Sections 41 and 42 of the *Expropriations Act*: The Abandonment and Disposition of Expropriated Lands

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I. Introduction and Overview

The Supreme Court of Canada has acknowledged that the expropriation of property is one of the ultimate exercises of governmental authority which constitutes a significant interference with a citizen's private property rights and causes severe loss.[1] For that reason the Court has confirmed that the power to expropriate should be strictly construed in favour of those whose rights are affected. These principles extend beyond the right of owners to receive full and fair compensation and be made economically whole, and also to the protection of private property rights through transparency, political accountability and protections against abuse in the expropriations process.

The power to expropriate is necessary for the delivery of public works in a safe, efficient and cost effective manner. Few would question the legitimacy of expropriation for works such as highways, transmission lines or public transit initiatives. When the power of expropriation is extended beyond an authority's immediate needs or to foster economic development or community improvement, the use of the power is not subject to such universal acceptance and may even be seen as an abuse by government. Protections against the abuse of the expropriation power can be found in the *Expropriations Act*,[2] which requires a public and transparent process when powers of expropriation are used.

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[1] *Toronto Area Transit Operating Authority v Dell Holdings Ltd*, [1997] 1 SCR 32 at para 20 ["*Dell Holdings"*]
[2] *Expropriations Act*, RSO 1990 c E-26 [the "*Expropriations Act*"].

There are few judicial or administrative limits on the scope of the government's ability to expropriate land for public purposes. Recourse regarding the propriety of the purpose of a given expropriation is primarily political; that is, it can be found at the ballot box. The transparency enshrined in the *Expropriations Act* ensures that the public is informed about the purposes for which an authority exercises its power to expropriate and assists in maintaining accountability through the political process. Limiting the transparency envisioned by the *Act*, or expanding the use of expropriation powers beyond those specifically authorized by elected governments, risks compromising the political accountability that is a crucial component of the expropriation process.

Concerns about the transparency of an authority's purposes with regard to expropriated land may arise at the time of the taking itself, or during the abandonment or disposition of expropriated land. Sections 41 and 42 of the *Expropriations Act* were intended to afford expropriated owners a degree of due process when the land that was expropriated from them is no longer required for the purpose of the expropriation.

This paper reviews the history and application of sections 41 and 42 of the *Expropriations Act*, with particular emphasis on recent judicial interpretation of those sections. It is hoped that, given the limited judicial consideration of sections 41 and 42, this paper will provide useful guidance to practitioners and parties to the expropriation process on these important statutory provisions.

II. Overview of Sections 41 and 42

The aim of sections 41 and 42 of the *Expropriations Act* is to regulate and control the abandonment and disposition of property that was expropriated for a public purpose by a sanctioned authority. These provisions maintain the rights of landowners and ensure

accountability within the expropriation process. They should be subject to careful consideration as a result.

a. Section 41

Section 41 of the *Expropriations Act* reads as follows:

> **Abandonment of expropriated land**
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> 41. (1) Where, at any time before the compensation upon an expropriation is paid in full, the land or any part thereof is found to be unnecessary for the purposes of the expropriating authority or if it is found that a more limited estate or interest therein only is required, the expropriating authority shall so notify each owner of the abandoned land, or estate or interest, who is served or entitled to be served with the notice of expropriation, who may, by election in writing,
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> (a) take the land, estate or interest back, in which case the owner has the right to compensation for consequential damages; or
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> (b) require the expropriating authority to retain the land, estate or interest, in which case the owner has the right to full compensation therefor.
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> **Revesting**
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> (2) Where all the owners elect to take the land, estate or interest back under clause (1) (a), the expropriating authority may, by an instrument signed by it and registered in the proper land registry office and served on each owner, declare that the land or part thereof is not required and is abandoned by the expropriating authority or that it is intended to retain only such limited estate or interest as is mentioned in the instrument, and thereupon,
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> (a) the land declared to be abandoned revests in the owner from whom it was expropriated and those entitled to claim under the owner; or
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> (b) in the event of a limited estate or interest only being retained by the expropriating authority, the land so revests subject to such limited estate or interest.

This provision is commonly referred to as the "offer back" requirement.[3] Subsection 41(1) provides that where expropriated land, or a part of it, is no longer necessary for the purposes of the expropriating authority, each owner entitled to be served with notice of the expropriation may elect whether to take the expropriated land back or to require the expropriating authority to

[3] *179061 Ontario Inc v Hamilton-Wentworth District School Board*, 2016 ONCA 210 at para 1 ["*Hamilton-Wentworth*"].

keep the land and pursue full compensation.[4] The offer back requirement also arises where it is determined that a more limited estate or interest in the land than that which was expropriated is required. Where owners elect to take the land back from the expropriating authority, they are entitled to compensation for any consequential damages arising from the expropriation process to that point. Subsection 41(2) addresses the technical process of revesting the land to the owner where they elect to take it back.

It is important to note that section 41 only applies to the period of time ***before*** compensation for the expropriated lands has been paid in full. This presumably applies to the payment of compensation to all parties with an interest in the expropriated property.[5] The section's application before the payment of compensation is consistent with the Canadian expropriation regime's roots in the United Kingdom's "compulsory purchase" regime and by analogy to a forced sale.[6] If compensation is viewed as analogous to the purchase price for the expropriated property within the context of an ordinary sale, its payment would affect transfer of title to the buyer (in this case the authority). If the final purchase price is not paid, then title to the land (or remnants thereof) remains with the buyer. The key difference within the context of expropriation is that title to the expropriated lands vests in the expropriating authority prior to payment of compensation.[7] Section 41 addresses and endeavours to remedy potential inequities arising from this early vesting.

