

## **FROM THE INSIDE OUT:**

# **INSIGHTS ON PROPERTY ACQUISITION BY THE MINISTRY OF TRANSPORTATION**

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Having participated in the process of acquiring land for Ministry projects for more years than I care to admit, I really do not know where to start. I guess with my optimistic expectations of what I hope to accomplish in the brief time I have available. Primarily, I would like to provide a brief overview, and in the time allotted it will have to be brief, of how the Ministry looks at acquisitions and why it does what it does. Some of you will know just what I am talking about, but others have not worked within the Ministry or not lately, and I thought this a good opportunity to talk a little about how the organization functions, how it is organized, what the Ministry's goals are in acquisition, the Ministry's record, some of the constraints on what we can do, the Ministry's attitude to expropriation and how it accomplishes this.

I would like to touch upon changes to the acts that govern how the Ministry does business and when I expect them to come into force.

Finally, if I have not run out of time and the old hook is not out to drag me off stage, I wish to touch on contracting and what the Ministry is looking for when it evaluates responses to Requests For Proposals including what the common errors are that result in either outright rejection or lower marks.

### **History**

When I started working for the Ministry, the Highway Act contained one of the most powerful expropriation powers in North America. It simply stated that the Minister could declare a piece of land to be a Public Highway and it was. Just sitting at his desk. That declaration was actually in the form of a draft notice to be published in the legal newspaper for BC, the BC Gazette, and the date of creation of the highway was taken to be either the date the Minister signed the notice or the date of publication of the gazette. It seemed to be both ways. It took only 3 days to acquire the land under that regime.

The process was the same for the notice whether the property was consensually acquired or expropriated. There was no notice sent to the owner, no advance payment. The owner usually got a letter advising that this was to happen, and a letter afterward with the

payment that the Ministry thought appropriate. However, expropriation happened very seldom and without much fanfare.

These were also the days of the use of the notorious Resumption clause from the original Crown Grant (can resume 5% of an owners land for public uses such as road), which also resulted in a notice in the BC Gazette.

With the advent of the new Expropriation Act on Dec 24, 1987, the way the Ministry did business changed. Not overnight, but over the course of a couple of years, the changes from pre Expropriation Act days was dramatic and evolved to the way the Ministry does business today when everything is predicated on what the Expropriation Act provides for and the precedents established by the Expropriation Compensation Board and various appeal decisions.

## **Organization**

The Ministry is organized into a headquarters branch and three regional offices. Where the Ministry was at one time staffed to provide most of its' own acquisition staff, did most of the initial negotiation appraisals in-house, and only contracted when projects were very large or there was contention on the value being offered, it is now staffed primarily to manage the process and use private sector contractors to accomplish the 'doing'.

This has resulted in the need to redefine the role of the Ministry staff and refocus the thinking from how 'to do' to 'how to manage' and get the 'rules' the Ministry works under to the contracted resources.

To help accomplish this, we are presently putting together a layered standards and procedures manual that hopefully will be on the Ministry's internet web site by the end of this fiscal year or early in the next fiscal year.

We are also employing our former Supervisors as Coordinators, who the contracted staff report to, and they seek to provide advice and assistance during the process of acquisition.

Another way we are seeking to accomplish education of contracted resources is encouraging partnerships and back and forth dialogue between the industry and the Ministry. This is a relatively new idea and the Ministry is pursuing avenues of how to most effectively reach out to industry to initiate and develop the vehicle for constructive and effective dialogue. Some of you will be contacted in the not too distant future with an invitation to participate and I look forward to some interesting discussions.

But to get back to the organization, the Regional offices are the prime acquisition forces and they are almost islands unto themselves in the sense that the direction of what to acquire and when it is needed is driven Regionally or by project and the actual reporting relationship is thru the Regional Director. Funding is provided Regionally or by project.

The role of the Headquarters office that I work in is primarily standards, procedures, consistency, expropriation documentation, special projects, and high level involvement in some of the larger projects.

## **Ministry's Goals**

In acquisition, the Ministry has two goals that are not always in agreement with each other. One of the goals is to acquire the necessary property to enable construction activities to take place, and sometimes the schedule that is imposed to meet regulatory restrictions such as fisheries windows does not leave the time the acquisition staff would like for negotiations to take place.

This puts pressure on the acquisition resources to meet the goal of construction, or 'black smoke' as it is referred to, euphemistically referring to the black diesel smoke from construction machinery, while meeting the other goal of the Ministry of quality acquisitions with sufficient time for the owner to be fully conversant with the acquisition, offer, get their own reports, consult legal advice, and meet the final goal of the Ministry, that of a consensual acquisition.

In meeting these goals, there is often opportunity to become 'creative' and while that does have its' place in some acquisitions, there are regulatory and legislative constraints associated with being creative and I will discuss these shortly.

