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I.CLASSIFICATION AND KEYWORDS:

Expropriation – Governmental jurisdiction / authority – Right to compensation

II.ISSUE:

Jurisdiction of government re: expropriation

III.ABSTRACT:

Paper addresses " … some questions about the rights of Governments to expropriate land upon which measures have been taken for private conservancy such as registration of easements or restrictive covenants and in particular how those rights of expropriation are affected by the conservancy measures. The short answer from a strictly legal perspective is: They aren't affected at all." Analysis of various sections of *Expropriation Act* follows.

IV. CASES, STATUTES, TEXTS CITED:

Amdue Holdings v. The City of Calgary, (1980) 20 L.C.R. 7
Mannix v. The Queen in the Right of the Province of Alberta, (1983) 27 L.C.R. 13

Expropriation Act
Water Resources Act

THE GOVERNMENT TAKETH AWAY

Canada came into being in 1867 under the authority of Her Majesty, Queen Victoria, Ruler of the United Kingdom via the British North America Act. As every school child in Canada knows the various powers of state were divided between the Provinces and the Federal Government under the terms of the BNA Act. The Provinces won the right to legislate over Property. As a consequence every property right which we as private citizens enjoy has been granted to us by the Provincial Crown. Unfortunately for some, what the Government giveth, the Government can taketh away.

I was asked to address for this conference some questions about the rights of Governments to expropriate land upon which measures have been taken for private conservancy such as registration of easements or restrictive covenants and in particular how those rights of expropriation are affected by the conservancy measures. The short answer from a strictly legal perspective is: They aren't affected at all. There is, however, a longer answer which may provide solace to some.

The Provincial powers of expropriation are defined and elaborated by legislation - The Expropriation Act. Section 2 of the Act makes it clear that it applies to all expropriations "authorized by the law of Alberta". In order to be "authorized" the right of expropriation must be granted by other Provincial legislation. For example the right to expropriate land for the purposes of a dam is given by the Province to itself and others through Section 31 of the Water Resources Act. Municipalities are granted the authority to expropriate through the Municipal Government Act. A body authorized by such legislation is referred to by the Expropriation Act as an "expropriating authority".

Section 3 of the Expropriation Act provides that an expropriating authority may "acquire any estate required....in the land". It is by virtue of this provision that an expropriating authority may, by the expropriation process, effectively transfer to itself complete and absolute ownership in the land. When it does so, the rights of other interest holders in the land, be they holders of 'fee simple'(the owners), or interest holders by mortgages, caveats, easements, restrictive covenants or other instruments, are extinguished. Because this power of expropriation is so absolute the Provincial Legislators deemed owners and interest holders in the land should have the right to air their objections to the expropriation and thus, Section 10 of the Expropriation Act provides to those persons the right to an "Inquiry Hearing".

In order to object to an expropriation and require an Inquiry Hearing an interest holder in the land must fall within the definition of an "owner" under the Act. That definition includes those who are shown by the records of the land titles office as having a particular estate or interest in or on the land. Other papers in this conference have discussed the requirements under our present Land Titles system for dominant tenements and servient tenements in easements and restrictive covenants. In the case of those easements or restrictive covenants it is the owner of the dominant tenement who would probably qualify as an "owner" for these purposes and would have the right to object to the expropriation and force an Inquiry.

Once a Notice of Objection is served upon an Expropriating Authority, wheels are set in motion which in the ordinary case should result in a hearing before an Inquiry Officer appointed by the Attorney General of the Province and a written report from the Inquiry Officer within about 35 days. The test for the Inquiry Officer is whether the intended expropriation is "fair, sound and reasonably necessary" in the achievement of the objectives of the expropriating authority. The Inquiry Officer must hold the hearing in public and may hear and consider all types of evidence. He may also add as a party to the inquiry any owner whose land would be affected by the expropriation and person who appears to have a material interest in the outcome of the expropriation.