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[4] See the definitions of "registered owner" and "owner" at subsection 1(1) of the *Expropriations Act, supra* note 2, as well as the notice requirements found at section 9.

[5] The inclusion of "all owners" could result in an uncertain situation where an owner with a remote or limited interest in the expropriated property cannot be located or refuses to agree on final compensation. This could be remedied by an authority advancing the determination of final compensation by serving a Notice of Arbitration.

[6] *Cedars Rapids Manufacturing and Power Company v Lacoste*, [1914] AC 1083; Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2d ed (Scarborough, ON: Carswell, 1992) at pages 3-4.

[7] *Expropriations Act, supra* note 2 at section 9.

b. Section 42

Section 42 of the *Expropriations Act* is not similarly limited in terms of its temporal application. It reads as follows:

> **Disposal of expropriated lands**
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> 42. Where lands that have been expropriated and are in the possession of the expropriating authority are found by the expropriating authority to be no longer required for its purposes, the expropriating authority shall not, without the approval of the approving authority, dispose of the lands without giving the owners from whom the land was taken the first chance to repurchase the lands on the terms of the best offer received by the expropriating authority.

This section is often referred to as the "right of first refusal" provision.[8] It requires that where expropriated lands are not required for the expropriating authority's purposes, they be offered back to the expropriated owner for purchase prior to the sale of the land to a third party. The offer to the expropriated owner must be on the terms of the best offer for the lands received by the expropriating authority. An expropriating authority may be exempted from offering the expropriated lands for sale to an expropriated owner if the approving authority approves of the land's disposition to another party without following the right of first refusal provision. [9]

III. History and Intent of Sections 41 and 42 of the *Expropriations Act*

Legislation governing the disposal of expropriated land dates back to 1845 when the *Land Clauses Consolidation Act* recognized the rights of original owners to repurchase property before superfluous lands could be sold by expropriating authorities. [10] Legislation in Ontario has only addressed this issue within the last half-century as part of the modern *Expropriations Act*. .

[8] *Hamilton-Wentworth, supra* note 3 at para 31.
[9] See the definition of "approving authority" at section 1(1) of the *Expropriations Act, supra* note 2.
[10] *Land Clauses Consolidation Act*, 1845, 8 & 9 Vict c 18 at sections 127-131.

The modern *Expropriations Act* is a product of the Ontario government's *Royal Commission Inquiry Into Civil Rights*, conducted by Justice James McRuer (the "McRuer Inquiry").[11] The McRuer Inquiry arose as a result of significant public and academic criticism of the expropriation regime in Ontario at the time. Those criticisms included that it lacked uniformity and objectivity because a multiplicity of statutes, in addition to the common law, governed the rights of parties to an expropriation. The McRuer Inquiry's recommendations suggested reforms to the expropriation regime that were intended to make it more objective and to orient its focus to be on the state's obligations to repair injuries suffered by individual landowners for the public good. The report released as a result of the McRuer Inquiry (the "McRuer Report") led to significant reform of the statutory regime governing expropriation and compensation in Ontario with the passage of the *Expropriations Act* in 1968.

Sections 41 and 42 of the *Expropriations Act* arose directly from the McRuer Report and the legislative reform exercise that followed. Prior to the enactment of those statutory provisions, there was no restriction on an expropriating authority's subsequent treatment or disposal of lands that had been expropriated. This left the system vulnerable to expropriating authorities seeking to "flip" expropriated land for a profit. Public authorities could expropriate greater amounts of land than necessary in order to profit from the disposition of the excess lands after the works were constructed.

[11] Ontario, *Royal Commission Inquiry Into Civil Rights* (Toronto; Queen's Printer, 1968) vol 3 (Commissioner: Justice James Chalmers McRuer) [the "*McRuer Report*"].

Sections 41 and 42 were an attempt to address these vulnerabilities by regulating the process for disposing of such abandoned lands and ensuring the expropriation power was only exercised in accordance with authorized purposes.[12] The McRuer Report noted:

> If a contemplated expropriation is for a purpose not provided in the relevant legislation, then there is no power to proceed with it. This accords with the basic principle that a person's property rights should not be taken from him except for purposes specified by the Legislature. … [An expropriating authority may sell expropriated land] to whomever it sees fit and at any price. The absence of any restrictions is an unjustified encroachment on the rights of owners and tends towards expropriation of more land than is required in order that a speculative profit may be made.[13]

It should be noted that statutes empowering expropriation often confer a broad discretion on authorities to expropriate greater amounts of land than is required for their immediate needs.[14] The McRuer report warned about the possible abuse of this wide discretion:

> These provisions may be used on contravention of fair principles of expropriation law. An authority could deliberately expropriate more land than was necessary for the proposed work with the sole purpose of selling the surplus land at a considerable profit realized through increased value by reason of the work involved. This would reduce the total cost of the project at the expense of the owner of the unnecessary land.[15]

The McRuer Report recommended the adoption of what would become sections 41 and 42 in order to guard against these possible abuses.[16]

An example of the vulnerabilities that sections 41 and 42 were intended to address is found in the Federal Court decision *Woodburn Estate v National Capital Commission*, which considered a situation where expropriated lands were sold to a third party when they were no longer required

