



REVIEW SUBMISSION

GOVERNMENT OF NEWFOUNDLAND & LABRADOR

DEPARTMENT OF MUNICIPAL AFFAIRS & ENVIRONMENT

MUNICIPAL LEGISLATION REVIEW

19 JANUARY 2018



January 18th, 2018

Government of Newfoundland & Labrador
Department of Municipal Affairs & Environment
P.O. Box 8700
St. John's, NL
A1B 4J6

Attention: The Honourable Eddie Joyce, Minister of Municipal Affairs & Environment

Dear Minister,

On behalf of the Appraisal Institute of Canada - Newfoundland (AIC - NL) and its approximately 90 valuation professionals, I am pleased to have the opportunity to make a submission in the context of the Government of Newfoundland's review of municipal legislation, specifically with respect to the following:

- *The Municipalities Act, SNL 1999 Chapter M-24*
- *The City of St. John's Act, RSNL 1990 Chapter C-17*
- *The City of Mount Pearl Act, RSNL 1990 Chapter C-16*
- *The City of Corner Brook Act, RSNL 1990 Chapter C-15*

Preparation of this document involved consultation with all members of the AIC – NL. Members were asked to provide opinions based upon their professional experience as to how the Acts could be improved to provide enhanced services to the taxpayers of Newfoundland and Labrador. The recommendations are related to the stewardship of assets, transparency in acquisition, tax sales and boards and tribunals.

The Appraisal Institute of Canada (AIC) is the nation's leading real property valuation association with more than 5,400 members located from coast to coast across Canada. The AIC represents approximately 80% of Canada's valuation / appraisal professionals. Established in 1938, the AIC works collaboratively with its 10 affiliate provincial associations to grant the distinguished Accredited Appraiser Canadian Institute (AACI) and Canadian Residential Appraiser (CRA) designations. AIC Members have a long history of providing unbiased appraisal, appraisal review, consulting, reserve fund study, mass appraisals and machinery and equipment valuation.

As a self-regulated body, the AIC holds its members to a nationally and internationally recognized standard – the Canadian Uniform Standards of Professional Practice (CUSPAP). CUSPAP incorporates the key elements that underpin every assignment completed by an AIC Member; it also establishes an ethical and professional conduct standard to protect the public interest.

The AIC – NL was first established in 1964, and as mentioned has a current roster of approximately 90 members working in both public and private sector roles.

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We trust that you find this information useful in your current review process of the Municipal Acts. We are available to discuss the information and recommendations provided in greater detail at any time upon your request.

Respectfully submitted,

**The Board of Directors of
The Appraisal Institute of Canada – Newfoundland and Labrador Association**

Katie Manojlovich, AACI, P. App., President
Glen Power, AACI, P. App., Past President
Derek Strong, CRA, P. App., President Elect
Michael Kirkland, AACI, P. App., National Director
Mike Warr, AACI, P.App., Director



Background: AIC Professional Members and Municipal Governments

Professional real estate appraisers rank amongst a small group of professionals who fulfill key internal and external roles associated with municipal government within this province.

Internally, the most active role involves municipal assessors, who estimate the value of properties included on taxation rolls. In addition to the assessment role, our members fulfill roles within municipalities such as internal real estate specialists primarily dealing with real estate acquisitions and disposals.

Externally, independent appraisers play a critical role in the assessment appeal process, and function as a cross check against errors that may occur within a mass valuation process involving thousands of valuations over a short period of time.

With respect to municipal acquisitions and disposals, professional appraisers are relied upon for provision of independent opinions of value required in sound decision making. This is true for both sides in municipal transactions, as property owners also use appraisers for decision making.

Throughout Canada, professional appraisers also provide analysis and advice related to the municipal planning process, property management and leasing, feasibility studies, forecasting, etc.

Key Observations & Recommendations

Common themes expressed by senior AIC Members interviewed, with respect to strengthening or tightening-up provisions included within the Acts, primarily include reference to ‘stewardship of assets’, as well as ‘transparency’ with respect to expropriation related matters, as well as with respect to ‘tax sales’ for recovery of taxation. A number of key areas are discussed as follows, with associated recommendations.

