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Expropriation and the Socio-economic Status of Neighbourhoods in Canada: Equal Sharing of the Public Interest Burden?

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Abstract

Expropriation – the non-consensual taking of privately-owned property by the state in exchange for the payment of compensation – is a widely-used tool of land use planning in Canada as it is in many other states. While in principle all privately-held properties are equally susceptible to expropriation in Canada, legal frameworks on expropriation fail to guard against the possibility that less-wealthy neighbourhoods become more susceptible to expropriation than more wealthy ones (the 99% versus the 1% to put it in the terms used by the Occupy movement of the early part of this decade). The paper examines existing legal frameworks as well as a number of historical expropriation projects in Canada to depict how and why this may come to pass. It does so with a comparative eye turned towards the United States. The paper concludes with several recommendations for strengthening expropriation law frameworks in Canada to ensure that the property of the less-wealthy is as well protected as those properties in higher-income neighbourhoods.

Key words

Expropriation; eminent domain; urban planning; neighbourhoods; socio-economic difference; home; megaprojects; community activism

Resumen

La expropiación –la adopción no consentida de una propiedad privada a manos del estado, a cambio de una compensación económica– es una herramienta

Article resulting from the paper presented at the workshop *Indignation, Socio-economic Inequality and the Role of Law* held in the International Institute for the Sociology of Law, Oñati, Spain, 30-31 May 2013, and coordinated by Jane Matthews Glenn (McGill University), Anneke Smit (University of Windsor) and Véronique Fortin (University of California, Irvine).

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ampliamente utilizada en la planificación urbanística, tanto en Canadá como en muchos otros estados. Aunque en principio, todas las propiedades en manos privadas tienen la misma posibilidad de ser expropiadas en Canadá, los marcos jurídicos en materia de expropiación fallan a la hora de proteger a los barrios con menos recursos para que no sean más susceptibles a la expropiación que los más ricos (el 99% frente al 1%, según los datos utilizados por el movimiento Occupy durante la primera parte de esta década). Este artículo analiza los marcos legales y una serie de proyectos de expropiación históricos en Canadá para describir cómo y por qué puede llegar a ocurrir esto. Se realiza una comparación con la situación en Estados Unidos. El artículo concluye con una serie de recomendaciones para fortalecer los marcos de la ley de expropiación en Canadá, y asegurar que las propiedades de los menos ricos están protegidas de la misma manera que las propiedades en los barrios más acomodados.

Palabras clave

Expropiación; derecho de expropiación; planificación urbanística; barrios; diferencia socio-económica; hogar; megaproyectos; activismo comunitario

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1. Introduction

This paper considers the effect of a neighbourhood's socio-economic status on the likelihood it will be affected by expropriation in Canada. The starting point for the article is a presumption that expropriation (known as eminent domain or takings in the US, or compulsory purchase in the UK) has a disproportionately greater effect on poor and middle-class neighbourhoods than on wealthier ones. To put it in the terms used by the recent Occupy movement, it would seem that the 99% are far more likely to suffer expropriation than the 1%. While expropriation is grounded in an understanding that private property rights must sometimes be ceded in the name of the greater good (and indeed that this is a feature of almost every society which recognizes private property rights) (Reynolds 2010), this is more difficult to accept when it appears that property rights in wealthier neighbourhoods are likely to be better shielded from government intervention in the form of expropriation. The article focuses on Canada with the United States as the primary comparator.

