

Pre-Expropriation Site Access & Contamination Complications



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2

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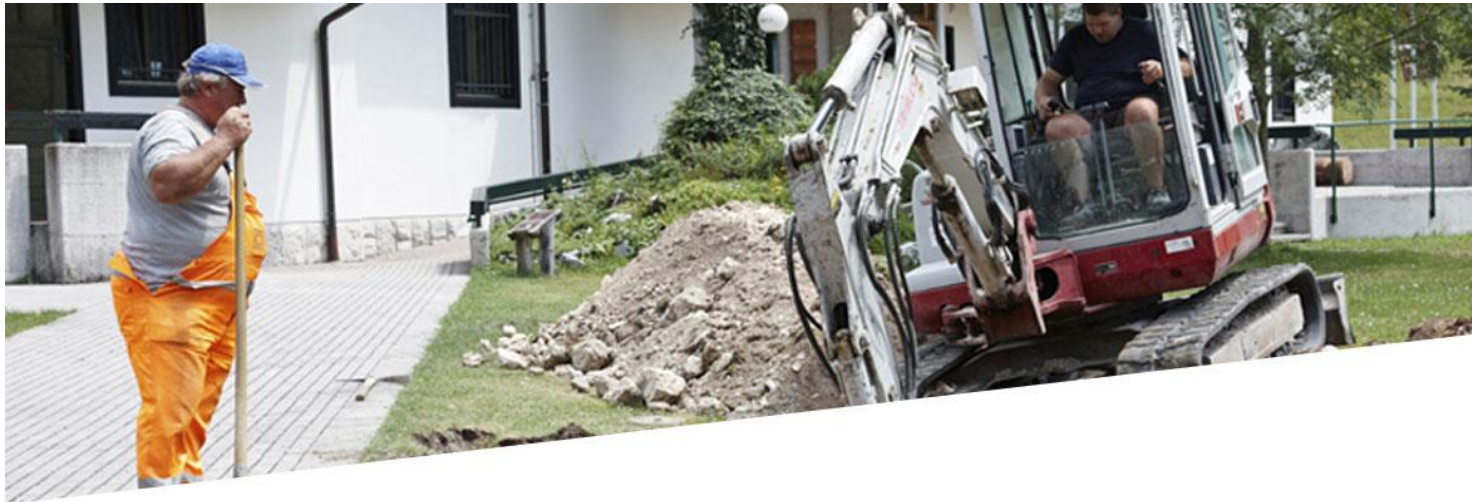
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Part I

Site Access: Pre-Expropriation

3



Site Access: Pre-Expropriation

4

Projects will often benefit from gaining early access to potential “target” properties in order to assess property specific issues such as:

- **Accurate legal boundaries;**
- **Geotechnical stability and soil composition;**
- **Presence of underground services;**

Site Access: Pre-Expropriation

5

(cont.)

- **Presence of archaeologically significant artifacts; and**
- **Environmental condition, including presence of any contaminants, species at risk, or other habitat issues.**

The negotiation of access is typically the authority's first contact with the owner, and is a good opportunity to build a relationship.

Expropriation Act: Section 9(1)

6

Entry for Limited Purposes:

9 (1) In addition to any other powers under an enactment, a person authorized by the expropriating authority may, before or after serving an order under section 5(4) or an expropriation notice under section 6(1)(a),

a) During daylight hours, and

b) After making reasonable efforts to notify the owner or occupier of the land,

enter any land for the purposes of

c) Making surveys, inspections, examinations, soil tests or doing other things that are necessary to determine

i. The location of proposed works, or

ii. The description of the land that the expropriating authority intends to expropriate, and

d) Completing an appraisal of the value of the land or any interest in it.

Expropriation Act: Section 9(2) to (4)

7

Entry for Limited Purposes:

9(2) the person authorized may, on entering the land, cut down any trees or brush that obstructions the running of survey lines.

9(3) the expropriating authority must pay compensation for damages that it causes by the exercise of its rights under this section.

9(4) When the land entered on is not expropriated, an action does not lie against the expropriating authority for damage caused by the exercise of a right of entry under this section unless notice in writing, signed by the claimant, is given to the expropriating authority who exercised the right of entry, within 6 months after the entry occurred.

