The ABCs of Expropriation: an Overview of the Different Regimes

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What is expropriation?

Expropriation is a legal process by which a public authority can compel a property owner to surrender private property for reasons of public interest. Governed by both provincial and federal legislation, expropriation is designed to facilitate infrastructure projects that are essential to society's collective well-being.

Although expropriation is necessary for urban development and land use planning, it must be done with due respect for the rights of landowners. For example, it must provide for the payment of fair and equal compensation that takes various factors into account, such as the market value of the property and the costs associated with moving it. The expropriation process is governed by strict rules intended to strike a balance between public needs and individual rights, and to guarantee fairness and transparency.

Expropriation is an exceptional means of acquiring rights of ownership. It makes it possible for various government bodies to acquire land. The power to expropriate is necessary for projects of public interest, such as the construction of roads, schools and other public infrastructure.

What property can be expropriated?

Expropriation involves the ownership rights over immovable property or the dismemberment of the right of ownership attached to an immovable. The government can expropriate all rights of ownership covering immovable property, save for a few exceptions: The domain of the State cannot be expropriated, and the power to expropriate cannot be used in the presence of a reserve, which prohibits any construction, improvement or addition to an immovable for the term of the reserve, save for necessary repairs.

Certain movable property can also be expropriated. In Quebec, the expropriation of rights in an immovable may include movables that are accessory to the immovable or used as part of the agricultural, commercial, industrial or institutional activities that the expropriated party carries out on

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the immovable.

Federal and provincial jurisdiction over expropriation

The Canadian Constitution does not assign exclusive jurisdiction over expropriation to any particular level of government—in our case the provincial or federal legislative authorities. Both have the power to expropriate in accordance with their respective areas of jurisdiction. Just like Quebec does, the other Canadian provinces have their own expropriation laws.

In Quebec, article 952 of the *Civil Code of Québec* stipulates that no owner can be compelled to transfer their ownership except by expropriation in accordance with the law for public utility and in return for just and prior compensation. This provision points to the exceptional nature of expropriation, as, after expropriation, the owner is deprived of all of the attributes of its property. In fact, no one can expropriate without an enabling law.

The legal framework regarding expropriation in Quebec has undergone major changes in recent years. The province's main expropriation regime was formerly set out in the *Expropriation Act*, assented to in 1973. That law was replaced by the *Act respecting expropriation* (hereinafter the "ARE") in 2023. The ARE establishes a new framework for the expropriation of rights, among other things.Significant changes were made to the Quebec regime, in particular in terms of procedure and indemnity calculation.

Other Quebec laws also provide for expropriation by other entities, such as the *Cities and Towns Act*, the *Municipal Code of Québec* and the *Act respecting municipal industrial immovables.*

The federal power of expropriation is restricted to federal heads of power as set out in section 91 of the *Constitution Act 1867*. The power to expropriate granted by the *Expropriation Act* (hereinafter, the "Federal Act") belongs to the federal Crown.[1]

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In this text, we will examine the scope and implications of expropriation laws and distinctions between these laws to better understand them. We will begin by analyzing the legal provisions that define the circumstances under which expropriation is warranted. We will then review indemnity mechanisms and available recourses. We will finish by describing the administrative and judicial proceedings that govern the expropriation process. Our analysis will provide a better understanding of how these laws fit into the broader legal context.

The ABCs of Quebec's expropriation regime

Quebec approach

The ARE stipulates that every expropriation must be decided or authorized beforehand by the government, on the conditions that it determines. Once these authorizations have been obtained, the expropriating party may proceed with the expropriation by resolution, order or regulation. The power to expropriate may also be granted to other non-governmental entities, such as municipalities, metropolitan communities, school service centres or school boards, which are not required to obtain an authorization. In addition, certain public bodies, such as Hydro-Québec, have the power to expropriate.

Under the terms of the ARE, if the expropriation concerns an entire lot, the expropriation procedure begins with the filing of an extract from the cadastre of Québec showing the expropriated immovable

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with the Administrative Tribunal of Québec (hereinafter, the “ATQ”). Expropriating more than one right requires the filing of a general plan.

After the first filing, the expropriating party must send a notice of expropriation (hereinafter, the “expropriation notice”) to the holder of a right in the expropriated immovable. The date of service of the expropriation notice is the date of expropriation. This date is important—it is generally the cutoff date for calculating indemnity.