As this article explores, differential treatment of neighbourhoods depending on their socio-economic status comes about both through direct targeting of lower-income neighbourhoods for expropriation, and through more indirect privileging of wealthy neighbourhoods when expropriations for large-scale infrastructural projects are planned. With respect to the first point, expropriation may be used in Canada, as in much of the US, for the purposes of urban renewal or community redevelopment. Such projects have traditionally tended to focus on the redevelopment of blighted areas and generally have not touched wealthy ones. With respect to the second point, it is posited that when planning large-scale infrastructural projects, governments are more likely to select routes and sites which allow the acquisition of less expensive property, rather than those which would affect wealthier neighbourhoods. In this way wealthy neighbourhoods are privileged and receive a de facto protection against expropriation which other neighbourhoods do not enjoy. Like many topics concerning expropriation/eminent domain, the impact of expropriation on lower-income neighbourhoods has been explored quite comprehensively in the US whereas the Canadian situation has received more limited consideration. Yet, as the article attempts to show, similar concerns exist in Canada and the legal tools are lacking at present to provide needed protection to ensure that the wealthy are not better protected than the rest of the population from expropriation.

To frame the issue in the terms used by the workshop at the Oñati Institute for the Sociology of Law for which this paper was written, the differential treatment of neighbourhoods in expropriation is a cause for indignation. The use of the term "indignation" stems from the use of the terms indignés/indignados to refer to those involved in the French and Spanish versions of the Occupy movement, heavily influenced by the text *Indignez-vous* by Stéphane Hessel (2010). As one website aimed at the followers of these movements states:

> S'indigner, c'est bien. Proposer, c'est mieux! Il s'agit maintenant d'établir que l'indignation n'est pas aux antipodes de la réflexion. Qu'il existe une vie des idées au-delà de l'émotion. Que les indignés proposent autant qu'ils s'opposent. A nous de jouer! (Indignezvous.fr 2011).

The goal of the workshop was precisely this – not only to oppose but also to reflect and to propose. The purpose of this article is therefore not only to problematize the way in which expropriation law and policy as practised in Canada currently distinguishes between the 99% and the 1%, but to propose ways in which this inequality might be corrected, in particular through the use of legal tools.

While the problem is largely a political one (tough choices have to be made by governments ostensibly acting in the public interest), law too has a role to play in eliminating such inequality: the law provides inadequate protection for less-wealthy neighbourhoods from financial and political pressures which favour the taking of their neighbourhoods over wealthier ones. With respect to infrastructural mega-

projects, Canada and the U.S. seem to stand together in their inadequate response to the proliferation of such projects and what seems to be a disproportional effect on the poor. By contrast, in the case of expropriation for urban renewal projects, in Canada use of expropriation for such purposes is largely unaddressed by courts or legislatures, while U.S. state legislatures have recently taken steps to curb this trend (albeit in response to a US Supreme Court decision in 2005 which seemed to open the floodgates for this type of project). As will be discussed below, while the steps recently taken in the U.S. have not removed all abuses of power or inequitable applications of eminent domain, they may nonetheless serve as important examples for Canadian law reform.

Three preliminary notes should be made here which relate primarily to the use of the United States as a primary comparator to Canada on the issue of expropriation/eminent domain. First, the constitutional basis for the protection of property rights and the use of expropriation powers is quite different in Canada than in the United States. In the United States the right to private property is constitutionalized, as it is in most states with a written constitution and a tradition of private property ownership. Further, as in most such constitutionalised states, in the U.S. a corollary to the right to private property, the "takings provision" of the Fifth Amendment, allows the state to take property for a public interest purpose provided that just compensation is paid. Canada, by contrast, is an anomaly among constitutionalized states in that its *Charter of Rights and Freedoms* (1982) does not articulate the right to property, the right of the state to expropriate, or the obligation of the state to pay just compensation. In Canada expropriation law instead finds its basis in statute (for example Expropriation Act R.S.B.C., Expropriation Act R.S.N.B., Expropriations Act R.S.O.) and common law. While in U.S. takings are based on a "public use" justification, no such language appears in most Canadian legislation, with expropriation rights being granted to government bodies for specific purposes (for example community redevelopment, the building of highways, "municipal" purposes). The extent to which this difference in legal basis, in and of itself, creates differing levels of protection of private property rights in the two countries, and in the way in which property rights are balanced with the public interest in terms of expropriation/eminent domain, is the subject of differing opinions (Metcalf 2010, Harris 2012, Phillips and Martin 2012). What is clear, however, is that despite these fundamental differences in legal basis for expropriation in Canada vis à vis the United States, there are strong similarities in terms of the impacts of expropriation/eminent domain on less-wealthy neighbourhoods.