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[12] *McRuer Report, supra* note 11 at page 984.
[13] *Ibid* at page 1074.
[14] See for example *Public Transportation and Highway Improvement Act*, RSO 1990, c P-50 at section 11; *Municipal Act, 2001*, SO 2001, c 25 at sections 6, 10 and 11.
[15] *McRuer Report, supra* note 11 at page 1077.
[16] *Ibid* at pages 1077-1078.

for the authority's purposes.[17] In 1961 the Defendant National Capital Commission expropriated land from the Plaintiff for inclusion in the greenbelt surrounding the City of Ottawa and paid compensation in the amount of $110,000.[18] In the 1990s the National Capital Commission conducted a study and determined that the expropriated land was no longer required for the greenbelt and declared it surplus. After it was declared surplus the Plaintiff unsuccessfully attempted to reacquire the land.[19]

The National Capital Commission applied to have the land severed and re-zoned for commercial use; the Plaintiff opposed the re-zoning but the Ontario Municipal Board confirmed it in 1998.[20] The Plaintiff again asserted that it wished to reacquire the lands and was told that to do so, it would have to bid on it like any other interested party. The land was eventually sold to a developer in 1999 for $6,072,000.[21] The Plaintiff brought an action in Federal Court asserting that they had an interest in the expropriated lands and a right to reacquire them if no longer required by the National Capital Commission.

Madam Justice Heneghan of the Federal Court granted a motion for summary judgment brought by the National Capital Commission and dismissed the action. The Court held that the "abandonment" provisions of the Federal *Expropriation Act*, RSC 1952 c 106 had no application to the case before it. There was no legislative provision addressing the circumstances and the Court found that there was no common law right to reacquire the expropriated lands.[22] The National Capital Commission could abandon the purposes for which the land was expropriate so

[17] *Woodburn Estate v National Capital Commission*, [2001] 1 FCR 305 ["*Woodburn Estate*"].
[18] *Ibid* at paras 4-6.
[19] *Ibid* at para 9.
[20] *Ibid* at para 10.
[21] *Ibid* at para 12.
[22] *Ibid* at para 33.

long as that abandonment was not part of a "colourable scheme".[23] While the term colourable scheme was vague and ambiguous, the Court found that it suggested some degree of duplicity and impropriety; there was no evidence of such conduct in the case before it.[24]

The Court noted that the substantial price the National Capital Commission was receiving for the property, and its proposed use in commercial development after a long period of time in the greenbelt, invited some speculation as to the motives behind the sale. But in the absence of any evidence that the 1961 expropriation was for the purposes of banking land holdings for future profitable sale that speculation was not enough to establish a colourable scheme.[25] The motion for summary judgment brought by the National Capital Commission was granted as a result, and the Plaintiff's action was dismissed.

The Federal Court's decision in *Woodburn Estate* demonstrates the effect of what the McRuer Report called a lack of "any statutory restrictions on an expropriating authority's right to do with the [expropriated] land what it wishes".[26] Though there was no evidence of abuse in *Woodburn Estate*, it is not difficult to envision how such circumstances could encourage the "expropriation of more land than is required in order that a speculative profit may be made".[27]

The McRuer Report considered expropriations acquiring more land than required for public purposes in order to achieve a profit to be an "unjustified encroachment on the rights of owners" and recommended that the *Expropriations Act* be amended to include a requirement that "the consent of the approving authority [be obtained] before any surplus land could be sold by an

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[23] *Woodburn Estate, supra* note 17 at para 33; *National Capital Commission v Munro*, [1965] 2 ExCR 579.
[24] *Ibid* at para 34.
[25] *Ibid* at para 38.
[26] *McRuer Report, supra* note 11 at pages 1073-1074.
[27] *Ibid* at pages 1073-1074.

expropriating authority".[28] This recommendation was effected as what eventually became section 42 of the *Expropriations Act*.

The abandonment provisions of the Federal *Act* referred to by the Court in *Woodburn Estate* are roughly the equivalent of section 41 of the Ontario *Expropriations Act*. As compensation had been paid in full in that case, the Court found that the section had no application.[29] Prior to the existence of section 41, however, the McRuer Report concluded that "an owner whose land has been taken by the exercise of statutory powers has a just claim to resume ownership of the land in certain circumstances if it is no longer required by the expropriating authority".[30] To that end it went on to recommend that where expropriated land, or a part thereof, "is found to be unnecessary for the purposes of the expropriating authority…the owner should have the right to take the land back with a right of compensation for consequential damages, or to insist on the expropriating authority's retaining the expropriated lands and paying full compensation therefor".

The excerpted provisions from the McRuer Report were incorporated as section 41 of the *Expropriations Act*. Its modern wording has remained unchanged since the *Expropriation Act*'s 1968 implementation.

IV. Interpretation and Application of Sections 41 and 42 of the *Expropriations Act*

In the nearly 50 years since their enactment sections 41 and 42 of the *Expropriations Act* have been subject to surprisingly little judicial consideration. Recent case law from the Ontario Court

[28] *McRuer Report, supra* note 11 at pages 1073-1074.
[29] *Woodburn Estate, supra* note 17 paras 32 and 35.
[30] *McRuer Report, supra* note 11 at page 1073.

of Appeal has shed some light on the interpretation of these provisions,[31] but various issues remain unresolved.