This is the forum for action by those promoting the conservancy interests. The inquiry hearing is the one and only legal opportunity throughout the expropriation process for those persons hoping to preserve the environmental integrity of the land to stand up and be heard and to create the political pressure required to reverse the expropriation process. I use the phrase "political pressure" because the owner has no specific legal right to stop the expropriation. The Inquiry Officer's Report must only be "considered" by the Expropriating Authority. After such consideration it may do as it pleases. It is therefore extremely important at the Inquiry stage of proceedings to not only persuade the Inquiry Officer of the lack of fairness, soundness or reasonable necessity of the taking but also to make the same known to the politicians and bureaucrats whose jobs are affected by political winds.

One issue which acutely affects such persons is cost. Once an owner's interest in land is extinguished by expropriation that interest is replaced by a statutory right to compensation. The procedures for collecting and the parameters of the compensation are also contained within the Expropriation Act. Cost is not something which may be determined by the Inquiry Officer but rather by the Land Compensation Board or in some instances by the Courts or the Surface Rights

Board. However, the soundness of the taking, in light of those costs, might be argued at the Inquiry.

The cases which deal with compensation approach the issue in terms of economic, not environmental, costs. This should be of little surprise to anyone for rarely in commercial ventures are environmental costs factored. The rules for compensation in Alberta are fairly well defined by the Act.

In the case of the expropriation of an environmental interest protected by easement or restrictive covenant only the "owner" as defined in the Act is the person entitled to compensation. As earlier discussed the holder of the dominant tenement is likely to be the only person qualified under the Act as an owner for the purposes of compensation. Section 42(2) limits the compensation as follows:

> (2) When land is expropriated, the compensation payable to the owner shall be based on:
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> (a) the market value of the land
> (b) the damages attributable to disturbance
> (c) the value to the owner of any element of special economic advantage to him arising out of or incidental to his occupation of the land to the extent that no other provision is made for its inclusion, and
> (d) damages for injurious affection.

Usually expert appraisal and other evidence is given to the Land Compensation Board under the above headings and the Board must base its decision on the evidence and within the confines of those parameters. It seems to this writer that an owner of an easement or restrictive covenant might successfully argue for the cost of purchasing similar land and any incidental costs associated with such replacement. Problems will arise when for reasons of size, uniqueness of habitat, etc.. the land is not readily replaceable. The key to compensation, according to our Alberta Court of Appeal is that an owner not be "out of pocket" as a result of the expropriation. (Amdue Holdings v. The City of Calgary, (1980) 20 L.C.R. 7)

Assistance might be gained from Section 44 of the Act which provides "... no allowance shall be made on account of the acquisition being compulsory except where unusual circumstances exist for which no provision for compensation is contained in this Act." In the case of Mannix v. The Queen in the Right of the Province of Alberta, (1983) 27 L.C.R. 13 at page 71 the Chairman of

the Land Compensation Board stated, "*In this case the province took 313 acres more or less from Mannix. It was a compulsory taking. The parcel of land was in a unique setting involving a beautiful valley, heavily treed and with flowing water. Because of the very nature of the expropriated land much of it would have been lost to environmental reserve on any application for subdivisioon. Although I have found that the CEP Plan would have found favor with the City of Calgary, nevertheless, the result is that nearly two-thirds of the land holding would be converted to environmental reserve, which, in my view is substantial. When a substantial portion of a land holding, because of the very nature of its topography, ends up as reserve and as a result cannot be used for residential housing, the expropriated owner is faced with accepting no award for undevelopable acreage. I think this constitutes "unusual circumstances".* " The Board in this case awarded an extra 10% of the stated market value to the owner. One might use similar logic to overcome some of the obstacles to full compensation for an 'owner' of a restrictive covenant or easement.

Does this assist in resisting expropriation altogether? The best one can say is it might, given vocal and politically effective lobby efforts. This is the point of the long answer to the question originally posed. Although there is no legal mechanism to stop an expropriating authority bent on acquiring land, the process associated with the expropriation can be used to attempt to gain a political advantage over the proponents of such expropriation. The existence of an easement or restrictive covenant on land for the purposes of conservation may provide an effective tool both to provide for initial involvement by those interested in such conservation and for moral and perhaps economic suasion.