The second challenge relates to the parties who tend to be involved in the American property rights debate: much research in this area has been funded and/or commissioned by the organisations within the U.S. property rights lobby which tend to be affiliated with neo-liberal agendas. American advocates and academics (sometimes one and the same) have engaged widely and vocally with at least some aspects of this issue. By contrast, in Canada the law and urban planning academies have been, if not silent, then at least far more tempered and limited in their responses. While (as will be touched upon below) such movements do exist in Canada, they are generally less active and less vocal than in the U.S. The goal of this article is not to mirror the kinds of anti-eminent domain arguments advanced by such organisations and the research they fund. The argument is not against expropriation in all cases; however it is that using expropriation tools in such a way as to allow wealthy neighbourhoods to escape their effects, and to force other neighbourhoods to bear the burden with respect to expropriation, is unjust and a cause for indignation. The article argues that it is time for a more fulsome debate in Canada about the impact of expropriation, and the disproportionate effects on less-wealthy neighbourhoods in particular, and makes several recommendations about how the vulnerability of these neighbourhoods to expropriation might be minimised.

Lastly, while the primary geographic focus of the paper is Canada (and to a lesser extent the United States), the vulnerability of less wealthy neighbourhoods to expropriation is a global issue. For example, recent Olympic Games have seen extensive expropriations of such neighbourhoods carried out in Beijing, Vancouver, London and Sochi (Hatcher 2010, Golubkova and Akin 2012,). Preparations for the Eurovision Song Contest held in 2012 in Baku, Azerbaijan, also gave rise to an extensive slum-clearing exercise (Human Rights Watch 2012). It is hoped that lessons learned in the Canadian context will also be relevant in other jurisdictions where large-scale and high-profile expropriations, with impacts on less privileged populations often not well-placed to resist, regularly take place.

2. Targetted neighbourhoods: curing blight, urban renewal, and economic rejuvenation

Canada, like the United States, has seen widespread use of expropriation as a tool of large-scale urban renewal projects. This is the case both historically and at present. Over time, in both Canada and the U.S., what began as a narrower focus on removal of "blight" has broadened to a legal acceptance of projects which promise economic development or rejuvenation. In the United States, constitutional interpretation is relied upon to empower governments to expropriate property for such purposes. The Fifth Amendment requires that eminent domain be used only for "public use", which has been interpreted to include blight removal and subsequently urban renewal projects, as discussed below. Specific legislation has also addressed blight clearance projects in the United States (Blight Elimination and Slum Clearance Act, Blighted Property Removal, Power of authority for purposes of redevelopment of blighted, deteriorated or deteriorating areas). In Canada, by contrast, the power to expropriate for such purposes may be granted through specific legislative provisions such as the Ontario *Planning Act* s. 28, discussed below, or similar legislation in other provinces (Community Charter R.S.B.C., Local Government Act R.S.B.C., Vancouver Charter R.S.B.C., Municipal Government Act R.S.A., Municipal Expropriation Act R.S.S., The Planning and Development Act R.S.S., The Planning Act C.C.S.M., Department of Municipal Affairs Act S.N.L., Municipalities Act R.S.P.E.I., Planning Act R.S.P.E.I., The Charlottetown Area Municipalities Act R.S.P.E.I., City of Summerside Act R.S.P.E.I., Municipalities Act R.S.N.B., Community Planning Act R.S.N.B., Halifax Regional Municipality Charter R.S.N.S.).