Claims for compensation arising from an expropriation in Ontario ordinarily proceed before the Ontario Municipal Board.[32] The Superior Court does not have authority to determine compensation arising from an expropriation. It does, however, have authority to consider applications to determine whether land has been abandoned for the purposes of sections 41 and 42, and to compel an expropriating authority to comply with their obligations arising from those sections.[33]

An interesting and unresolved issue is the Court's jurisdiction to consider a claim for consequential damages where land is taken back in accordance with paragraph 41(1)(a) of the *Expropriations Act*. There is case law before the Ontario Municipal Board indicating that it has jurisdiction over claims for consequential damages arising from paragraph 41(1)(a).[34] This seems consistent with the wording of section 26 of the *Expropriations Act*, which grants the Board jurisdiction to determine "compensation payable under the *Act*".

The Ontario Municipal Board lacks jurisdiction, however, to order an expropriating authority to return land that it has expropriated.[35] That jurisdiction rests with the Superior Court. It is not difficult to envision a situation where an expropriated owner successfully proceeds with an application seeking a declaration that lands expropriated from it have been abandoned. The interests of efficiency dictate that the application judge should make a determination as to

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[31] *Hamilton-Wentworth, supra* note 3.
[32] *Expropriations Act, supra* note 2 at section 29.
[33] *Progressive Developments (1978) Ltd v Winnipeg (City)* (1982), 145 DLR (3d) 405 ["*Progressive Developments*"]; *Grauer Estate v Canada*, [1986] FCJ No 946 (TD); *Hamilton-Wentworth, supra* note 3.
[34] *Buckhorn Lodge Ltd v Ontario (Minister of Transportation and Communications)* (1972), 3 LCR 105; *Marsdin v Hamilton (City)* (2013), 110 LCR 142 at para 18 ["*Marsdin*"].
[35] *Marcus v Metropolitan Toronto (Municipality)* (1974), 5 LCR 78.

consequential damages at that time, rather than forcing the expropriated owner to commence new proceedings before the Ontario Municipal Board to have consequential damages determined.

a. Interpretation and Application of Section 41

The Ontario Municipal Board has held that for the abandonment contemplated by section 41 to occur, there must be an actual expropriation and taking of land.[36] It is not enough that expropriation be anticipated, or an application for approval to expropriate be commenced. The expropriation itself must have taken place and the lands vested in the expropriating authority for section 41 to apply. As section 41 anticipates a "revesting" of title to the land in the expropriated owner where they elect to take the abandoned land back, the requirement that an expropriation be commenced is sensible.

The term "abandonment" is not defined in the *Expropriations Act*. Section 41 contemplates that it will apply in situations where expropriated land is "found to be unnecessary for the purposes of the expropriating authority". It may also apply where it is found that a "more limited estate or interest" in the expropriated land is required. Judicial determination of whether expropriated land has been abandoned has focussed on the purposes of the expropriating authority for which the land was taken. Determining these purposes is crucial to the abandonment analysis.

In *7390691 Ontario Inc v Hamilton-Wentworth District School Board* the Ontario Court of Appeal considered this provision and held that an expropriating authority must state the purposes and objectives of its expropriation, and be held to them, to give effect to the protective elements of the *Expropriations Act*.[37] It is not the legislative or statutory provisions which empower the

[36] *Marsdin, supra* note 34 at para 18.
[37] *Hamilton-Wentworth*, *supra* note 3 at para 65.

expropriating authority to compulsorily acquire land that govern, but rather the purposes and objectives of the specific expropriation at issue.[38]

In reaching this conclusion the Court of Appeal referred to the decision of the Manitoba Court of Appeal in *Progressive Developments (1978) Ltd v Winnipeg (City)*.[39] That decision considered the equivalent of section 41 in Manitoba's expropriation legislation. The Court held that the purposes, when considering the application of the offer back provisions, was not referring to the general purposes of an authority but to the specific purposes set out in documents initiating the expropriation.[40] The Court held that the purposes in that case were those set out in the expropriating by-law.

The Federal Court has similarly concluded with respect to the federal equivalent of section 41 that it is not sufficient to refer to the general statutory purposes for which an expropriating authority is authorized to take land.[41] Reference must be made to the restricted purpose of the taking at issue in order to determine whether expropriated land has been abandoned.

The Court of Appeal in *Hamilton-Wentworth* held that the binding purposes when determining the application of section 41 were the purposes set out in the Notice of Application for Approval to Expropriate Land and the Notice of Grounds offered in anticipation of a hearing of necessity.[42] The purposes set out in those instruments were drafted broadly and offered the expropriating authority a wide scope within which to use the expropriated land. The Notice of Application set out that land was expropriated for the "purposes of the construction and operation of a secondary

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[38] *Hamilton-Wentworth*, *supra* note 3 at paras 69-70.
[39] *Progressive Developments, supra* note 33.
[40] *Ibid* at para 12. This would likely include the Notice of Application for Approval to Expropriate Land, the Application for Approval to Expropriate Land, the Notice of Grounds and any by-laws, regulations or other resolutions authorizing an expropriation.
[41] *Grauer Estate, supra* note 33.
[42] *Hamilton-Wentworth, supra* note 3 at para 75.

school and related amenities". The Notice of Grounds slightly modified that purpose to be "[t]he placement of a joint school and recreational facility on the [expropriated land] will enable the parties to cooperate to realize a project which individually they could not achieve due to funding and/or space restrictions".[43]