The expropriation notice must contain certain mandatory information, including the description of the expropriated immovable, the purpose of the expropriation and the date on which the property is to be vacated. The vacancy date corresponds to the date on which all divested parties must have vacated the immovable and the date on which the expropriating party becomes the owner.

In addition, an initial detailed declaration must accompany the expropriation notice, which must indicate the amount of indemnity the expropriating party is offering and be broken down according to the compensation items applicable to the divested party’s situation. The initial detailed declaration must also indicate at least the market value of the expropriated right. The introduction of the concept of “market value” is a departure from the previous law.

Once the expropriation notice has been received, the expropriated party has four months to file its own detailed declaration with the ATQ, setting out the compensation items they wish to claim. They must also inform the expropriating party of the presence of lessees or occupants, and of leases and written agreements entered into with lessees of the expropriated immovable, within 30 days of the date of expropriation. The expropriating party must then serve a notice to vacate on the lessee or occupant in good faith, accompanied by the initial detailed declaration, indicating an amount at least equal to three months’ rent if the expropriated immovable contains the lessee’s or occupant’s residence.

The expropriating party must register the expropriation notice in the land register no later than 30 days after the expropriation date. If the expropriating party fails to do so, any interested party may apply to have the registration of the expropriation notice cancelled. Compliance with this time limit is important, as damages may be awarded to the expropriated party to compensate for the injury resulting from failure to comply.

Also, the expropriated party may contest the expropriation in the 30 days that follow the expropriation date and request the cancellation of the expropriation notice. The request must be served on both the expropriating party and the ATQ. The contestation process is set out below.

The expropriating party takes possession of the property when it registers a notice of transfer in the land register, which corresponds to the vacancy date indicated in the expropriation notice. Such notice of transfer cannot be published before the initial provisional indemnity has been paid, or before the vacancy date. If these conditions are not met, the Land Registrar will refuse to register the notice. The divested party may, for serious reasons, apply to the Superior Court to remain in possession of the expropriated immovable for a certain amount of time, which may not exceed six months, but only if this does not cause serious prejudice to the expropriating party.

Summary of changes regarding indemnification

The coming into force of the ARE has changed the rules regarding indemnification. Under the previous law, the principle of indemnification was calculated based on “value to the owner,” whereas indemnification is now calculated on the property’s market value. This marks a significant change in direction for all judicial and administrative decisions. Previously, a presumption favouring compensation applied.[2] Now, under the ARE, the indemnities awarded are governed by a specific

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analytical framework, with defined calculations and distinct compensation approaches.

As it now applies, the ARE provides that the indemnity must be determined based on the expropriated property's market value. The expropriating party has the burden of proving the market value of the expropriated right, while the expropriated party has the burden of proving all other elements constituting the final indemnity. Market value in this context corresponds to the most probable sale price of the right, established as at the date of expropriation according to the highest and best use of the right in a free and open market. The highest and best use corresponds to the use of the right as at the date of expropriation, or to the use determined by taking into account certain criteria.

Different indemnities may be paid to compensate the expropriated party. An initial provisional indemnity corresponding to an amount at least equal to 100% of the market value indicated in the expropriating party's detailed declaration must be paid to the divested party so that it may continue its activities and limit the inconveniences resulting from the expropriation. This indemnity is equal to 100% of the market value of the expropriated right.

If the indemnity is insufficient, the expropriated party may apply for a supplemental provisional indemnity.

The final indemnity, indicated in the detailed declaration, is made up of the immovable indemnity, the indemnity in reparation for injuries, the indemnity for loss of suitability value and the indemnity for trouble, nuisance and inconvenience.

Immovable indemnity

This indemnity consists of the market value of the expropriated right and, if applicable, one of the following indemnities determined in accordance with the divested party's situation:

1. **the displacement indemnity**, in the case of an indemnity established according to the approach based on displacement of a structure;
2. **the redevelopment indemnity**, in the case of an indemnity established according to the approach based on redevelopment of an immovable;
3. **the enterprise closure indemnity**, in the case of an indemnity established according to the approach based on discontinuance of an enterprise;
4. **the equivalence indemnity**, in the case of an indemnity established according to the approach based on relocation;
5. **indemnity for the replacement of buildings and improvements**, established according to approach based on the re-establishment theory;
6. **indemnity for another use**.
   These indemnitiesare determined in accordance with the different approaches set out in the ARE. Lessees and occupants in good faith are entitled to the redevelopment indemnity, enterprise closure indemnity or equivalence indemnity.