1. Stewardship of Assets

With respect to the sale of public assets, the Acts do make reference to ‘fair market value’ in speaking to the disposition or leasing of real property valued at \$500 or more. No reference is made however to how fair market value is to be determined. Depending upon property specifics, estimating fair market value could be very complex, and potentially including a highest and best use study whereby value maximization strategies may be identified.

Without clear direction, and without fully understanding the complex nature of real property, there is risk that municipalities may not undertake appropriate due diligence and therefore undersell public assets. Our Members have discussed numerous examples of where this has likely occurred.



The requirement for appropriate due diligence is recognized by the Government of Canada, who commission independent valuation analysis for the sale of all public assets, as well as for the leasing of private assets for public use. Additionally, provinces such as British Columbia have already set in policy that asset values are set by appraisals, CRA/AACIs or CUSPAP standards.

To ensure that public assets are not undersold, it is therefore recommended that government consider provisions within the Acts that require municipalities to exercise appropriate due diligence in the disposition of such assets, including the commissioning of a professional valuation analysis.

Furthermore, the Government of Canada employs sound asset management planning which assists in maximizing the value of assets, as well as their utility to government.

Asset management can be defined as the process of creating value within the owner's objectives through the acquisition, use and disposal of real property assets. Alternatively, asset management is defined as the practice of maximizing the value of a portfolio of properties, within the objectives of the owner¹.

It is also recommended therefore, that the Acts include provisions that require municipalities to exercise careful and responsible management of all public assets entrusted in their care.

2. Transparency in Acquisition

In order to function effectively, it is required that municipalities acquire privately held property for the development of roads, parks, infrastructure, etc. Municipalities therefore, are entrusted with the ultimate power of expropriation. The Supreme Court of Canada, in the key Dell Holdings decision, stated that

“The expropriation of property is one of the ultimate exercises of governmental authority. To take all or part of a person's property constitutes a severe loss and a very significant interference with a citizen's private property rights.”²

Property owners therefore, are protected by legislation throughout Canadian jurisdictions that ensures that expropriated parties would be no worse off as a result of the expropriation. This is sometimes referred to as the principle of equivalence, which is at the root of statutory compensation; the principle that the owner shall be paid neither less nor more than his loss³.

¹ Asset Management, BOMI Institute, Defining Real Estate Asset Management, pg. 1-2

² The Supreme Court of Canada Dell Holdings Ltd. V. Toronto Area Transit Operating Authority, [1997], 1 S.C.R.32; 1997 Carswell Ont 79 [Dell]:

³ *The Law of Expropriation and Compensation in Canada, 2nd Edition 1992, Eric C.E.Todd, page 110.*



Within Newfoundland and Labrador, The Expropriation Act, the Urban and Rural Planning Act, the Public Utilities Act, and the Muskrat Falls Project Land Use are examples of such legislation.

Over many decades, AIC-NL Members have provided expert valuation and compensation analysis, and have testified on countless occasions related to the provisions outlined within the above referenced legislation. This has helped to ensure that property owners who have been expropriated are adequately compensated for the taking of their property for the public good.

Anecdotally, our Members have provided us with examples of interactions whereby property owners, who are potentially subject to expropriation by municipalities or other branches of government, have not been dealt with in a transparent and forthright manner during the initial negotiation process.

Property owners are not always informed of their rights under the legislation, and during negotiations direction is sometimes given to withhold reference to compensation related provisions of the relevant Act such as ‘disturbance, ‘detrimental effect’ or ‘injurious affection’. Our members have provided recent examples whereby municipalities have given specific direction to not discuss such provisions, and to exclude any such reference within valuation reports.

In most instances expropriated parties have limited knowledge of legislation implemented to protect their rights. It should be incumbent on the expropriating party to inform them, and to provide a sound basis for compensation associated with any acquisition. While certain municipalities have implemented such practices, we believe it should be applied consistently across all municipalities.

It is recommended that the Acts require municipalities to be as transparent as possible in the acquisition of private property for public use, and clearly inform property owners of their rights at the outset of negotiations.

Furthermore, it is recommended that at the commencement of negotiations that municipalities provide a sound and reasonable basis for compensation that addresses compensation related provisions allowed for within relevant legislation, as well as the option for the property owner to obtain their own independent opinion at the cost of the expropriating entity.