Gemex Developments Corp. v. Coquitlam (City)

2010 BCSC 1616

8

- **The landowner sought an injunction to prevent Coquitlam from expropriating its lands, and sought a declaration limiting Coquitlam’s right to enter the Gemex property for the purpose of conducting surveys.**
- **Court found Coquitlam was an “expropriating authority” as contemplated by section 9(1) of the *Expropriation Act*, meaning it had the statutory right to enter to make proper surveys.**

Gemex Developments Corp. v. Coquitlam (City)

2010 BCSC 1616

9

- **In dismissing the injunction application, the Court also found that Coquitlam also had the right to enter the Gemex lands pursuant to section 32 of the Community Charter, SBC 2003, c. 26.**

Community Charter, Section 32(1)

10

Authority to enter on and use property

32(1) Without limiting section 31 (expropriation power), a municipality may, for the purposes of one or more services of the municipality,

- (a) Enter on, break up, alter, take or enter into possess of and use real property, and**
- (b) Construct works through, under or over real property.**

Community Charter, Section 33(2)

11

33(2) If a municipality,

- (a) exercises a power to enter on...any property, or injuriously affects property by the exercise of its power, and**
 - (b) Exercises a power referred to in paragraph (a) that does not constitute an expropriation within the meaning of the *Expropriation Act*,**
- compensation is payable for any loss or damage caused by the exercise of its power.**

Community Charter, Section 33(3)

12

- 33(3) For the purposes of subsection (2), compensation must be paid as soon as reasonably possible in an amount set**
- (a) by agreement between the person claiming compensation and the municipality, and**
 - (b) if no agreement is reached, by the Supreme Court.**

Community Charter, Section 16

13

Authority to enter on or into property

- (1) This section applies in relation to an authority under this or another Act for a municipality to enter on property.**
- (2) The authority may be exercised by officers or employees of the municipality or by other persons authorized by the council.**

Community Charter, Section 16 (cont.)

- (3) Subject to this section, the authority includes authority to enter on property, and to enter into property, without the consent of the owner or occupier.**
- (4) Except in the case of an emergency, a person**
 - (a) may only exercise the authority at reasonable times and in a reasonable manner, and**
 - (b) must take reasonable steps to advise the owner or occupier before entering the property.**

Community Charter, Section 16 (cont.)

- (5) The authority may only be used to enter into a place that is occupied as a private dwelling if any of the following applies:**
- (a) the occupier consents;**
 - (b) the municipality has given the occupier at least 24 hours' written notice of the entry and the reason for it;**
 - (c) the entry is made under the authority of a warrant under this or another Act;**
 - (d) the person exercising the authority has reasonable grounds for believing that failure to enter may result in a significant risk to the health or safety of the occupier or other persons;**
 - (e) the entry is for a purpose referred to in subsection 6(a) in relation to regulations, prohibitions or requirements applicable to the place that is being entered.**

Community Charter, Section 16 (cont.)

16

- (6) Without limiting the matters to which this section applies, a municipality may enter on property for any of the following purposes:**
- (a) to inspect and determine whether all regulations, prohibitions and requirements are being met in relation to any matter for which the council, a municipal officer or employee or a person authorized by the council has exercised authority under this or another Act to regulate, prohibit and impose requirements...;**

Land Surveyors Act, RSBC 1996, c. 248

17

Land Surveyors Entitled to Enter Land:

59.1(1) A practicing land surveyor engaged in the practice of land surveying, or a person performing, for a practicing land surveyor, duties in relation to the practice of land surveying, must be permitted to pass over any land without hindrance from any person.

Right of Entry Agreements

18

- **Authorities typically seek access only with landowner consent.**
- **Where the landowner or their legal counsel are unfamiliar with section 9 of the Expropriation Act, the landowner may make unreasonable demands of the authority.**

Right of Entry Agreements

19

- **While authorities are often willing to provide limited indemnities, provide generous pre-access notice periods, and make special accommodations in order to please the landowner, authorities must set reasonable limits on what they will do to achieve consent.**

Right of Entry Agreements

20

Authorities will attempt to accommodate landowners, but will draw the line upon demands for, for example:

- a) excessive compensation where access is a (free) statutory entitlement;**
- b) Changes to the authority's insurance policies which would require the naming the landowner as co-insured;**

Right of Entry Agreements

21

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- c) Onerous indemnity agreements in favour of the landowner; or**
- d) Delays in access which would compromise the authority's project timing.**

Options Where Landowner Refuses Entry

22

- **Deliver written notice that the authority will be accessing the property notwithstanding the landowner's objections, and cite the statutory provision which entitles the authority to do so.**
- **Deliver that notice by registered mail or by courier to ensure the authority can provide proof of notice if obstructed.**
- **Ensure site access only follows proper delivery, and that access occurs on the day(s) and time(s) set out in the notice letter.**

