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PUBLIC EXPROPRIATION FOR PRIVATE ENDS?

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Expropriating Land for Private Sector Developments

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- **In 2005, the Corporation of the County of Oxford (Ontario), expropriated a 91.5 acre shopping mall property (the “Mall Land”), and then immediately flipped it to Toyota.**
- **Oxford County had managed to negotiate the purchase of 27 of 28 properties it required to entice Toyota to invest in the region, but the Mall Owner wanted compensation well above fair market value.**

Toyota Plant in Oxford County

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Challenging the Toyota Taking

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- **The Mall Owner commenced a legal action to challenge the legality of the expropriation on two primary grounds:**
 1. it said the expropriation was not for a true public purpose; and
 2. it said the sale to Toyota conferred an unlawful bonus on a private concern, which is prohibited by Ontario's *Municipal Act, 2001*.

What is a “public purpose”?

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- A municipality has broad authority under s.11 of the *Municipal Act, 2001* to deal with the “economic, social and environmental well being of that municipality”.
- But the Ontario Superior Court said:
“it is not disputed that a municipality (in this case Oxford) can expropriate lands and in turn sell them to a private party so long as the expropriation is in pursuit of the public interest”. (para 82)
- This is not an uncontroversial statement!

Meanwhile, in America...

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Public Purpose vs. Public Use

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- **In the United States, this issue was addressed very publically in the 2000-2005 case Kelo v. New London (Conn.), where the US Supreme Court was asked to rule on the legality of an expropriation by the City of New London for the construction of a Pfizer facility.**
- **The highest US court acknowledged that the Fifth Amendment to the US Constitution protects private property rights, subject to the “public use” limitation found within that Amendment.**

Public Purpose vs. Public Use

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- **New London was recognized as being in economic distress, with unemployment rates in the mid-1990s sitting at around double the state average (1920s depression era levels).**
- **New London and the state government studied and planned for economic revitalization, which ultimately included assembling 115 privately owned properties for future recreational and commercial uses.**
- **Using its power of *eminent domain* (a.k.a. expropriation powers), New London expropriated land from reluctant owners.**

Public Purpose vs. Public Use

- Justice Stevens, writing for the US Supreme Court in *Kelo* said, among other things:

“...The City would no doubt be forbidden from taking the (Owners’) land for the purpose of conferring a private benefit on a particular private party. See *Midkiff*, 467 US, at 245. (“A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void”)...Nor would the City be allowed to take the property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.”

Public Purpose vs. Public Use

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- Justice Stevens then noted:
“This Court long ago rejected any literal requirement that condemned (expropriated) property be put into use for the general public...Not only was the ‘use by the public’ test difficult to administer (e.g., what proportion of the public need to have access to the property?), but it proved to be impractical given the diverse and always evolving needs of our society.”
- So while the Fifth Amendment has a “public use” exception, it has been expanded to allow for a mere public purpose.

Public Purpose vs. Public Use

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- The US Supreme Court in Kelo eventually said:
“The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community...[AND] Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.”

Public Purpose vs. Public Use

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- The *Kelo* decision was not unanimous though, with strong dissenting reasons written by Justice O'Connor and Justice Thomas.
- O'Connor J. raised concerns that governments could now take property from those with fewer resources in order to put the lands in the hands of those with more resources. She saw risk of corruption and abuse.
- Thomas J. pushed for a return to the “use by public” test to ensure the public was actually benefiting in a direct fashion.

American States Move to Limit Application of Kelo Case

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- **According to Roger Pilon, the Vice-President of Legal Affairs at the Cato Institute where he holds a Chair in Constitutional Studies, writing just two years after the *Kelo* decision was issued by the US Supreme Court, more than 40 US states quickly passed legislation of varying strengths to better protect private property rights in order to reduce the potential for a Kelo-type taking in their state.**

[“The Constitutional Protection of Property Rights: America and Europe” (June 2007, American Institute for Economic Research), Roger Pilon, Ph.D.]

Meanwhile, back in Ontario...

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Vinacorp Financial Ltd. v. The Corporation of the County of Oxford,

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- **In 2004, Toyota made it known that it was looking for a 1,000 acre site for a new assembly plant, and identified several potential sites for its next facility.**
- **Oxford County moved to assemble land in order to secure a commitment from Toyota.**
- **Unable to secure a deal with the Mall Owner, Oxford County expropriated.**
- **Toyota had agreed in advance to reimburse Oxford County whatever it spent to compensate the Mall Owner.**

Vinacorp Financial Ltd. v. The Corporation of the County of Oxford,

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- **As stated, the Mall Owner commenced a legal action to challenge the legality of the expropriation on two primary grounds:**
 1. it said the expropriation was not for a true public purpose; and
 2. it said the sale to Toyota conferred an unlawful bonus on a private concern.

