirements for environmental approval, except of course in those cases where an authority benefits from wholesale exemption from environmental regulation.

§3.4 *Decisions of the Inquiry Officer Under the Present Legislation*

There is no reporting service that reports on decisions of inquiry officers. Accordingly, the authors of this text cannot make any absolute statements about

necessity process. Perhaps this limitation must be taken up by legislative amendment. In the meantime, owners seeking production of documents they consider to be relevant to the hearing of necessity process have available to them a mechanism for obtaining documentary disclosure through the *Freedom of Information and Protection of Privacy Act*. While somewhat cumbersome and time-consuming, such an approach may produce documentary disclosure that more effectively allows an owner to challenge a proposed taking. A request to adjourn the hearing of necessity pending a response to such an application would often presumably appear to have merit.

§3.0 "Fair, sound and reasonably necessary"

§3.1 *Background*

The McRuer Report provided the basis for the statutory formula of "fair, sound and reasonably necessary" now found in subsection 7(5). The nature of the objectives this language was intended to cover is found at page 1007 of that Report:

> The merits of the expropriating authority's general policy should not be considered relevant. For example, any evidence as to whether the public work contemplated, e.g. a new road or school, was necessary from a policy point of view, should be inadmissible. The necessity of the work should be assumed and treated as being beyond comment. The soundness and fairness of taking the particular piece of land described in the proposed expropriation plan should be the main issue at the hearing.

Morden at page 9, commenting on subsection 7(5), supported the view that "[t]he 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."

§3.2 *Decision Under the 1966 Legislation*

In the only reported decision under the predecessor section, subsection 1a(5) of *The Expropriation Procedures Act*, Moore, C.C.J. held that in reaching his decision he was not required to consider the land use requirements of the local municipality or balance the benefit or need of the expropriating authority against the prejudice to the owner of the land to be expropriated. Nor is there an onus on the expropriating authority to show that it would be impracticable or impossible to place its new facility on other land it already owns or controls: *Re Baycrest Hospital* (1968), [1969] 1 O.R. 392, 1968 CarswellOnt 309 (Ont. Co. Ct.), at page 396.

§3.3 *Court Decisions under the Present Legislation*

In *Parkins*, *supra*, §2.0, at 315 L.C.R., the High Court was called on to consider the test that should be applied by an inquiry officer in deciding whether

inquiries in general, but can only speak to their own experience. The authors' experience is that inquiry officers will on occasion recommend to approving authorities both to reduce and also to expand the scope of an acquisition in response to evidence and arguments adduced by owners at a hearing.

With respect to reducing the scope of an acquisition, reduction in scope need not necessarily be with respect to geographical extent. Sometimes the reduction in scope can relate to the nature of the interest acquired. For example, in *St. Clair Regional Conservation Authority v. Aarssen* (1983), 26 L.C.R. 289, 1983 CarswellOnt 868 (Ont. H.C.), Inquiry Officer Richard R. Walker recommended in a report dated January 22, 1982 that the proposed fee takings be reduced to easement takings and that the scope and extent of the rights granted by the easements be significantly reduced. That case involved acquisitions to facilitate a dam and floodway project. The expropriating authority sought to acquire certain properties in fee in order to facilitate the removal of buildings. The owners argued that the taking of an easement, which included the permission to remove buildings, was sufficient. The owners also argued that the authority's right to flood ought to be restricted in a number of respects over the lands to which the easement applied. Inquiry officer Walker and his recommendations were largely accepted by the approving authority, the Minister of Natural Resources.