The Court explicitly found that the narrow description included in the expropriating authority's resolution authorizing the expropriation, namely "the purpose of constructing a parking lot for a new Secondary School to be built on the current King George/Parkview site", was not the governing purpose for determining the application of section 41.[44] The Court offered three reasons as to why the resolution did not govern the purposes of the expropriation: 1) use of the expropriated lands as a school parking lot was just one of many permissible ways the expropriating authority could use land in providing a school site, and the expropriating authority should be afforded wide latitude in deciding how to use that land; 2) the critical purposes in the *Expropriations Act*, as envisioned by the McRuer Report, should be set out in the Notice of Grounds to be served before a hearing of necessity; and 3) the expropriated owner did not argue the narrow ground that the purpose set out in the notice of expropriation was the governing purpose, and had it done so that argument would have failed.[45]

The Court of Appeal specifically referred to the resolution authorizing the expropriation as "mere implementation" which did not set out the purposes of the expropriating authority.[46] Nothing had occurred with respect to the use of the expropriated land that was inconsistent with the Notice of Application and the Notice of Grounds. As a result the Court concluded that the

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[43] *Hamilton-Wentworth, supra* note 3 at para 75.
[44] *Ibid* at para 76.
[45] *Ibid* at paras 76-79.
[46] *Ibid* at para 78.

lands were not abandoned for the purposes of section 41.[47] The expropriating authority had not abandoned the expropriated lands and was not required to offer them back to the expropriated owner.

The Court of Appeal's concern about avoiding "micromanagement" of an expropriating authority's use of expropriated lands is a persuasive one.[48] The projects for which lands are expropriated are often large in scale and their exact design may be fluid and evolve over time. It is crucial to allow flexibility for public authorities to change the specific use to which they will be putting expropriated lands without being required to offer those lands back to an owner every time project design is modified.

The Ontario Court of Appeal's analysis, however, may have been too heavily focussed on the broad purposes of expropriation and the right of public authorities to use expropriated lands for a wide range of purposes. This approach comes at the expense of ensuring transparency and public accountability in the initiation of the expropriation process, where an elected body is charged with deciding on the nature and scope of an expropriation. The interpretive approach taken by the Court of Appeal appears to be somewhat at odds with the interpretive direction from the Supreme Court of Canada that expropriation provisions are to be strictly construed against expropriating authorities and in favour of the rights of expropriated owners.[49]

These interpretive principles would dictate that the directions and objectives of the expropriating authority should be construed narrowly in order to give the protections offered by section 41 as broad an application as reasonably possible. The purposes set out in the notice of expropriation

[47] *Hamilton-Wentworth, supra* note 3 at paras 78 and 80.
[48] *Ibid* at para 77.
[49] *Dell Holdings, supra* note 1 at para 20.

or resolution authorizing expropriation should not be viewed as "mere implementation". They should instead be the guiding consideration in determining the expropriating authority's purposes when considering section 41.

This approach is consistent with that followed in earlier cases considering the equivalent of section 41 in other jurisdictions. In *Grauer Estate v Canada* the Federal Court found that the purposes of the expropriation at issue were found in a certificate signed by the applicable Minister which was included with the expropriation plan deposited in the land titles office.

That certificate set out the public purpose for which the land was taken as being "[l]ands required for the extension of Vancouver Airport at Sea Island, British Columbia".[50] The Court went on to find that the purpose of the expropriation in that case was "for the extension of runways"; a narrow purpose indeed. A re-configuration of the airport expansion project resulting in no runway on the expropriated lands rendered them unnecessary for those purposes and the offer back requirement was rendered operative.[51]

The Manitoba Court of Appeal has also confirmed that the purposes to be considered in determining the applicability of section 41 (or its equivalent) are those set out in the expropriating by-law.[52] In contrast the Ontario Court of Appeal in *Hamilton-Wentworth* found that the resolution authorizing expropriation was not binding in determining the expropriating authority's purpose as a parking lot. That purpose, as set out in the resolution, was just one of the ways in which the authority could use expropriated land for a school site. Interestingly this is not a reference to the purposes as set out in either the Notice of Application or Notice of Grounds. It

[50] *Grauer Estate, supra* note 33.
[51] *Ibid*.
[52] *Progressive Developments, supra* note 33 at para 13.

appears to refer to the provisions of the *Education Act* authorizing the particular expropriating authority at issue to expropriate land for school sites.[53]

This reference to the broad purposes for which an expropriating authority may take land under its empowering statute has been rejected by both the Manitoba Court of Appeal and the Federal Court.[54] Its inclusion in the Ontario Court of Appeal's reasoning in *Hamilton-Wentworth* could unduly broaden the interpretation of "purposes" at issue when in applying section 41, and consequently undermine the transparency fostered by sections 41 and 42.

The *Expropriations Act* empowers public authorities, with the approval of elected and accountable government, to expropriate land for broad and public purposes. The primary counterbalance to the broad authority to expropriate for public purposes is political accountability for those who authorize the use of expropriation of private lands. It is consistent with this balance that the purpose of an expropriation be that which is set out in the documents authorized and approved by those with political accountability, instead of those empowered to advance the expropriation process after approval is given for the expropriation. To permit an expropriating authority to alter or materially elaborate on the purpose of an expropriation beyond that set out in the resolution passed by a legislature, municipal council or other politically accountable public body may compromise the transparency and political accountability that section 41 is meant to ensure.