Indemnity in reparation for injuries

The indemnity in reparation for injuries corresponds to the actual cost at present value of

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	material injuries directly caused by the expropriation and suffered by the expropriated party.
Indemnity for loss of suitability value	The Indemnity for loss of suitability value corresponds to the loss suffered by a divested party given the personal value the divested party attributes to the immovable and that a buyer normally does not take into account. This indemnity is capped at $32,422.00, subject to indexation.
Indemnity for trouble, nuisance and inconvenience	The indemnity for trouble, nuisance and inconvenience corresponds to the value of direct, material and certain damages sustained by the divested party and caused by the expropriation procedure, in particular for that party's loss of time to prepare for the case and participate in meetings. This indemnity may only be claimed by certain divested parties and is capped at $10,807.00, subject to indexation.

The expropriated party has to prove which approach applies its case. Once the evidence is presented, the ATQ decides in accordance with the applicable approaches having been proven.

Contestation

In the 30 days following the date of expropriation, the expropriated party may contest the expropriating party's right to expropriate and request the cancellation of the notice of expropriation by filing an application with the courts of the district in which the expropriated immovable is located. Said application must be served on the expropriating party and on the ATQ, and must be heard and decided urgently.

The new law respecting expropriation provides that a contestation of the right to expropriate does not automatically stay the expropriation procedure, unless the court, at the request of the expropriated party, so orders. Previously, the situation was reversed—contesting the right to expropriate stayed the expropriation procedure.

Although section 17 of the ARE does not set out any criteria applicable to an application for a stay, the Superior Court has indicated that the party seeking the stay must demonstrate that it has an arguable case, that it will suffer serious or irreparable harm if the stay is not granted, and that the

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balance of convenience tips in its favour.[3]

If the expropriated party's application is granted, the expropriation notice registered in the land register will be cancelled, and the divested parties will be entitled to apply to the ATQ for damages to compensate for the prejudice resulting from the expropriation procedure.

The ABCs of the federal expropriation regime

Federal approach to expropriation

The Federal Act confers the power to expropriate to the Crown. The Federal Court has described the decision to expropriate as highly discretionary and political in nature.[4] The Crown's power to expropriate is, as such, very broad. It covers all land in Quebec. In the Federal Act, the term "land" is defined as including land, mines, buildings, structures, fixtures and objects that are immovable within the meaning of Quebec civil law.

In certain situations, the Minister of Public Works and Government Services (hereinafter referred to as the "Minister") may deem any land to be required for a public purpose. In this context, the Minister makes a formal request to the Attorney General to initiate the expropriation process.

As soon as the Minister makes the request, the formal federal expropriation process is set in motion, and the Crown can take the steps necessary to expropriate the land in question. On receiving the Minister's request, the Attorney General registers a notice of intention to expropriate with the office of the registrar in the registration division where the land is situated.

The notice must contain a statement regarding the Crown's intent to expropriate the right in question. It must also describe the land in question and indicate the nature of the right to be expropriated. Lastly, it must indicate the public work or other public purpose for which the right is required.

After the notice is registered, the Attorney General must provide the Minister with a report setting out the names and last known addresses, if any, of persons appearing to have a right in the land. After registration of the notice, the Minister has 30 days to publish the notice of intention to expropriate in at least one issue of a publication in general circulation in the region where the land is located. In addition, a copy of the notice must be sent to the persons whose names appear in the Attorney General's report as soon as possible after registration of the notice. The notice and any other document intended for a third party must be sent by registered mail to the latest known address. The Minister must then have the notice published in the *Canada Gazette*. The notice is deemed to have been given on the date of publication in the *Canada Gazette*.

The Federal Court has described the power to expropriate conferred by the Federal Act as a broad discretionary power to assess and decide what is in the "public interest", and what immovable real rights are required for this purpose. As such, contesting an expropriation can be difficult.