In the case *York (Regional Municipality) v. Gill* (heard April 3 and 4, 1985), (Ont. Bd. of Inquiry), Inquiry Officer Goldkind dealt with an owner who argued that the taking of the proposed strip from her property was not "fair, sound and reasonably necessary," because it was not extensive enough. The property in question was located on a triangular piece of land between the two roadways. The taking would totally remove the screening vegetation on one side of the cottage property and leave it totally exposed to the widened thoroughfare on that side. Inquiry Officer Goldkind recommended the taking be expanded to a fee taking of the whole property, and his recommendation was accepted and applied by the approving authority. A similar result was directed by Inquiry Officer Stuart in *Ontario (Ministry of Transportation) v. Marwick* (1998), 67 L.C.R. 230, 1998 CarswellOnt 6130 (Ont. Bd. of Inquiry), in a circumstance where the proposed acquisition would leave the remainder of the property landlocked. The inquiry officer found it was fair, sound and reasonably necessary to take the whole of the property rather than only a part of it.

In *Verdiroc v. Toronto (City)*, another unreported decision of Inquiry Officer Goldkind, released in August 1998 (Ont. Bd. of Inquiry), the principles in the *Gill* case received application in a more sophisticated fact situation. In *Verdiroc*, the authority proposed to expropriate from the owners a number of small pieces of land and interests of various kinds, including permanent rights-of-way and strata fee takings, in order to accommodate a new subway station and bus loop. The property was located in a prime development area of the City of Toronto. The 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, the owners 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. Inquiry Officer Goldkind agreed with the owners' position, holding that:

> In order to develop their property, the [owners] will be forced to enter into an agreement with the [authority] on terms which may be less favourable to the [owners], and arise as a result of the limited taking by the [authority], and for which the [owners] may not be compensated under the *Expropriations Act*. This is not fair and reasonable. The [authority] should acquire all of the [owners'] property. (at 47)

In another case, where evidence was led demonstrating that, following an expropriation, decreased sight lines would compromise traffic safety, the Inquiry Officer held that the proposed taking was not fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority: *Crothers v. Ontario (Minister of Transportation)*, an unreported decision of Inquiry Officer Stuart, heard February 11, 1997. In the same decision, but dealing with a separate land holding, the inquiry officer recommended that the Ministry investigate the widening of the road through an abandoned CN right-of-way to avoid the taking of the claimant's land and possible danger to a fish habitat. Given the availability of this alternate route, the inquiry officer concluded that the Ministry's proposed taking was not fair, sound, and reasonably necessary.

On an application for judicial review, the Divisional Court refused to interfere with the decision of an inquiry officer that a proposed expropriation was fair, sound and reasonably necessary where the expropriating authority itself gave conflicting evidence as to the length of time required for a temporary easement. The court held that some consideration should be given to the practical difficulties faced by the expropriating authority when deciding what is fair, sound and reasonably necessary in the circumstances: *Marisa Construction v. Toronto (City)* (1998), 65 L.C.R. 81, 114 O.A.C. 314, 4 M.P.L.R. (3d) 267, 1998 CarswellOnt 5782 (Ont. Div. Ct.), leave to appeal to Court of Appeal refused (December 7, 1998), Doc. CA C30770, M23431, 1998 CarswellOnt 4964 (Ont. C.A.).

It is not open to a landowner in the context of a hearing of necessity to challenge the expropriating authority's objectives. In *Kowal v. Ontario (Ministry of Transportation)* (2000), 70 L.C.R. 70, 2000 CarswellOnt 6023 (Ont. Bd. of Inquiry), Inquiry Officer Freidin questioned the relevance of engineering evidence led by the claimants as to the need for a two-lane bridge where the stated objective of the expropriation was for construction of a one-lane bridge. It seems apparent that strict adherence to the principle of not questioning ob-

jectives would eliminate the genuine opportunity for a hearing if the objectives are stated too narrowly. The question for claimants' counsel then is whether the issue of narrowly stated objectives imperilling a genuine opportunity for a hearing is a matter to be raised before the inquiry officer or in another form.