Options Where Landowner Refuses Entry

23

- **If the landowner's property requires preparation before entry, advise the landowner to prepare accordingly. For example, have them secure any dogs or dangerous animals in an enclosure and away from the authority's work area.**
- **Advise the on-site staff that the landowner has been uncooperative and ensure that they are prepared to react appropriately to resistance, hostility, or even dangerous situations.**

Options Where Landowner Refuses Entry

24



Options Where Landowner Refuses Entry

25

- **Ensure on-site staff have copies of the statutory provisions which authorize access, the notice letter delivered to the landowner, and a copy of the proof of delivery.**
- **Ensure on-site staff are aware that their personal safety is paramount, and that any perceived risk of violence or even serious confrontation with the landowner will justify abandoning the target property and meeting with management for the authority.**

Options Where Landowner Refuses Entry

26

- **Ensure on-site staff take contemporaneous notes of any serious confrontation, threats or actual violence from the landowner. These details will allow the authority's lawyers to craft accurate affidavits to support court orders for entry, should such orders become necessary.**
- **It is unlikely that the police will intervene to enforce an authority's statutory right to access land in the face of landowner opposition.**

Options Where Landowner Refuses Entry

27

- **A court order may become necessary, and legal counsel for the authority should be consulted to determine the best approach for securing that entry order.**
- **The authority may file a Petition in the Supreme Court of British Columbia, which Petition would be supported by affidavit evidence describing the history of the authority's interactions with the landowner and detail any threats or hostile actions on the part of the landowner [Rule 16-1 of the *Rules of Court*].**

Options Where Landowner Refuses Entry

28

- **The landowner would be personally served with the Petition and all affidavits, and would then typically have 21 days to file a Response to Petition.**
- **In the absence of a Response to Petition, the authority may proceed with a Petition hearing without the landowner being represented and without the landowner filing any responding argument opposing the order.**

Options Where Landowner Refuses Entry

- **The authority may also seek “short leave” of the court, in order to shorten the timeline for the landowner delivering a Response to Petition.**
- **The order sought should include a confirmation of the authority’s statutory right of entry, and any additional declaratory relief the authority may think necessary to complete its on-site work.**
- **The order may include an “enforcement” provision (see also Dineley & McNaughton presentation from 27 October 2017 re *Civil Disobedience*).**

Options Where Landowner Refuses Entry

30

- **If the landowner or their lawyer are in court for the issuance of the Entry Order, they should be asked to sign the entry order in open court.**
- **If the landowner has not participated in the court process, the court should be asked to include in the order language which would make service of the Entry Order easier on the authority. For example, the Entry Order could include a provision which states: “service of this order, once entered by the**

Options Where Landowner Refuses Entry

31

Supreme Court registry, will be deemed effective upon delivery to the subject property by courier or registered mail”.

- **A provision like this will make it impossible for the landowner to obstruct ultimate access by evading service of the Entry Order.**
- **When on-site staff return to the target property for the purpose of conducting testing or study, they should have a copy of the Entry Order on hand along with proof of service of that Entry Order.**

Options Where Landowner Refuses Entry

32

- **Again, on-site staff should be advised that their safety is paramount, and that the landowner may remain hostile or aggressive. The on-site staff should have instructions to stand-down if they experience any resistance to entry or threats of violence.**
- **If on-site staff are refused entry, despite the landowner having a copy of the Entry Order, the on-site staff should abandon the target property and make contemporaneous notes of the confrontation with the landowner.**

Options Where Landowner Refuses Entry

- **The notes of the confrontation may be used by legal counsel to the authority in an application for an order for contempt of Court.**
- **The application for a contempt order would be typically advance under Rule 8-1 of the Rules of Court, being an interlocutory application within the pre-existing Petition proceedings.**

Options Where Landowner Refuses Entry

- **The application for the contempt order would, again, have to be served on the “contemnor” (the landowner acting in contempt of court).**
- **Fresh affidavit evidence would be submitted to the court which would describe the service of the Entry Order on the landowner, and would then describe the landowner’s ongoing resistance to the authority gaining access to their property.**

Options Where Landowner Refuses Entry

- **The Supreme Court would then have the option of having the landowner committed (incarcerated), fined, or both [Rule 22-8(1) of the *Rules of Court*].**
- **Courts do not like making contempt orders, and will often attempt to achieve compliance by speaking firmly to the contemnor (should the contemnor actually appear in court for the hearing).**

Options Where Landowner Refuses Entry

36

- **Unrepresented litigants often enjoy considerable leniency from our courts, and can create frustrating delays.**
- **The authority should be seeking payment of costs from the obstructing landowner for each step, in order to create additional leverage for compliance.**
- **The Contempt Order should be drafted with enforcement language to prompt police assistance.**