The Federal Act provides that any person wishing to object to the expropriation may do so no later than 30 days from the day on which the notice of intention to expropriate is published in the *Canada Gazette*. They must give the Minister their notice of objection in writing, indicating their name, address and the nature and reasons for their objection, as well as the nature of their interest in objecting to the proposed expropriation.

At the end of the 30-day period, if an objection has been served, the Minister must order a public hearing on the objection received. The Attorney General must then appoint a hearing officer to conduct the hearing.

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The hearing officer must fix the date, time and place for the public hearing no later than seven days of their appointment, and must give every person who has served notice of objection to the Minister an opportunity to be heard. The hearing officer may also inspect the land to which the notice relates. The hearing will be conducted in the manner determined by the hearing officer. Once the hearing is over and no later than 30 days after their appointment, the hearing officer must submit a written report to the Minister on the nature and grounds of the objections made.

After the public hearing, or if no objection is filed within 30 days, the Minister may confirm or abandon the intention to expropriate. However, if the Minister has not confirmed his intention on expiry of 120 days after the day notice was given, the Minister is deemed to have abandoned the intention. In the event of abandon, the Minister must have a notice of abandonment of the intention sent to the persons concerned and to the Attorney General.

In the event of confirmation, the Minister must ask the Attorney General to register a notice of confirmation of intention to expropriate (hereinafter, the “confirmation notice”). Once the confirmation notice has been registered, the Minister must send a copy to all persons appearing to have a right in the land and to all persons having served an objection.

Upon registration of a confirmation notice, the right becomes absolutely vested in the Crown. Within 90 days of the registration of the confirmation notice, the Minister must make a written offer of compensation to all persons who actually have an interest in the land. The Crown takes possession of the land once the procedure is complete.

Amounts paid in compensation

Compensation is paid to each person who, immediately before registration of a notice of confirmation, was the holder of an interest in the land to which the expropriation notice relates. The compensation amount is equal to the aggregate of the following amounts:

> **The value of the expropriated right or interest on the date of its taking by the Crown**: based on market value, i.e., the amount that would have been paid for the right or interest if it had been sold in the open market on the date of its taking by the Crown.
> **The amount of the decrease in value of the remaining property of an owner**: obtained by subtracting from the value of all the immovable real rights or interests in land that the holder had immediately before the taking of the expropriated right or interest the sum obtained by adding the value of the expropriated right or interest and the value of all the remaining immovable real rights or interests in land immediately after the time of taking of the expropriated right or interest.

The reference date for calculating compensation is generally the date on which the confirmation notice was registered. The Crown also pays to each person entitled to compensation an amount equal to the appraisal, legal and other costs reasonably incurred by that person in asserting a claim for such compensation.

The Federal Act provides a mechanism for negotiating compensation, when the person entitled to compensation and the Minister are unable to agree on the amount of compensation. After an offer of compensation has been made and within 60 days of the offer, either party may serve notice on the other to negotiate compensation.

The awarding of compensation under the Federal Act therefore differs significantly from that under the ARE, although market value is also central to the indemnity awarded under the ARE.

Railway companies

The procedure is different for railway companies. They must first make a request to the federal

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Minister of Transport regarding the immovable real right or interest in land, which they have unsuccessfully attempted to purchase. The Minister of Transport then recommends expropriation to the Minister of Public Works and Government Services, who must then have the Crown expropriate the immovable real right that the railway company was unable to acquire.

Conclusion

There are a number of differences between the applicable regimes. A legislative duality such as this can result in inequity, leading to different results for expropriated parties in similar situations, and for expropriating parties. As we explained, the criteria used to assess compensation, the procedures used to determine compensation and the recourses available may vary considerably from one law to another. An expropriated party may therefore obtain different compensation depending on the applicable regime, even if the objective conditions regarding their expropriation are comparable to those of another expropriated party under a different regime.

For more information, or if you have any further questions, please feel free to contact our team. We will be happy to assist you and provide you with the information you need regarding any expropriation procedure.

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1. This text only covers the Federal Act's application in Quebec.
2. *Toronto Area Transit Authority* v. *Dell Holdings Ltd*, [1997] 1 SCR 32.
3. *Société immobilière 2081-2083 Marie-Victorin inc.* c. *Ville de Varennes*, 2024 QCCS 3969, para. 15.
4. *Vachon (Succession) v. Canada (Attorney General)*, 2024 FC 709.

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