Recent legislation implemented by the province has partially addressed the latter recommendation. Section 5.5. of the *Muskrat Falls Project Land Use and Expropriation Regulations under the Muskrat Falls Project Land Use and Expropriation Act*, states the following:



Application for expropriation

5. (1) Where a proponent requires land which, in the opinion of the proponent, is necessary for the Muskrat Falls Project, the proponent may, under the authority of paragraph 12(1)(b) of the Act, make an application to the expropriating authority requesting that the expropriating authority expropriate the land on the proponent's behalf.

(2) An application for expropriation shall be in the prescribed form and shall include the following information:

- (a) a general description of the land to be expropriated, including the nature of the interest to be expropriated;
- (b) a declaration of an officer of the proponent that the land to be expropriated is, in the opinion of the proponent, necessary for the Muskrat Falls Project;
- (c) the circumstances set out in subsection 12(5) of the Act that apply to the request;
- (d) the identity of any person claiming to have an interest in the land to be expropriated, if known;
- (e) the details of negotiations which have been undertaken with respect to the acquisition by the proponent of the land to be expropriated and any offer which the proponent has made or, where no offer has been made, the reason why no offer has been made;
- (f) a survey conducted by a surveyor licensed under the *Land Surveyors Act, 1991*, or other description of the land that is to be expropriated, in form and content satisfactory to the expropriating authority;
- (g) either
 - (i) a copy of an appraisal of the land, or
 - (ii) an affidavit of an officer of the proponent respecting an alternative method of valuation of the land;
- (h) a title search of the land to be expropriated, in form and content satisfactory to the expropriating authority, that details a registered security interest in the land concerned; and
- (i) the results of a search of the Judgment Enforcement Registry, or where the results are not attached, an explanation satisfactory to the expropriating authority as to why the information is not attached.

(3) Where a request is made to expropriate land, the expropriating authority shall determine whether the requirements of section 4 have been met.

(4) A proponent shall pay the costs of an appraisal required under this section and shall deliver a copy of it to the landowner, where known.

(5) An appraisal shall be carried out by a qualified independent appraiser who

- (a) is accredited by the Appraisal Institute of Canada; and
- (b) has earned the designation of Accredited Appraiser Canadian Institute, AACI.

Another issue raised by our professional Members involves the timeline associated with resolution of expropriation issues. In the experience of our Members, files involving compensation for



expropriation remain active and unresolved for many years, with no payment made, therefore imposing an unfair burden on property owners to the benefit of the public good. This also allows expropriating entities to defer payment for property acquired through expropriation.

It is recommended that the Act include provisions for expedient resolution of compensation for expropriation issues to ensure that citizens are not unfairly burdened as a result of expropriation. Consideration should also be given for immediate payment provisions associated with the underlying value of property expropriated, with other heads of claim to be resolved at a later date. Such a provision would limit certain citizens being treated or perceived to being treated unfairly, by expropriating parties who may wish to defer payment for property acquired for public use.

The final item under 'transparency' encourages governments to be more open and transparent with acquisition costs. The provincial government, and to a lesser degree municipal governments, have historically avoided registration of compensation paid for lands acquired for public use or protection (i.e. agricultural, environmentally sensitive). While this policy may be premised around concerns of compromising future acquisition costs, we believe transparency and openness with taxpayers is beneficial for all parties involved.

It is recommended therefore, that the Acts require municipal governments to make details associated with all government acquisitions available publicly.

3. Tax Sales

The Acts currently allow municipalities to sell real property for recovery of delinquent taxes. The mechanism in place is one of public notice and auction. Sale by auction is essentially a forced sale situation, whereby the attainable value may only be a fraction of fair market value.

Feedback from our Members indicates that such a system is considered a crude method, and may be optimized to ensure improved potential for full recovery of delinquent taxes as well as fair treatment of all stakeholders involved, which in addition to the taxpayer may also include mortgagees, lien holders, leaseholders, heirs, etc.

Sale at a fraction of value not only penalizes the delinquent taxpayer, but also all other parties that may have an interest in the property. Furthermore, sale of property at a fraction of value, depending upon the property's underlying value, may be considered an arbitrary penalty that does not treat all citizens fairly, i.e. the value loss differential may have a wide variance.