Options Where Landowner Refuses Entry

37

- **Hopefully the Contempt Order will cause the landowner to comply with the original Entry Order, but where it does not, the authority's lawyers should be in contact with the local police in order to achieve access with police oversight.**
- **Prior to the issuance of an Contempt Order with enforcement provisions, the police may not be willing to attend at the target property to assist in securing access for the authority.**

Part II

Contaminated Sites: Impact on Negotiation

38



Testing is Done – Site is Contaminated

39

- Where an authority determines that the target property is contaminated but that the expropriation must proceed, a decision must be made as to how statutory compensation will be impacted.
- The valuation of contaminated land is a complex process, and there is no single correct methodology (see Stuart Carmichael & Dr. Harm Gross' presentation from 2015 titled "*Valuation of Contaminated Sites*" – BCEA website).

Contamination- Impact on Market Value

40

- **One common approach to valuation of contaminated land is to secure an estimate of remedial costs, and to deduct those costs from the appraised value of the interests expropriated.**
- **This approach is not always the most accurate way to determine fair market value for the Advance Payment as the market will not always use a direct deduction of remedial costs to determine value.**

Contamination- Impact on Market Value

41

- **As an example, a contaminated industrial site may have great economic potential without any need to remediate existing contamination.**
- **If the likely “market” for an industrial property is other industrial users, it might be that the fair market value would be determined without any significant adjustment for the contamination.**

Contamination- Impact on Market Value

42

- **Another approach to valuation is to have the authority's appraiser factor in all known information relating to the contamination, perhaps by reviewing the report of another consultant, and attempt to find a valuation methodology which reflects the actual condition of the property. This may be by finding similarly contaminated sites to use as comparables or by finding other evidence as to value.**

Contamination - Impact on Market Value

43

- This approach is complex for the appraiser, but more closely follows the compensation scheme in the Act.
- The appraiser will need input as to, among other things, the environmental condition of the property, any risk of liability to a market purchaser who would be a “responsible person” under the Environmental Management Act, and any statutory or regulatory duties to remediate.

Victory Motors (Abbotsford) Ltd. v. Assessor of Area

No. 15, Fraser Valley, 2017 BCCA 295

44

- **Owner of contaminated commercial site challenged the BC Assessment valuation of the property, arguing that the contaminated status of the land made it worthless.**
- **The highest and best use of the subject was unattainable due to contamination, but BC Assessment fought for an appraisal methodology based on the income generated on site.**

Victory Motors (Abbotsford) Ltd. v. Assessor of Area

No. 15, Fraser Valley, 2017 BCCA 295

45

- **Mr. Justice Frankel for the unanimous BCCA said, regarding the owner’s argument that there was no market value due to the contamination and that the tax assessment should be based on a value of nil:**
“I do not agree. That property has value to its current owner can be a sufficient basis on which to determine its value.”
- **The Expropriation Act once considered value to owner in determining compensation, but today the Act looks at “market value” as being different than value to owner.**

Victory Motors (Abbotsford) Ltd. v. Assessor of Area

No. 15, Fraser Valley, 2017 BCCA 295

46

- Consider whether *Victory Motors* and the assessment precedents cited therein use a “value to owner” approach which conflicts with the compensation mechanism in the *Expropriation Act*.
- Until *Victory Motors* is addressed directly in the expropriation context, the case will be used in expropriation negotiations as leverage for authorities.
- Note that the BCCA also said “for the Board (BC Assessment) to have taken into account potential liabilities under the *Environmental Management Act*, would have required it to engage in impermissible speculation.”

Considerations for the Owner

47

- To ensure that the Owner is not under-compensated, the Owner should (among other things), ensure that:
 - a) Any remediation estimates are based on sufficient analysis, and are vetted by an independent professional;
 - b) The remedial plan is appropriate given the claimed highest and best use, and not excessive by design. For example, no industrial site needs to be remediated to drinking water standards if it will continue to be heavy industrial; and
 - c) There is no unnecessary off-site work included in the estimates which are not required at law.

Considerations for the Authority

48

- To ensure that the authority does not over-compensate the owner, the authority should consider (among other things), whether:
 - a) There are any statutory obligations to remediate the subject property, and the details of the relevant standard;
 - b) There is risks to the authority caused by any offsite migration;
 - c) There is actual cost to the authority from attending to the remediation (incremental increase in project cost); and
 - d) The highest and best use is impacted by the contamination, and whether remediation alters the analysis.

THANK YOU

49

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