In *Crozier v. Ontario (Minister of Transportation)*, an unreported decision heard December 4, 5 and 7, 2000, Inquiry Officer Freidin accepted the evidence of the owners and the submissions of counsel for the owners that evidence of alternative design and construction methods intended to implement the expropriating authority's objectives was relevant to the inquiry, particularly where those alternative design methods would reduce the scope of the land required to achieve the objectives. The relevant evidence in *Crozier* related to alternative interchange designs that would require less land and still accomplish the more broadly stated objective of establishing a controlled-access highway using separated grade intersections. Proving the usefulness of this approach, the Ministry of Transportation revised its interchange designs and subsequently acquired less land from the owners based on the inquiry officer's recommendations.

The duty of an inquiry officer is, *inter alia*, to provide the approving authority with a summary of the evidence and arguments advanced at the hearing by the parties. The failure of the Joint Board in *Marvin Hertzman Holdings Inc. v. Toronto (City)* (1998), (*sub nom. Re Yonge Street Regeneration Project*) 65 L.C.R. 180, 48 M.P.L.R. (2d) 65, 165 D.L.R. (4th) 529, 113 O.A.C. 312, 37 O.M.B.R. 129, 1998 CarswellOnt 3671, [1998] O.J. No. 3854 (Ont. Div. Ct.), additional reasons (February 2, 1999), Doc. Toronto 427/98, 1999 CarswellOnt 217 (Ont. Div. Ct.), to summarize the evidence of all 76 witnesses who appeared before it was not a ground for appeal. The Joint Board fulfilled its duty by setting out the important points of the evidence led and the submissions made on the central themes of the case. Leave to appeal to the Ontario Court of Appeal was refused (1998), 64 L.C.R. 180n, 165 D.L.R. (4th) 529n, 1998 CarswellOnt 4193 (Ont. C.A.).

Where an owner alleges a reasonable alternative exists, he or she bears the onus to lead evidence that the alternative is "preferable." In *Investex Holdings v. Peel (Municipality)* (September 14, 2005) (Inquiry Officer Freidin), application for judicial review dismissed (2006), 91 L.C.R. 227, 42 R.P.R. (4th) 282, 2006 CarswellOnt 1959 (Div. Ct.), the respondent sought to expropriate a temporary and permanent easement over the southerly portion of the applicant's property to accommodate sewage flows from approved and future development in the area. During the course of the hearing, one of the expropriating authority's engineers admitted that an alternative route for the sewage easement that would accomplish the authority's objective was "reasonable." However, the alternative required the expropriation of another owner's lands, and the owner led no evidence in support of the proposition that its alternative was "preferable." In the circumstances, Inquiry Officer Freidin accepted the authority's evidence that the proposed expropriation was fair, sound and reasonably necessary, and

ruled that the owner had failed to discharge its onus of demonstrating that another alternative was preferable.

Upon judicial review, the court rejected the owner's argument that it had been denied natural justice, noting that the inquiry officer had conducted a full hearing and that there had been a reasonable consideration of alternatives despite the fact that the applicant had chosen not to call any witnesses.

§3.5 *Joint Board*

Pursuant to the *Consolidated Hearings Act*, R.S.O. 1990, c. C.29, joint boards may be established to consider applications for environmental, planning and other approvals required for public undertakings. The approval required under this section for expropriation is expressly included by the Schedule to the Act; the delegated joint board exercises the power of an inquiry officer.

The Joint Board was constituted to hear the application by the City of Toronto for approvals under the *Expropriations Act* and the *Planning Act* in respect of the city's plan to clean up and regenerate the intersection at Yonge and Dundas: *Marvin Hertzman Holdings Inc. v. Toronto (City)* (1998), (*sub nom. Re Yonge Street Regeneration Project*), 65 L.C.R. 180 at 182, 36 O.M.B.R. 321, 48 M.P.L.R. (2d) 77, 1998 CarswellOnt 2293 (Ont. Joint Bd.), per D.L. Santo and J.R. Boxma, affirmed (1998), 65 L.C.R. 180, 48 M.P.L.R. (2d) 65, 165 D.L.R. (4th) 529, 113 O.A.C. 312, 37 O.M.B.R. 129, 1998 CarswellOnt 3671 (Ont. Div. Ct.), additional reasons (February 2, 1999), Doc. Toronto 427/98, 1999 CarswellOnt 217 (Ont. Div. Ct.), leave to appeal to C.A. refused (1998), 65 L.C.R. 180n, 1998 CarswellOnt 4193 (Ont. C.A.). The Board approved the project stating that it represented good planning and benefited the public interest since it would promote the economic and social welfare of the area and the City of Toronto.

