

Business Loss Claims: Key Advocacy Considerations



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Part 1

Business Loss Claims: Statutory Basis

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Expropriation Act: Section 20(1)

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Advance Payment:

20 (1) Within 30 days after

- a) an order is filed under section 5(4)(b),**
- b) the approving authority complies with section 18(2) or (3), or**
- c) an agreement is made under section 3(1),**

the expropriating authority must

- d) pay to the owner the amount the expropriating authority estimates is or will be payable to that owner as compensation, other than for business loss referred to in section 34(3),**

Expropriation Act: Section 30(1)

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Right to Compensation:

30 (1) Every owner of land that is expropriated is entitled to compensation, to be determined in accordance with this Act.

Expropriation Act: Section 31(1)

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Basic Formula:

31 (1) The court must award as compensation to an owner the market value of the owner's estate or interest in the expropriated land plus reasonable damages for disturbance...

Expropriation Act: “Owner”

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“**owner**”, in relation to land, means

- (a) a person who has an estate, interest, right or title in or to the land including a person who holds a subsisting judgment or builder’s lien,
- (b) a committee under the *Patients Property Act*,
- (b.1) an attorney under Part 2 of the *Power of Attorney Act*,
- (b.2) a guardian, executor, administrator or trustee in whom land is vested, or
- (c) a person who is in legal possession or occupation of land, other than a person who leases residential premises under an agreement that has a term of less than one year;

Expropriation Act: Section 34(1)

Disturbance Damages Generally:

34(1) An owner whose land is expropriated is entitled to disturbance damages consisting of the following:

- a) Reasonable costs, expenses and financial losses that are directly attributable to the disturbance caused to the owner by the expropriation;**
- b) Reasonable costs of relocating on other land, including reasonable moving, legal and survey costs that are necessarily incurred in acquiring a similar interest or estate in the other land.**

Expropriation Act: Section 34(3)

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Disturbance Damages Generally:

34(3) If an owner whose land is expropriated carried on a business on that land at the date of expropriation and, after the date of expropriation, relocates the business to and operates it from other land, reasonable business losses directly attributable to the expropriation must not, unless that person and the expropriating authority otherwise agree, be determined until the earlier of,

- a) 6 months after the owner has operated the business from the other land, and**
- b) One year after the date of the expropriation.**

If no taking, do you have rights?

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Gautam v. Canada Line Rapid Transit Inc., 2018
BCSC 1515

- **Mr. Justice Grauer confirmed that Cambie Street business owners did not have the right to claim for business losses where they were not expropriated, but instead awarded compensation for the temporary loss in value to the leasehold interests of the representative plaintiffs.**

If no taking, do you have rights?

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Antrim Truck Center Ltd. v. Ontario (Transportation), 2013 SCC 13

- **Confirmed that an owner who lost no interest in land could recover both for pure injurious affection (“injurious affection, no land taken”) and for business losses resulting from the project.**

Expropriation Act: Section 33

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Exclusions from Market Value:

33 In determining the market value of land, account must not be taken of

(b) An increase in the value of the land resulting from a use that, at the date of expropriation, was capable of being restrained by a court.

Al's Auto Wrecking Ltd. v. City of Surrey

February 22 2006, E.C.B. No. 40/97/265

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[156] Having reviewed the authorities, the board is of the view that, as a general rule, loss of profits and similar disturbance damages such as loss of goodwill that are based on unlawful use are not compensable, except in the rare situations where estoppel applies or where it would otherwise be unconscionable to deny recovery. **The board sees force in the respondent's submission that it would be inconsistent, to say the least, to deny a claimant any increase in market value as a result of unlawful use, but to permit recovery of loss of profits based on such use.** There are public policy considerations for denying such recovery. While there is no specific provision in the Act with respect to disturbance damages, as is provided for market value in s. 33(d), s. 34 states that an owner is entitled to disturbance damages consisting of "reasonable" costs, expenses and financial losses...The board concludes that the claimant is not entitled to recover loss of profits and loss of goodwill based on unlawful use as such financial losses cannot be considered "reasonable" on the facts of this case.

Part 2

The Owner's Perspective

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Mitigating Impact on Business: Considerations for the Owner

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- **Will the project directly impact your land?**
- **If yes, will it be a partial-taking or a full-taking?**
- **If no taking, will you be in the position of the Cambie Street businesses with limited claim rights?**
- **Should you consider relocating, and do you have a reasonable basis for claiming relocation costs?**

Mitigating Impact on Business: Considerations for the Owner

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- **Are there physical or strategic changes your business can make to mitigate the project's impact?**
- **Can you help to mitigate the impact by:**
 - **Increasing your advertising efforts and budget;**
 - **Extending or changing your business hours;**
 - **Retaining additional staff during the interruption; or**
 - **Implementing physical changes to allow the business to continue operating.**

Quantifying Loss: Owner's Perspective

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Hire a Chartered Business Valuator early in the process, to ensure that you are capturing the correct data necessary to track changes.

That expert will want the data necessary to track:

- **Changes in historical performance pre/post taking;**
- **Transferred sales to other locations, if any;**
- **General regional trends for your company or your industry; and**
- **Data relating to other possible causes for changes in performance.**

Quantifying Loss: Owner's Perspective

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- **While owner's will be quick to attribute all negative business trends to an expropriation and the related project, the authority will be looking closely at causation. For example:**
 - **Has the business lost key management during the loss period;**
 - **Have unrelated projects also impacted traffic and customer flows (particularly important in the context of retail);**
 - **Have online sales or other business trends fundamentally changed the owner's industry;**
 - **Was the business in decline prior to the taking, for unrelated reasons;**
 - **If the business doesn't recover post-project, why not?**

Measure of Lost Profits: Retail Sales

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- **A decrease in sales or a drop in gross income is not the correct measure of business loss**
- **In the retail context, for example, the experts will be studying a multi-variable data set to determine what the claim for lost profits might be.**
- **For example, using “contribution margin” as a measure requires the expert to determine the revenue less direct operating expense which would be expected to vary in a direct relationship with change in revenue.**
- **This is not an exact science.**

Part 3

An Authority's Perspective

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What are business losses?