The primary issue associated with the current system is that there is no check on value, and there is potential for others to benefit significantly from what may be viewed as the bad fortune of citizens



and taxpayers. A similar situation existed with respect to ‘power of sale’ proceedings prior to reform of the Conveyancing Act.

Sections 6 through 9 of the Conveyancing Act ⁴ is reproduced on the following page, which also allows for public auction. It also includes the requirement for the property to be appraised, as well as a requirement that the property shall not be sold for less than 75% of the appraised value.

Such a system is considered fair to all parties involved, minimizes the risk of abuse, as well as the potential for others to benefit from windfalls resulting from the system in place.

Accordingly, with respect to tax sales it is recommended that the Acts include provisions similar to the Conveyancing Act, and include requirement for the property to be appraised at fair market value prior to sale, with restriction on sale below 75% of fair market value.

⁴ RSNL 1990 Chapter C-34 Conveyancing Act, An Act Respecting Conveyance by Deed.



Excerpt from Conveyancing Act

Power of sale

6. A mortgagee shall not exercise the power of sale conferred by this Act unless written notice is first given to the mortgagor and another registered encumbrancer or guarantor

- (a) requiring payment of the mortgage money and there has been a default in payment for 30 days after the giving of the notice;
- (b) requiring that interest under the mortgage that is in arrears and unpaid be paid and there has been a default in payment for 30 days after the giving of the notice; or
- (c) requiring that a breach of a provision contained in the mortgage deed, or in this Act, and on the part of the mortgagor or of a person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest on the mortgage money be remedied and that breach remains unremedied for not less than 30 days after the giving of the notice.

1988 c37 s1

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Notice of sale

7. (1) A notice of sale of a mortgaged property by public auction or public tender shall not be published until the period referred to in section 6 has expired.

(2) A notice of sale of a mortgaged property by public auction or public tender shall be placed in a newspaper in general circulation in the area where the mortgaged property is located at least once a week for 2 consecutive weeks before the date on which the sale is to take place.

1988 c37 s1

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Property shall be appraised

8. (1) Before the date on which a sale of a mortgaged property is to take place the mortgagee shall obtain a written appraisal of the mortgaged property by a qualified appraiser.

(2) Where there is no qualified appraiser available in the area where the mortgaged property is located, the mortgagee shall obtain a statement of the fair market value of the property from a licensed real estate agent familiar with the property values in the area in which the property is located.

1988 c37 s1

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Sale of property

9. (1) A mortgaged property shall not be sold at a sale by public auction or public tender by a mortgagee for less than 75% of the appraised value of the property unless the mortgagee first obtains approval for the sale from a judge upon an application after notice has been given to interested parties.

(2) A mortgaged property shall not be sold at a sale by private contract by a mortgagee unless there are no offers to purchase the property at the time of the public auction or public tender or unless the offers are unreasonably low.

(3) A mortgaged property shall not be sold at a sale by private contract by a mortgagee for less than 75% of the appraised value of the property unless the mortgagee first obtains approval for the sale from a judge upon an application after notice has been given to interested parties.



4. Boards & Tribunals

Considerable frustration was expressed by Members interviewed with respect to composition of boards, tribunals, tax appeal courts, etc., established for resolution of real property related issues pertaining to expropriation, assessment appeals, etc.

Primarily, there is concern that erroneous decisions are being made involving individuals who often have limited knowledge, experience or background. Secondly, not all written decisions made by such boards, tribunals, etc. are readily accessible to the public.

To simplify and expedite the expropriation process, it is recommended that the Acts include provision for establishment of an arbitration panel with a pre-determined set of arbitration rules. Under this system the Minister would appoint a panel of persons with appropriate legal and appraisal expertise as potential arbitrators to be available to perform arbitrations pursuant to a set of fixed arbitration rules.

It is suggested that this would be a more appropriate approach than the current one as it would have a consistent set of rules. Using a panel of expropriation expert arbitrators would also better meet the goals of timeliness, cost effectiveness and judicial and procedural fairness.

This issue was also a consideration in the recent drafting of the Muskrat Falls regulations. Please refer to section 16 of the Muskrat Falls Expropriation Regulations.

It is also recommended that written decisions associated with board, tribunals, panels etc. be made readily available to the public.