2.1. Historical use of expropriation for urban renewal

The use of urban renewal justifications to cure perceived blighted neighbourhoods is considered to have reached its peak in North America in the 1950s through 1970s. Urban renewal projects effected through expropriation were very much the trend during these decades, and a wave of projects (and proposed projects) roared across the urban centres of the United States, Canada (Marquis 2010), as well as – perhaps to a lesser extent – western Europe. As Holm has noted, the urban renewals of this time "exemplified the ideology of functional cities in the age of Fordism", destroying the old to be replaced by something completely new, more coherent and purpose-built (Holm 2006, p. 114). The social ills and economic weakness inherent in the original neighbourhoods were to be washed away with a new physical environment which would bring about social change.

In the United States, the use of eminent domain for such urban renewal projects was bolstered by the landmark 1954 Supreme Court decision in *Berman v. Parker*. In a unanimous decision, the Court found that the "public use" requirement in the takings provisions of the U.S. Constitution did not require that property taken be actually *used* by the public in order for the taking to be constitutional. Rather, as long as the *purpose* of the taking was a public one, the property could be taken and conveyed to another private party. Urban regeneration projects and blight clearance (in that case in the District of Columbia) constituted a public purpose and

therefore the use of eminent domain was justifiable. *Berman* set the stage for decades of such interventionist and large-scale projects in the U.S. (Urban Renewal 1964), despite the critiques of the programme found in the seminal works of such observers as Jacobs (1961) and Anderson (1964). Further, in 1981 the Michigan Supreme Court decision in *Poletown Neighbourhood Council* v *City of Detroit* affirmed the position the Supreme Court had taken in *Berman,* and ensured that large-scale uses of eminent domain where the property would ultimately be handed over to another private party could continue.

Canada saw a similar trend toward blight clearance. The *National Housing Act,* passed in 1944 and amended subsequently in 1949, 1956 and 1964 (Lowden 1970), cemented the role of the federal government in clearing perceived slums and encouraging urban redevelopment. Following on the growth of the use of official plans in Canadian municipalities – and the growth of urban planning in Canada generally (Valiante and Smit 2015) – the *Act* provided encouragement for municipalities to engage in large-scale redevelopment projects as a way to eliminate blight and remove poor neighbourhoods (Cross and Collier 1967). One of the most high-profile historical examples of expropriation for urban renewal in Canada during the post-war years is that of Africville, on the outskirts of Halifax. Africville was a African-American community, founded by former slaves who arrived from the U.S. through the Underground Railroad from 1700 onwards, which was expropriated and razed in the early 1960s in the name of urban renewal and "in order to permit the betterment of housing conditions for the residents" of Africville (Byers 1962, p. 3). The Africville clearance was only one of several such projects conducted under an ambitious redevelopment plan in Halifax (Paterson 2009).

Trefann Court and Regent Park are two examples of large-scale urban renewal projects planned in the post-war years in Toronto, albeit with very different outcomes. The proposals for redevelopment of both of these east-Downtown neighbourhoods called for extensive expropriations to accomplish their goals. The Regent Park neighbourhood was indeed demolished and a social housing project built in its place. By contrast, Trefann Court was ultimately left intact, due in part to the advocacy of then-law student, later Toronto mayor, John Sewell, in opposition to the proposed redevelopment (Sewell 1972). Other economically-depressed neighbourhoods which were "rejuvenated" through the use of expropriation in Canada in the 1960s included the Lebreton Flats in Ottawa (Picton 2009), the Civil Square project in Hamilton (Jelly 2013), the Borgia Street expropriations in Sudbury (Bonin and Hallsworth 1997), and the Strathcona neighbourhood in Vancouver (Harcourt *et al*. 2007, Scott 2013). There were many more – Lowden (1970) estimates that between 1964 and 1968 the Canadian government committed close to $300 million in funds for urban renewal projects conducted under the National Housing Act.