One of the biggest challenges facing the agents acquiring land for the Ministry, particularly on projects where the Ministry is using alternative delivery models, is overcoming the project engineer's and design engineer's pre-conceived notion that "I bought my house in 2 days, how come you cannot buy a partial in less than that?" This translates into schedules providing sufficient time to acquire prior to construction and educating the project managers and schedulers that property is important and needs sufficient time to acquire.

This is an ongoing struggle.

## **Ministry Record**

The overall record of the Ministry in acquisitions is, in my completely unbiased opinion, one of the best for an organization that undertakes so many projects.

I like to compare the Ministry with the only other jurisdiction for which I have any statistical data and that is Caltrans (State of California department of Transportation). Caltrans publishes a booklet that it provides to owners whose property will be required for a project and it states an expropriation rate of 20%.

For the last major project for which there is any data of that kind, which is the Vancouver Island Highway Project, the final expropriation rate is in the range of 16 to 18% .

For most of the Regional projects, being relatively small ones, the rate is even better, approaching the 5 to 10% range, when looking at overall acquisitions in a region over a year. Last year was even better. It remains to be seen what this year looks like.

Of the files acquired under the Expropriation Act, somewhere in the order of 10% ever actually get to a compensation hearing. Most are settled in advance of a hearing, and most are settled in the 2<sup>nd</sup> to 3<sup>rd</sup> year after expropriation. Some linger as the Ministry currently takes the position that it will not push the owner to a hearing, and the owner or their lawyer sometimes does not drive the file to a conclusion for whatever reason.

The Ministry is striving to maintain an acquisition program where most of the acquisitions are on a consensual basis and ongoing good relations are maintained with the owners. We understand that with maintenance, fence programs, snow removal, and regulatory activities the Ministry will be dealing with these same owners sometimes on a weekly basis for years to come and maintaining that good working relationship with the owners makes everybody's life easier. In some of the interior areas, the farms are family operations that mean we are dealing with generations of the same families.

### **Constraints on How the Ministry Does Business**

One of the biggest complaints that I hear is from owners or their representatives is that we, being the Ministry, are not being creative in resolving issues or in assessing compensation for what are, in essence, new and unique heads of claim or items of compensation. The other complaint I hear is 'why does it take so long for approval'.

First, let me address the 'creativity'. There are various forms of 'creativity', and for us in the Ministry, that means looking for ways to solve an owner's problems and issues within the confines of the Financial Administration Act, Expropriation Act, Highway Act, while maintaining consistency in dealing with owners along a project. It also means conforming to established precedents while not creating new precedents. What may be a small dollar value on one property may, on another property may be worth hundreds of thousands of dollars. In that case, if it becomes a sticking point, we actually prefer the Board to make a determination and once the issue is finalized, we structure our compensation offers in conformity with that determination. We are always cognizant of the fact that if we set a precedent on one deal, it will affect all other deals.

One of the 'creative' ideas that is continually asked of us by owners, or their representatives seeking a way to get more money, is avoidance of expropriation. The cost for an expropriation is fairly large, with most files that go to the Board for a determination, or settle 'on the court house steps' costing between \$50,000- \$75,000 (average) once all the costs such as: owners legal, our legal (yes, we are charged for our legal representation by internal transfer to the Ministry of Attorney General), appraisals (both sides), and other experts, our contracted agent to drive the file, our internal staff cost. So owners often look to settle for a part of that cost to avoid expropriation. This is one area where the Ministry takes a hard line, as we know that if we do it once and settle

for an additional, say \$15,000 to avoid the cost of expropriation, it will immediately become known throughout the industry and that will be part of the new bottom line on all acquisitions.

Another 'creative' idea that owners press for is having the Ministry remove land from the Agricultural Land Reserve. The Ministry has to go to the Commission for approval for road as an approved use. We likely have less influence with the Commission than the owner does. And in any case, you can imagine the trouble we would be in if we even attempted that.

The same goes for rezoning or commercial access approval. True, the Provincial Approving Officer is employed by the Ministry of Transportation, but actually administers portions of the Land Title Act, Local Government Act, Highway Act, and a few others. The Provincial Approving Officer is an independent individual and would be incensed if our agents attempted to fetter his/her discretion or actions. There is just no way that can even be contemplated.

Other constraints include the Financial Administration Act and related statutes that require Ministry employees with spending authority to exercise their authority according to set rules. This precludes some of the easy ways out of a situation, such as taking back an equitable mortgage when a residential property has little value or is at the bottom of the range of values for an area.

Constraints such as consistency along a project, treating all owners the same based on market value, and complying with legislation come into play.

Often it is necessary, for owners needing to re-establish themselves, that subdivision, rezoning, or similar functions take place. Our agents cannot act for the owner to accomplish that while acting for the Ministry, as the impression is that the Ministry is applying for the rezoning and Government cannot be seen as aiding one individual to achieve a regulatory approval while not aiding someone else. That does not preclude the owner from hiring an agent to provide those services, and within reason having the Ministry compensate for that. It just precludes the Ministry being involved on a front line basis

Another constraint is in the approval process and time. This is the 'why does it take so long to make a deal' question. The way the spending authority is set up, our agents have no authority but to recommend settlements. The Coordinators have up to \$500,000 spending authority, Managers up to \$1,000,000, and Project or Regional Directors have approval over that. What this means is that the agent sometimes has to go to two or three people to have a deal approved. With minimum staff, the time has to take into account other activities that these people become involved with.