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[53] *Education Act*, RSO 1990 c E-2, at section 195.
[54] *Progressive Developments, supra* note 33 at para 12; *Grauer Estates, supra* note 33.

b. Interpretation and Application of Section 42

It may be that in numerical terms at least, the instances of judicial consideration of section 42 of the *Expropriations Act* are approximately even with those interpreting section 41. Detailed judicial interpretation of the specifics of section 42 of the *Expropriations Act* is, however, far less frequent than even the limited judicial consideration of section 41 or its equivalent provisions in other jurisdictions.

Section 42 becomes operative, like section 41, when expropriated lands are found by the expropriating authority to no longer be necessary for its purposes. Given that the wording of section 41 and 42 is similar in this respect it stands to reason that the principles that are applicable to determining an expropriating authority's "purposes" with respect to section 41 would be extended to section 42.

There is no requirement in section 42 that it only be exercisable prior to the payment of compensation in full. Its limitation is instead that the expropriating authority must be in possession of the expropriated lands in order for the section to become operative. As there is no limitation in section 42 about the timing in the compensation process when it becomes effective it could conceivably be at any point, before or after final compensation is determined and paid out. Read in context with section 41, however, section 42 appears intended to cover situations after compensation is paid out. Situations prior to the payment of compensation are governed by section 41.

This is because the application of section 42 prior to the final payment of compensation could lead to an unintended result; an expropriating authority would be seeking payment for lands it has taken without the owner having received their full and fair compensation under the

Expropriations Act. Such a result is contrary to the text and purposes of the *Expropriations Act* and could be subject to abuse.

Where section 42 is engaged the expropriating authority must offer the expropriated owner an opportunity to repurchase the lands on the terms of the best offer received for them, unless it is exempted from doing so by the approving authority. There is some judicial authority indicating that an expropriated owner may release their right of first refusal to repurchase land under section 42 in advance where the release is "broad and unequivocal" about the parties' intentions to waive the repurchase obligations.[55]

The interaction between sections 41 and 42, specifically the ability under section 42 for an expropriating authority to exempt itself from the right of first refusal requirement, was raised in the *Hamilton-Wentworth* decision.[56] The expropriating authority in that case, which was also the approving authority, had passed a resolution approving the transfer of the expropriated lands without offering the expropriated owners the first chance to repurchase the lands.[57] The authority took the position that not only did that resolution dispense with the right of first refusal requirement under section 42, but also the offer back requirement of section 41. On the basis of its dismissal of the expropriated owner's claim based on section 41, the Court declined to rule on the issue of whether the obligations under section 41 can be waived by an approving authority.[58]

The expropriating authority's position on this issue did not appear to be based upon the wording of the *Expropriations Act*. Both section 41 and 42 are mandatory obligations on an authority in the case of abandoned lands. Only section 42 contains an exemption allowing an approving

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[55] *Great Gulf Holdings Inc v York (Regional Municipality)* (2000), 13 MPLR (3d) 281 at paras 11-13.
[56] *Hamilton-Wentworth, supra* note 3 at paras 82-87.
[57] *Ibid* at para 85.
[58] *Ibid* at para 87.

authority to excuse the expropriating authority from compliance with the section. The two are separate provisions of the *Act* and there is nothing to suggest that they are dependent on one another or should be read conjunctively. The exemption provisions of section 42 apply for the purposes of that section only, and do not appear to have any application to other sections of the *Expropriations Act*, including section 41.

Apart from the exemption by an approving authority of an expropriating authority's obligations to offer land for repurchase under section 42, it may not be engaged in the first place where the purpose of the expropriation was the eventual transfer of lands to a third party. In *Vincorp Financial Ltd v The Corporation of the County of Oxford*, the Ontario Superior Court considered an application brought by expropriated landowners to set aside the expropriation of their lands for eventual transfer to a third party for economic development in the region.[59]

The Respondent County in that case had expropriated land for the eventual purpose of assembling and transferring them to Toyota Motor Manufacturing North America.[60] Toyota intended to construct a new assembly plant on the expropriated lands transferred to it. It was anticipated that the construction of the Toyota manufacturing plant would confer a significant economic benefit for the region, including the generation of desirable jobs.

The primary thrust of the application on behalf of the owners opposing the expropriation was based on provisions of the *Municipal Act, 2001*, SO 2001 c 25.[61] There was a cursory argument on behalf of the owners that the expropriating County was not authorized to transfer the expropriated lands to Toyota because it had not complied with the requirements of section 42.

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[59] *Vincorp Financial Ltd v The Corporation of the County of Oxford*, 2014 ONSC 2580 ["*Vincorp*"].
[60] *Ibid* at para 4.
[61] *Ibid* at para 8.

The Court held that the facts demonstrated that the purpose of the expropriation remained the same throughout the process; acquisition of the expropriated lands for the Toyota plant.[62] As there was no evidence to demonstrate that the expropriated lands were no longer required for that purpose, section 42 had no application and the argument was dismissed.

It should be noted that the purposes of expropriation set out in the Notice of Application in *Vincorp* made no mention of the transfer of the expropriated land to a third party, or to the Toyota plant specifically.[63] They refer instead to the need to secure lands for the purposes of ensuring a supply of employment and industrial land in a particular area. Despite the lack of specific reference to it, the establishment of a Toyota plant on those employment lands could conceivably fit within the enumerated purposes. The Court's approach in *Vincorp* of referring to the broad purposes set out in the Notice of Application to offer flexibility in the expropriating authority's use of land is consistent with the later direction from the Ontario Court of Appeal in *Hamilton-Wentworth*.