2.2. Recent developments

Recent years have seen a new wave of urban renewal projects in Canada. In her study of the "moralization" of cities, Ruppert (2006) contends that earlier surges in the popularity of urban renewal projects in North America reflected "utopian images" of the good city. She argues that while North America and Western Europe have moved in large part past these types of grand and idealized theories about what makes a good city, these views still very much colour the way in which city planning is done. Large-scale urban renewal projects selling a "vision" of what a city or even neighbourhood is to become, and often requiring extensive acquisition of private property in order to implement these visions, are part and parcel of this movement.

Likewise, Carpenter and Ross note that the renewed focus on eminent domain as a tool of urban renewal coincides with "third-wave" gentrification. While gentrification typically refers to a type of neighbourhood transformation whereby "middle- and

upper-middle-income people gain control, through market means rather than state-forced displacement, of an area that had fallen on hard times and had effectively been ceded to the less well-to-do" (Carpenter and Ross 2009, p. 2449), in cutting-edge third-wave gentrification, the state has come to be a strong catalyst for such market change. Within this framework, it is not surprising that eminent domain (expropriation) has become a commonly-used tool for redevelopment or renewal: here, too, the state takes a leading hand in effecting urban change, even when the plan is largely unfolding under the leadership and financing of the private sector.

In the case of the United States, the proliferation of urban renewal or economic development projects using eminent domain for land acquisition led to renewed judicial scrutiny in the early 2000s. In its 2005 decision *Kelo* v.*City of New London*, the United States Supreme Court considered the constitutionality of the acquisition by eminent domain of an entire neighbourhood to make room for a redevelopment project to include Pfizer pharmaceuticals, a luxury hotel, and condominiums. It was found that the "public use" requirement of the American constitution was satisfied despite the fact that the property in question was being taken from one private owner to be conveyed to another private owner (a developer). This was in part due to the extensive public planning process which had led to the approval of the redevelopment process – "a 'carefully-considered' redevelopment plan" (*Kelo*, Pt III, majority judgment of Stevens J.). This reaffirmed the Court's earlier decisions in *Berman* and *Poletown*. Further, *Kelo* found that even property which is not blighted may be taken for such redevelopment and conveyed to another private party. As such, following *Kelo,* both the poor and the middle classes were left susceptible to having their property taken by powerful corporate entities. Such a finding fuels the shift from urban renewal for the purposes of "curing" blighted neighbourhoods, to redevelopment for the purposes of economic rejuvenation. However, as will be discussed below, the legislative response to *Kelo* was swift and extensive, so that in much of the United States, the legal basis for such economic redevelopment takings is now for more limited.

In Canada there has generally been even less legal resistance to expropriation for private developments than in the United States. Recent examples of projects using expropriation for developer-led economic redevelopment purposes include Yonge/Dundas Square in Toronto, Windsor's casino development and Norwich building expropriations, and the proposed but then ultimately abandoned Griffintown rejuvenation in Montreal. The Yonge/Dundas Square (*Marvin Hertzman Holdings,* 1998) and Windsor Casino (*Legoyeau Holdings Ltd.,* 1994) projects held up against court challenges. Given the lack of constitutional framework, there is not even an explicit requirement in most cases in Canada that an expropriation be conducted for a public use or public purpose (unlike in the U.S. and most jurisdictions). An April 2014 Ontario Superior Court decision is a rare example of a Canadian court actually engaging in a consideration of whether a given expropriation was done "in the public interest" when the ultimate new owner of the property was to be another private party. This case stemmed from the location of a Toyota car factory in Woodstock, Ontario, and the acquisition by the City of Woodstock of 28 adjacent properties for the purpose of providing Toyota with sufficient parking space. All but one of the properties were acquired by consensual sale, but the City used its expropriation power under the Ontario *Municipal Act* to expropriate the last. In finding the expropriation valid, the Court noted that the fact that there was a direct benefit to Toyota from the expropriation did not negate the existence of a public purpose for the expropriation, which fell within the municipality's legislative powers under the Ontario *Municipal Act* and which had been well-documented throughout the process (*Vincorp Financial* 2014).