The Board found that section 28 of the *Planning Act*, R.S.O. 1990, c. P.13, created jurisdiction for the city to acquire lands for community improvement and transfer those lands to a third party developer. The jurisdiction under section 28 was not confined to areas that were in a state of physical dilapidation. The Board refused to question the objectives of the authority and concluded that the project, being in the public interest, was fair, sound and reasonably necessary in the achievement of the objectives of the city. The Board's finding was supported by the commitment of city officials to provide full and fair compensation to owners affected.

The Board's decision was accompanied by a number of conditions: that City Council endorse the commitment to proceed with the project and plans of expropriation be filed by a specified date, that the lease between the private proponents be executed by a fixed date, and that certain planning conditions be fulfilled by a specified deadline.

Joint boards have shown some tendency toward responding to objectors' concerns by prescribing compensation rules, which arguably extend the rights

to compensation otherwise available under the *Expropriations Act*. This ought to come as no surprise as the practice of responding to owners' legitimate concerns in this way is well established in proceedings before the Ontario Energy Board in the provisions mentioned at section 2, §1.4, *supra*.

The leading example of this trend is the decision of the Joint Board in the southwestern Ontario decision where the Board issued broad, comprehensive conditions of approval and required that Ontario Hydro, among other things:

1. install narrow base towers to alleviate the concerns of farmers respecting the operation of farm equipment close to towers and further loss of agricultural land;
2. replant on an acre-for-acre basis any trees removed for its line either on the farmer's own lands, if he or she wished, or on land owned by the local municipality or local conservation authority;
3. compensate farmers for trees removed;
4. provide owners and tenants with an opportunity to meet with them to discuss concerns;
5. carry out post-construction monitoring to evaluate the effectiveness of mitigation measures;
6. arrange on-site visits to monitor project construction;
7. offer to purchase the property of a resident within 75 metres of the edge of a right-of-way for a 500-kilovolt or 230-kilovolt transmission line, or relocate at its own expense the residence;
8. purchase or relocate a residence within 100 metres of any installation on the transformer station or installation on any new switching area.

In part, this tendency must result from the fact that the scope of the inquiry that the Joint Board is permitted to entertain allows it to consider a range of impacts on an owner's enjoyment that is beyond that permitted by an inquiry officer, or the Ontario Municipal Board. Also, this tendency results from the differing jurisdiction of the Joint Board, which has the power to impose conditions of approval not granted to the inquiry officer.

§4.0 Other Jurisdictions

Alberta has adopted the identical language found in the Ontario Act, whether the taking "is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority": subsection 6(2). The procedure before the inquiry officer and the report of the inquiry officer are provided for in sections 15 and 16. In British Columbia, the statute provides that the inquiry officer must determine whether "the proposed expropriation of the land is necessary to achieve the objectives of the expropriating authority with respect to the proposed project or work, or whether those objectives could be better