Vinacorp Financial Ltd. v. The Corporation of the County of Oxford,

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- **The Superior Court noted that the mall building was 240,000 sq/ft, largely vacant and in very poor repair.**
- **There was something unusual about the way the Mall Land had been financed and the corporate entities which comprised the Mall Owner interacted – this shouldn't be material to the issues under examination, but it perhaps explains the reason the parties couldn't agree to a sale by consent.**

Vinacorp Financial Ltd. v. The Corporation of the County of Oxford,

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- **In May 2005, Oxford County passed a bylaw (the “Oxford Bylaw”), granting itself authority to make an application to expropriate the Mall Land. The recitals to the Oxford Bylaw stated that:**
“To address Oxford’s ‘need for an adequate, stable and marketable supply of employment and industrial land...”
AND
“Oxford has attempted without success to secure additional lands [i.e. The mall lands] for employment and industrial use.”

Vinacorp Financial Ltd. v. The Corporation of the County of Oxford,

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- **The Mall Lands had been sold in 2002 for \$1.35 Million to the Mall Owner.**
- **Three years later, the Mall Owner offered to sell to Oxford County for \$16.5m.**
- **Oxford County had an appraisal which indicated the property was worth between \$2m and \$4m.**
- **Oxford County offered \$4.5m, which offer never received a response.**

Vinacorp Financial Ltd. v. The Corporation of the County of Oxford,

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- **On 8 June 2005, the Deputy Minister of Municipal Affairs wrote to Toyota to provide assurances that the Province would respond “reasonably and expeditiously” to process approvals necessary to accommodate Toyota’s timeline.**
- **On 13 June 2005, Oxford County wrote to Toyota and confirmed its intention to enter into a binding agreement with Toyota to convey the Mall Lands to Toyota post-expropriation.**

Vinacorp Financial Ltd. v. The Corporation of the County of Oxford,

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- **The Oxford County letter indicated that Toyota would just have to re-pay Oxford County what the authority would have to pay to “acquire or expropriate” the Mall Lands.**
- **30 June 2005, Toyota issued a press release announcing its new plant in Oxford County.**
- **In early-July 2005, Oxford County wrote to the Provincial Minister of Municipal Affairs, seeking approval to use the 1,000 acre site for a fabrication, manufacturing and assembly facility – and ask the Minister to also make several other necessary changes to various planning instruments.**

Vinacorp Financial Ltd. v. The Corporation of the County of Oxford,

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- **In late-July 2005, Oxford County passed another by-law which approved a suite of agreements with Toyota (the “Toyota Agreements”).**
- **The Toyota Agreements included Oxford County’s promise to proceed “diligently, expeditiously and cost effectively” with the expropriation if that became necessary, and to keep Toyota fully informed about the progress via regular written status reports.**

Vinacorp Financial Ltd. v. The Corporation of the County of Oxford,

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- Further, Oxford County agreed that it would not enter into any agreement under threat of expropriation with the Mall Owner without Toyota's prior written approval.
- In October 2005, Ontario's Lieutenant Governor in Council, at Oxford County's request, exercised a discretion found s. 6(3) of Ontario's *Expropriations Act* to waive the requirement for a Hearing of Necessity in view of the special circumstances and public interest associated with Toyota's project.

Vinacorp Financial Ltd. v. The Corporation of the County of Oxford,

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- **November 2005, the Mall Owner started the litigation examined by this presentation.**
- **December 2005, Oxford County approved an expropriation of the Mall Lands and filed an expropriation plan which vested the Mall Lands with Oxford County.**
- **The Ontario Act normally would have allowed the Mall Owner to demand an inquiry into whether the taking was “fair, sound and reasonably necessary in the achievement of the objectives of the expropriating authority”, but here that right had been stripped by the Province.**

Vinacorp Financial Ltd. v. The Corporation of the County of Oxford,

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- Under Ontario's *Expropriations Act*, Oxford County was required to make an offer of compensation to the Mall Owner, which it did on 21 March 2006 – being \$4.2 million. That offer was not accepted.
- In August 2006, Oxford County sold the Mall Lands to Toyota for \$4.2 million.

Vinacorp Financial Ltd. v. The Corporation of the County of Oxford,

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- Oxford County's broad authority to expropriate is found at section 6 of the Municipal Act, 2001, but that power is implicitly tied to advancing the public interest within its jurisdiction.
- Query whether securing a commitment from Toyota justifies expropriation by Oxford:
 1. This is a philosophical question that is sure to be divisive; and
 2. It is also a question of legislative interpretation.