Further, like in the U.S., in Canada there has been a noticeable shift in the phraseology of the justifications for these types of redevelopment projects in recent years. For example, in Ontario, section 28 of the *Planning Act* now gives

municipalities the authority to expropriation for the purposes of "community improvement". A "community improvement area" is defined as a:

> municipality or an area within a municipality, the community improvement of which in the opinion of the council is desirable because of age, dilapidation, overcrowding, faulty arrangement, unsuitability of buildings *or for any other environmental, social or community economic development reason* [emphasis added] (Planning Act).

The inclusion of this last phrase suggests that at least in Ontario, as in the United States, it is no longer necessary to find blight in order to undertake large-scale redevelopment. The decision of the Ontario Municipal Board in relation to the Yonge/Dundas Square expropriations, upheld by the Ontario Divisional Court in *Marvin Hertzman Holdings*, affirmed that this provision could be interpreted to allow expropriation for the purposes of urban renewal even if the property in question was not blighted.

Such projects are far from universally supported by the public. One problem is that even if economic renewal projects are no longer about blight clearance, they still suggest a bias on the part of some about the type of city, and uses of city spaces, which are desirable; the poor often end up on the wrong side of this tension. Carpenter and Ross (2009), in the American context, are among those who conclude that Kelo-style uses of eminent domain do indeed affect the poor more significantly than more wealthy owners. Further, they maintain that large numbers of low-income housing units have in fact been lost through recent urban rejuvenation projects: while previous generations of urban renewal/blight clearance projects often focused more, at least rhetorically, on the creation of better housing, this has been absent from most economic redevelopment-style projects in recent years. Ruppert (2006) argues that modern urban renewal projects are symptomatic of a city vision which simply prioritizes one set of interests over another, and a rhetoric on the part of city planners and developers which encourages the public to "buy in" to the need for the project. As she writes about the Yonge-Dundas Square urban renewal project:

> Retailers were criticized for selling cheap merchandise of poor quality, for not investing enough in the maintenance and security of their properties, for facilitating criminality, and for allowing their properties to become run-down. It was in relation to the moralization of such conduct that a vision of the good city was defined. This vision was recognised by dominant groups constructed as the public – middle-class consumers, office workers, tourists, families, and high-end retailers – and was defined in relation to the socially distant others – street youth, panhandlers, discounters, and low-income shoppers. This vision united the public and was the basis on which they consented to professional visions of a good city space at Yonge-Dundas.

Beyond the questionable ethics of prioritising one set of interests over another in this way, there is a further irony: large-scale urban renewal projects of the type that require expropriation often do not even accomplish their stated goals. Therefore in some cases, neighbourhoods which bear at least some characteristics of strong and healthy communities are destroyed by expropriation and large-scale urban renewal projects, only to lead to less-healthy communities, or perhaps no communities at all. In the case of Kelo, the proposed development has not been built, in part due to the closing of Pfizer's corporate headquarters in the town (Bullock 2010). Rather, in 2012 the City of New London reorganised its development corporation which had overseen the project, and its newly-elected mayor apologised for the expropriations (Edgecomb 2012). Likewise, in Windsor, the building of a casino, deemed by the court a legitimate "redevelopment" (the language which predated the current "community improvement" requirement, as discussed above) under the Ontario Planning Act (Legoyeau Holdings Ltd. 1994) and for which numerous properties including low-income housing were acquired, has had questionable results in terms of economic rejuvenation of the neighbourhood (Phipps 2004). The LeBreton Flats neighbourhood in Ottawa, which

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as mentioned above was the subject of an extensive expropriation for urban renewal in the early 1960s, has remained largely undeveloped despite numerous attempts at rejuvenation projects. As McKenna (2014) has written, "LeBreton Flats became a sad monument to bungled urban planning, missed opportunity and shrunken ambition." Discussions of residential development options were renewed in late 2014, at which point the neighbourhood housed fewer than 400 residents.