achieved by (a) an alternative site, or (b) varying the amount of land to be taken or the nature of the interest in the land to be taken": subsection 14(1). Thus, British Columbia does not include a consideration of fairness in its assessment of the necessity of the taking. Note also, that the federal statute does not include a statutory standard by which the expropriation is evaluated at the inquiry. In Manitoba, the test is whether the intended expropriation "is fair and reasonably necessary for the achievement of the objectives of the expropriating authority": Schedule A, subsection 6(2). The procedure for the appointment of an inquiry officer, the duties of the inquiry officer and the requirement that the inquiry officer report his or her finding are found generally in sections 4 to 8, inclusive, of Schedule A. In New Brunswick, the statutory language is broader than in the other three provinces. It applies the language: "reasonably necessary to accomplish the objectives of the expropriating authority or applicant," but goes on to require a balancing of the objectives of the expropriating authority or applicant against that of the owner, and where the application for expropriation is made by an entity that is not an expropriating authority, it must be "consistent with the public interest": subsection 17(2). Procedures governing the hearing before the inquiry officer are scattered through sections 10 to 17, inclusive.

POWERS AND DUTIES OF APPROVING AUTHORITY

8. (1) The approving authority shall consider the report of the inquiry officer and shall approve or not approve the proposed expropriation or approve the proposed expropriation with such modifications as the approving authority considers proper, but an approval with modifications shall not affect the lands of a registered owner who is not or has not been made a party to the hearing.

REASONS, SERVICE OF DECISION

(2) The approving authority shall give written reasons for its decision and shall cause the decision and reasons to be served on all the parties and on the inquiry officer within 90 days after the date on which the approving authority receives the report of the inquiry officer. S.O. 2002, c. 18, s. 1(1), Sched. A, s. 9(3).

CERTIFICATE

(3) The approving authority shall certify its approval in the prescribed form.

§0.0 History

Section 8 was amended by the provincial government through Bill 179, the *Government Efficiency Act, 2002*, S.O. 2002, c. 18. In particular, subsection 8(2) was revised by S.O. 2002, c. 18, s. 1(1), Sched. A, s. 9(3), to require that the approving authority give written reasons for its decision to be served not only on the parties, but also on the inquiry officer, within 90 days after the date

on which the approving authority receives the report of the inquiry officer. This amendment was intended to make subsection 8(2) consistent with the section 7 amendments.

Subsection 8(2) formerly read as follows:

REASONS

(2) The approving authority shall give written reasons for its decision and shall cause its decision and the reasons therefor to be served upon all the parties within ninety days after the date upon which the report of the inquiry officer is received by the approving authority.

§1.0 Powers and Duties of the Approving Authority

§1.1 *The Nature of the Function*

An approving authority which gives a decision under section 8 is discharging an administrative function and not a judicial or quasi-judicial function. As such the authority is answerable to the electorate but its action or its decision is not reviewable in proceedings by way of *certiorari*: *Zaichuk v. Ontario (Water Resources Commission)* (1974), 5 L.C.R. 151, 1972 CarswellOnt 1345 (C.A.). See also *Walters*, *infra*, §1.2.

§1.2 *Widest Discretionary Power*

The approving authority is invested with the widest discretionary power to determine, subject only to considering the inquiry officer's report, whether an expropriation should proceed. Thus, where an inquiry officer reported under subsection 7(6) that a proposed expropriation was neither fair nor sound and that on the merits it should not be approved, and the approving authority nevertheless approved the expropriation, an action to annul the expropriation was dismissed. The Supreme Court of Canada refused to read into the statute any obligation to consider the expropriation at a public meeting or, in the absence of good faith, to impose any duty other than to "consider" the inquiry officer's report, which the authority did: *Walters v. Essex (County) Board of Education* (1974), 5 L.C.R. 144, [1974] S.C.R. 481, 38 D.L.R. (3d) 693, 1973 CarswellOnt 233, 1973 CarswellOnt 233 F. See also *Buttery Construction Ltd. v. Windsor (City)* (1978), 17 L.C.R. 33, 1978 CarswellOnt 615 (Div. Ct.), at page 44, where the court was not persuaded that the approving authority was guilty of bad faith or impropriety simply because the approval was contrary to the inquiry officer's report, no sufficient reason was given by the authority for rejecting the report, and the expropriation was not for a public purpose: "Whether the . . . policy and an expropriation is wise or unwise is not for the Court to appraise."