V. Remaining Interpretational Issues

Given the relative paucity of jurisprudence considering sections 41 and 42 of the *Expropriations Act*, there remain a number of interpretational issues left to be determined. A sampling of these outstanding issues are canvassed below.

[62] *Vincorp, supra* note 59 at para 97.
[63] *Ibid* at para 26.

a. What Purpose Governs When There is No Hearing of Necessity or Notice of Grounds?

The Court of Appeal in *Hamilton-Wentworth* concluded that the "critical purposes [of an expropriation] are those set out in the Notice of Grounds to be served before the hearing of necessity".[64] Though the purposes set out in the Notice of Application for Approval to expropriate land were relevant to the analysis, the comments of the Court indicate some primacy for the purposes as set out in the Notice of Grounds.

Whether or not a hearing of necessity is conducted is a discretionary matter that is in the hands of the expropriated landowner.[65] It should not be presumed that a hearing of necessity will take place in every expropriation. In practice such hearings are rare and can even be waived by the provincial cabinet in appropriate circumstances.[66] The result is that in most cases, there is no Notice of Grounds and the critical purpose set out therein would not be available for the purposes of determining whether section 41 or 42 of the *Expropriations Act* has been engaged.

This begs the question as to what constitutes the purposes of the expropriating authority in such circumstances. The Court of Appeal referred to both the broad purposes in the Notice of Application and the slightly more specific purposes in the Notice of Grounds, while rejecting the highly specific purposes in the authority's resolution authorizing the expropriation.[67] Where no Notice of Grounds is issued, default may be had solely to the purposes set out in the Notice of Application, which include less detail of the scope of the expropriation. It appears unfair and unintended for an owner who has not required a hearing of necessity to be held to impliedly

[64] *Hamilton-Wentworth, supra* note 3 at para 78.
[65] *Expropriations Act, supra* note 2 at subsection 6(2).
[66] *Ibid* at subsection 6(3).
[67] *Hamilton-Wentworth, supra* note 3 at paras 75-76.

waive rights and protections offered by a narrower definition of purpose under sections 41 and 42 of the *Expropriations Act*.

Given what appeared to be the Court of Appeal's attempt to balance flexibility for the expropriating authority with some degree of specificity, such an approach would not strike the appropriate balance. Where there is no Notice of Grounds, the purposes set out in the instrument authorizing expropriation should play some role in determining the expropriating authority's purposes. While those purposes should perhaps not be determinative, they nevertheless have a role to play in determining a more specific purpose than those set out in the notice of application.

b. What Owners are Included in "Each Owner" or "All Owners" for the Purposes of Section 41?

Section 41 of the *Expropriations Act* requires that each owner of the expropriated lands that would be entitled to service of a notice of expropriation is entitled to notice of abandonment and to elect whether to take the lands back or not. Pursuant to subsection 41(2), only where "all the owners" elect to take the land back may the expropriating authority initiate the formal proceedings required to revest the lands.

The broad definition of an owner for the purposes of section 41 may lead to obvious difficulty. As at least one academic commentator has pointed out, under this definition even an owner with a very minor interest in the expropriated land could frustrate the entire offer back and revesting process where they do not agree to it.[68]

John W. Morden,has written of this concern as follows:

[68] Eric C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2d ed (Scarborough, ON: Carswell, 1992) at page 10-243.

> It therefore appears that it is possible for an execution creditor who is owed $250, or a tenant with only a few weeks to run in his lease, by refusing to elect to take back the land, to frustrate a re-vesting desired by the expropriating authority and the owner of the fee simple. All owners must elect before the right to re-vest becomes operative. [emphasis in original] [69]

The same concern was raised by R.B. Robinson, Q.C. in his report on the *Expropriations Act*. Mr. Robinson recommended that the right to elect should not be given to any owner of a charge, lien or other encumbrance who has been paid in full.[70]

The potential for frustration of section 41 as a result of one defined owner refusing to cooperate appears unintended by the legislation. An amendment to the *Expropriations Act* in order to provide a mechanism whereby those owners entitled to relief under the abandonment provision can actually access such relief without regard to the consent of other defined owners would be a prudent step to curing this unintended effect.

c. Are There Temporal Limitations on the Applicability of Section 42?

Unlike section 41, which is time-limited to a period before compensation for the expropriated land is paid in full, section 42 contains almost no such temporal limitation. So long as the expropriated lands are in the possession of the expropriating authority, it appears that section 42 may be engaged where those lands are no longer necessary for the authority's purposes.

The only limitation on the temporal application of section 42 is the typical prohibition against retroactive application of legislation. *Re Metropolitan Toronto and Region Conservation Authority and Municipality of Metropolitan Toronto* considered an application to apply what is

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[69] John W. Morden, *An Introduction to the Expropriations Act, 1968-1969 (Ontario)* (Toronto; Canada Law Book Limited, 1969) at page 35.