When it comes to purchasing a total parcel rather than a partial and it is not one of those situations where it is apparent that the whole parcel must be purchased, it is necessary to produce a business case and have it approved by the Partnerships Department acting for the BC Transportation Authority. The process is not onerous, but takes time.

## **Expropriation.**

Today, the Ministry looks at expropriation as a very serious initiative that is not undertaken lightly. Due to the connotations of an unwilling and unfriendly taking of property, the Ministry executive want to be sure that they are recommending the right course of action to the Deputy Minister and that all reasonable steps to arrive at a settlement have been taken.

If an owner requests an expropriation for whatever reason, the executive looks favorably at that and there is usually little difficulty in getting the Approving Authority to approve the expropriation. This is looked at as a 'consensual expropriation'.

Where the owner has not requested the expropriation, we go through a process designed to test the actions taken to arrive at a consensual agreement or a Section 3 Expropriation Act agreement and satisfy the executive that every step has been taken to address the owner's concerns and an agreement to meet construction dates is just not going to happen.

This starts with a pre-expropriation notification where the executive is given a type of 'heads up' that certain acquisitions have issues that are not readily solved and they are potential candidates for expropriation recommendations. This also gives the executive time to explore the actions taken to date and make suggestions that they would like to see given some consideration before a recommendation to expropriate comes back before them.

This works very well in serving to apprise the executive of the issues and complications in delivering the right-of-way for a particular project.

This also provides the opportunity for executive decision-making around whether or not the project is of such importance that expropriation should be undertaken to acquire the necessary land for the construction of the project. One option for the executive is to delay the construction while negotiations proceed.

When the expropriation finally is recommended, it is vetted by the project, sent to our office where either Mr. Wan or myself or both of us review it, discuss with our Senior Manager and Executive Director, then present to the Assistant Deputy Minister for endorsement, and finally to our Deputy Minister who is both the Expropriating Authority and Approving Authority. It is only after that exhaustive review that the forms are signed and served.

In this way, the Executive becomes aware of the issues, the work taken to resolve the issues, and can make an informed decision on the expropriation.

## **Changes to the Highway Act.**

Recently, in the last sitting, the Legislature passed the Transportation Act. This act brings together the Highway Act, Build BC Act, relevant portions of the Ministry of Transportation and Highways Act, Highway Scenic Improvement Act, and some others that are not germane to this presentation. This is part of the Government initiative to reduce red tape by combining the various acts the Ministry works with under one act.

This also has some impact on how the Ministry does its' business and I thought this was an opportune time to highlight some of these changes.

This bill has passed 3<sup>rd</sup> reading and has Royal Assent. It only requires an Order-in-Council to come into force. When that will be is still uncertain, but I personally believe it will be this calendar year.

The important parts include the power of the Minister to enter, remain on, and use land without notice or consent, take possession of natural materials, place or store things, or provide, remove, or repair access from land to an undertaking without notice or consent.

Compensation is not required for entry on land, but is required for any materials taken or damage to property, unless it was to deal with a situation that interferes with the Ministry's powers under the act.

If compensation cannot be agreed to, the Expropriation Compensation Board has jurisdiction to decide on compensation.

On expropriation powers, the Minister can expropriate land for purposes directly related to an undertaking and for protecting the environment from the effects of an undertaking.

This is an interesting provision and could possibly include environmental enhancement areas.

The old Section 12 of the Highway Act that specified no compensation for the first 1/20<sup>th</sup> part of an original Crown Grant area required for road is gone from the new act. It remains in the Crown Grant, but is no longer a requirement for highway acquisitions.

New provisions can be used for land owners to maintain or pay to maintain improvements on their land constructed by the Ministry that are primarily for the benefit of the landowner, such as fences, wells, ditches, etc.

There is now a section that deals with the injurious affection issue that always seems to raise its head in relation to highway improvements. The new act specifically states that injurious affection, no taking does not apply to highways. This is section 12 in the new act.

There are specific provisions for access and use of lands in an emergency and revised provisions for the disposal of land by the Ministry. This includes broader powers to lease both land and highways without a public competitive process.

If you have not read this act or considered the effect of the changes to how the Ministry does business, especially in respect to property acquisition, I urge you to visit the website and download the act to review at your convenience.

The website is [www.legis.gov.bc.ca/37th5th/3rd\\_read](http://www.legis.gov.bc.ca/37th5th/3rd_read)

Look for bill 47 – 2004 Transportation Act.

Thank you for the opportunity to give you some insights into the inner workings of the Ministry.