Vinacorp Financial Ltd. v. The Corporation of the County of Oxford,

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- **The Mall Owner argued from the beginning that Oxford County planned to simply flip the Mall Land to Toyota for the expropriation price. The courts confirmed that this is precisely what occurred.**
- **Oxford County argued the expropriation and the sale to Toyota were two separate transactions that must be considered individually.**

Vinacorp Financial Ltd. v. The Corporation of the County of Oxford,

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- **The Superior Court accepted that:**

“the public purpose that Oxford sought to achieve in expropriating the mall lands fulfilled the objectives of (the Oxford Bylaw), specifically to promote economic development in Woodstock... The opportunity of the Toyota plant was the activating force behind the expropriation and the related by-laws...” (para 93)

Vinacorp Financial Ltd. v. The Corporation of the County of Oxford,

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- Ontario's *Municipal Act, 2001* contains a prohibition on “granting of bonuses” to any manufacturing business or other industrial or commercial enterprise,” which can include the “leasing or selling any property of the municipality at below fair market value”. (section 106)
- The Ontario Superior Court looked at BC case law to consider whether the Toyota deal “granted a bonus”, but said because Oxford County had not conferred an obvious advantage (which it characterized as giving ‘something for nothing’), there was no “undue advantage” granted.

Vinacorp Financial Ltd. v. The Corporation of the County of Oxford,

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- **The Mall Owner also said it had lost the ability to negotiate a better price with Toyota, but the Court said:**

“this argument assumes that such an opportunity exists and on the facts of this case it did not. As noted above, a municipality has the power to expropriate land from one private entity and transfer it to another private entity”. (para 127)

Vinacorp Financial Ltd. v. The Corporation of the County of Oxford,

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- **Further, the Ontario Superior Court said that:**

“a municipality must have the tools at its disposal to pursue opportunities like the Toyota plant. One cannot overlook the practical effect of the plaintiffs’ argument: it would limit the available tools to pursue economic development. Surely this would be an absurd result.” (para 136)

Vinacorp Financial Ltd. v. The Corporation of the County of Oxford,

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- **The Ontario Court of Appeal (2014) upheld the Superior Court's decision stating that even if there were some type of improper bonus conferred on Toyota, which it said there was not, it had nothing to do with the legitimacy of the expropriation as that process was perfected pursuant to a legitimate municipal purpose – economic development of the community.**
- **An application for leave (permission) to bring a further appeal to the Supreme Court of Canada was denied – which is an implicit approval of the Court of Appeal decision.**

Meanwhile, in British Columbia...

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BC Municipalities Also Have Broad Powers of Expropriation

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- Municipalities in B.C. (other than the City of Vancouver) find their expropriation powers at section 31 of the Community Charter:

31. For the purpose of exercising or performing its powers, duties and functions, a municipality may expropriate real property or works, or an interest in them, in accordance with the Expropriation Act.

BC Municipalities Also Have Broad Powers of Expropriation

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- The City of Vancouver operate pursuant to the *Vancouver Charter*, and has powers to expropriate found at s. 532 of that Act:

532. If, in the exercise of any of its powers of acquiring real property, the city fails to come to an agreement with its owner as to the terms of acquisition, the city may, by by-law or resolution of Council, expropriate such real property.

BC Municipalities Also Have Broadly Worded Purposes and Powers

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- The Community Charter sets out the following municipal purposes:

7. The “purposes of a municipality include, (d) fostering the economic, social and environmental well-being of its community”*

*Note that the purposes set for Regional Districts mirror s. 7(d) of the Community Charter, being section 185(d) of the Local Government Act.

BC Municipalities Are Also Barred from Providing Bonus or Showing Favouritism

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Community Charter:

24(1). A council must give notice...of its intention to provide any of the following forms of assistance to a person or organization:

(a) Disposing of land...for less than market value...

25(1). Unless expressly authorized...a council must not provide a grant, benefit, advantage or other form of assistance to a business, including

(a) any form of assistance referred to in s. 24(1)...

Expropriating Authorities Must Also Follow Rules in the Disposal of Surplus Expropriated Land

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- Ontario's *Expropriations Act* (s. 42) addresses disposal of expropriated lands and requires an expropriating authority to give the owner first option to purchase, unless the approving officer approves of the sale to a third party without making the offer to the owner.
- This is similar to BC's *Expropriation Act* (s. 21) though our Act only extends the owner's right to 2 years post-taking

Applying the Oxford County Case in British Columbia

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- **While the legislation in every jurisdiction is drafted somewhat differently, I can see no legal reason why the Oxford County/Toyota expropriation could not be replicated in British Columbia.**

Any Questions?

THANK YOU!

[And, please note my new contact details]

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