[70] Ontario Ministry of the Attorney General, *Report on the Expropriations Act* (Toronto; Queen's Printer, October 1974) (prepared by R.B. Robinson, QC) at page 50 ["*Robinson Report*"].

now section 42 to expropriated lands acquired in 1965.[71] The amendments to the *Expropriations Act* leading to the enactment of section 42 did not come into force until 1968.[72]

The Court held that absent a clear intention, or necessary implication, that legislation was to apply retroactively, it applies to acts taken from the date of enactment forward. The *Expropriations Act* disclosed no such intention toward the retroactive application of section 42. It applies only to expropriations occurring after December 20, 1968.[73]

This would indicate that for any lands expropriated after December 20, 1968, if they are abandoned and disposed of section 42 must be satisfied. The passage of such a potentially lengthy period of time (somewhere in the order of as much as 50 years) creates obvious issues with respect to personnel, file retention, witness memory, etc.

In his 1974 report on the *Expropriations Act*, R.B. Robinson addressed the issue of section 42's lack of temporal limitation and the issues arising from by recommending "that a time limit be introduced into s.[42]; the Alberta statute has a time limit of 2 years and this should be satisfactory. Without such a limitation, an owner would have to be given the first chance to re-purchase, even though the expropriation occurred 50 years previously".[74] This recommendation was not adopted.

Both Alberta's and British Columbia's expropriation legislation contains a limitation period of two years in their equivalent of section 42.[75] Such a limitation period is attractive in that it avoids holding an expropriating authority to ancient obligations owed as a result of expropriations that

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[71] *Re Metropolitan Toronto and Region Conservation Authority and Municipality of Metropolitan Toronto* (1974), OR (2d) 91.
[72] *Ibid*.
[73] *Ibid*.
[74] *Robinson Report, supra* note 70 at page 51.
[75] *Expropriation Act*, RSA 2000, c E-13 at section 70; *Expropriation Act*, RSBC 1996, c 125 at section 21.

occurred many years, or even decades, in the past. It is consistent with general principles regarding limitation periods and laches.

The ability of an approving authority to exempt an expropriating authority from the right of first refusal obligation under section 42 should be more than sufficient to address this concern, however. Where an expropriating authority is disposing of abandoned lands expropriated many years in the past, it has the option to apply to its approving authority for an exemption from this provision's requirements. This allows the necessary flexibility while guarding against possible abuse.

Although it may not be sensible for authorities to have the disposition of surplus lands complicated by section 42 in perpetuity, the protections in the Sections 41 and 42 should apply at the very least until final compensation is determined, rather than for an arbitrary limitation period. It may also provide an incentive for expropriating authorities to advance the process of having compensation finally determined, either through an amicable resolution or a determination by the Ontario Municipal Board. A limitation period for the application of section 42 could resurrect concerns about authorities having an incentive to hold land for a prescribed period before disposing of it without obligations intended to protect the expropriated owner.

d. What Does "Dispose of the Lands" Mean with Respect to Section 42?

Section 42 has application where expropriated land is no longer necessary for the purposes of an expropriating authority, and that authority seeks to dispose of those lands. Disposal of land is not a defined term in the *Expropriations Act* and there has been little to no judicial definition of it. The jurisprudence respecting section 42 seems to uniformly address the self-evident circumstances where abandoned lands are being sold by the expropriating authority.

It remains an open question as to when another form of disposition of abandoned land will trigger section 42. For example, would a long term ground lease to a third party qualify as disposal of land for the purposes of the *Expropriations Act*? A significant amount of land was expropriated for the purposes of the construction of Highway 407. Would the long-term lease for the highway entered into by the Ontario Government as part of its privatization qualify as a disposition sufficient to trigger section 42? While Highway 407 could have been rife with potential test cases on this proposition, the Ontario government may have been concerned with the issue and accordingly exempted itself from the application of sections 41 and 42 of the *Expropriations Act* for the purposes of the Highway 407 privatization.[76]

It would also be an open question in those circumstances whether the expropriated lands were no longer necessary for the purposes of the expropriating authority (ie. a highway). The scope of disposition for the purposes of section 42 is a matter to be defined further by the courts. In order to ensure as broad a scope of protection for landowners as possible, disposition should include a wide range of land transfer methods in order to guard against potential abuse.

VI. Conclusion

Allowing public authorities a broad power to expropriate can lead to situations where expropriated owners suffer an economic disadvantage as a result of the unfair use of expropriation powers. The planning for major works inevitably includes the expropriation of lands that are not only immediately required, but may be required for public purposes in the future. Most would consider this to be a wise use of expropriation powers and prudent planning. Could this power be extended to expropriate more land than is necessary for the purpose of

[76] *Highway 407 Act, 1998*, SO 1998 c 28 at section 8.

disposing the land after public works are built? These issues illustrate the concerns arising when there is a lack of regulation regarding the disposal of expropriated lands that are no longer necessary for a public purpose.

The restriction on government abuse of expropriation powers is primarily through political accountability as part of the democratic process. A government who uses expropriation powers in an abusive manner is ultimately be responsible to citizens who will pass on its conduct judgment at the ballot box. This recourse is only possible if the *Expropriations Act* ensures a transparent process fostering that political accountability.

Sections 41 and 42 of the *Expropriations Act* contemplate these considerations and strive to curtail the potential abuse of government expropriation. The sections are only effective in fulfilling their purpose if they are afforded a broad interpretation that recognizes the aforementioned need for accountability and transparency in the expropriations process. The current law leaves a number of issues unresolved, to the detriment of both expropriating authorities and expropriated property owners. Further interpretation of sections 41 and 42 by the Court would provide clarity to all impacted by the *Expropriations Act*.