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PRE-REFORM:

- 1. Cost of finding equally suitable business premises;**
- 2. Cost of moving and re-establishing the business;**
- 3. An amount to cover loss of business and increased costs during transitional period; and**
- 4. An amount to offset depreciation in the profitability of the business resulting from the change of location.**

R. Gauthier, [1968] 1 ex. C.R. 75

What are business losses?

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B.C. Law Reform Commission's 1971 Report On Expropriation (pp. 151 – 152):

“In the case of business loss, the only method of properly determining the extent of the loss may be on the basis of the experience of the relocated business

...

We do not believe that the owner of a business should be forced to relocate in order to recover business loss if it is not feasible for him to do so. Where it is not feasible for him to relocate, he should be compensated for the loss of his business.

...

The compensation for the loss of a business would not be the value of his whole business – it should be for the loss suffered... Intangible assets, generally goodwill, cannot be liquidated, and compensation should be payable for that loss.

What are business losses?

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RELOCATION VS. TERMINATION

TEMPORARY VS. PERMANENT



What are business losses?

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- **What happens in the context of a partial taking?**
- **Reconfiguration instead of relocation?**
- **If there is no relocation and no reconfiguration, what are the impacts on a business?**

What are business losses?

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Where are we today?

- **Although several expropriation cases have awarded compensation for “business losses”, none has defined the phrase.**
 - **see para. 66 of *Shuswap Lake Estates Ltd. v. B.C. (Transportation and infrastructure)*, 2016 BCSC 1779 (Canlii).**

What are business losses?

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- **Business losses are a type of disturbance damage. As with any other type of disturbance damage, an owner must prove that:**
 - **The business loss is causally related to the expropriation;**
 - **The business loss is not speculative or remote; and**
 - **The business loss could not otherwise have been reasonably avoided (i.e. mitigated).**
- **These factors apply regardless of whether the taking is total or partial.**

Criteria

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- 1. CAUSATION**
- 2. RELOCATION**
- 3. GOODWILL**
- 4. SECURITY OF TENURE**
- 5. DOUBLE COMPENSATION**
- 6. MITIGATION**

Causation

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- Often taken for granted, but must be proven.
- see *Shuswap Lake Estates Ltd. v. British Columbia (Transportation and Infrastructure)*, 2016 BCSC 1779 (Canlii), paras. 83 - 100
- The owner has onus of proof and must:
 1. Identify the alleged business loss;
 2. Quantify that loss; and
 3. Casually relate that loss to the expropriation.

Causation

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Things to consider:

- Nature of the business
 - (i.e. mom and pop shop vs. large-scale, multinational retail)
- The state of the particular industry
- Macro and micro economics
- Competition (including impact of online sales)
- Changes in traffic patterns

Relocation Costs vs. Goodwill

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- My view of section 34...
- If a business is impacted by a taking and/or related works, that business should relocate to avoid losses. The business will be compensated for its relocation and other related costs.
- If a business must relocate, but cannot, it is entitled to its reasonable business losses in excess of the value of its goodwill.

Relocation Costs vs. Goodwill

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- **The question is as follows: in the absence of an anticipated indemnity in the form of compensation, would a reasonably prudent business owner continue to incur losses in excess of the value of his or her business in order to save it?**
- **I say “no”.**
- **The reasonableness of a claim of business losses should therefore be weighed against**
 - 1) **the cost of relocating, and**
 - 2) **the value of the goodwill of the business.**

Security of Tenure

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- **Often times, a business owner is not the fee simple owner of the land on which it operates.**
- **A business' entitlement to disturbance damages, including business losses, is directly related to the security of its tenure to expropriated land.**
- **A lessee, for example, is not equally entitled to the quantum of business losses that a fee simple owner would be. A lessee's entitlement to damages is qualified by its specific interest in the land (see section 39 of the Act).**
- **For example, the lease term and prospects of renewals inform an business' entitlement to losses.**
- **Note: a lessee's claim for business losses is often at odd's with a fee simple owner's claim for compensation based on a higher use.**

Double Compensation

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- **Cornerstone of the *Expropriation Act***
- **Must ensure that business loss – in terms of loss of profit – is not paid in addition to the corresponding loss in value of land owing to that reduction in profit.**
- **In theory, the profitability of land is already reflected in its market value.**
- **Best illustrated by the income approach to valuing land in the context of a partial taking.**
- **Where a business leases an expropriated site, need to ensure that the reduction in value of the land, and therefore leasehold interest, is factored into a claim for loss of profit.**

Mitigating Impact on Business: Considerations for the Authority

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In planning a significant project, an authority should consider the following:

- **Whether a taking is required;**
- **The closure of accesses;**
- **Changes in traffic patterns, both vehicular and pedestrian;**
- **Acquiring baseline data;**
- **The highest and best use of the lands.**

Experts

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Other experts who may be engaged:

- **Retail Experts;**
- **Economists;**
- **Demographers;**
- **Traffic Engineers;**
- **Other...**



THANK YOU!

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