3. Collateral damage: Overburdening poorer neighbourhoods for infrastructural projects

Urban renewal projects, discussed above, are a special case when it comes to expropriation since they are to a degree about clearing out an existing neighbourhood and favouring another type of development. By definition, then, they are likely to target poorer neighbourhoods and generally leave wealthier ones alone (although *Kelo* suggests in the US context that the line between these two classifications may be a fluid one). But a neighbourhood's socio-economic status may play a role in other types of expropriation as well. Less-wealthy neighbourhoods may be disproportionately affected by expropriations for projects which have nothing, or little directly at least, to do with neighbourhood rejuvenation.

A prime example of this is large-scale infrastructural projects. Such projects are aimed at creating or improving such outputs as utility provision, new or extended highways, bridges, or hospitals for the benefit of the public at large. Yet in these projects too, poorer neighbourhoods may be asked to bear more of the burden in the name of the public interest.

The use of expropriation for infrastructural projects in Canada has a long history. In Canada, Hibbits (1988, p. 500) depicts the tensions between the development of transportation infrastructure and the protection of private property rights as far back as the construction of the Welland and Rideau canals in the early- to mid-1800s. Private entities even had expropriation rights: for example the Canadian Transit Company, the company granted the rights to build the original Canada-US bridge and border crossing at Windsor and Detroit, also held the right to expropriate under special federal legislation enacted to create the corporation (An Act to Incorporate the Canadian Transit Company 1921). (This practice continues today in some jurisdictions, as touched upon below.)

Jumping ahead, there are numerous examples from more recent history. In the early 1970s more than 700 properties near Pickering, Ontario, were expropriated by the Canadian government for the purpose of building a new airport for the Greater Toronto Area (GTA). The proposed Spadina Expressway project in Toronto, also in the late 1960s and early 1970s, would have seen an expressway run south into the city's downtown core, cutting across several residential neighbourhoods and requiring extensive residential expropriation (Robinson 2011).

This mirrors developments in the United States, where there have historically been countless similar projects involving extensive expropriation for infrastructure purposes, many of which also related to the creation of highways. Garnett (2006) depicts the eradication of Catholic parishes in Chicago for the purpose of building new expressways. Other cities, including Detroit (Sugrue 2005), Miami, Los Angeles, New Orleans, San Francisco, Washington, and Baltimore (Robinson 2011), have seen similar approaches to infrastructural development and urban growth.

While the infrastructure/expropriation tension is therefore far from new, the problem has been magnified in recent years in Canada at least. This is in part due to the amount of stimulus money the federal and provincial governments have dedicated to infrastructural improvement projects since the economic downturn began in 2008. The federal Canadian government alone spent approximately $63 billion on stimulus spending between 2009 and 2012, much of which went to

infrastructure projects (Action Plan). The new Windsor-Essex Parkway/Herb Grey Parkway project in Windsor, Ontario (leading from Highway 401 to a new Canada-US bridge border crossing) (Pearson 2012), the eastern extension of the toll Highway 407 (Mills 2012), the creation of the Anthony Henday Drive in Edmonton, the South Fraser Perimeter Road in Delta B.C. (Payne 2009) and the Bruce-Milton Hydro Transmission Line project (Halliday 2012) are all examples of Canadian infrastructural mega-projects for which extensive expropriation, sometimes hundreds of individual properties for one single project, has been or is being done. Similar projects in the United States continue to use eminent domain for land large-scale land acquisition. For example, much of the Detroit neighbourhood of Del Ray is to be acquired by eminent domain in order to make way for the plaza of the new border crossing mentioned above (although, ironically, it is the Canadian government which is [at the time of writing] seeking directly to acquire the Del Ray properties in question as part of the $550 million loan from the Canadian government to the State of Michigan to help to finance the bridge (Battagello 2014)).

It is not easy to track infrastructural expropriation in Canada by the socio-economic status of affected neighbourhoods (in the writer's experience conducting empirical research on expropriation, expropriating authorities either do not organize information in this way, or at least are hesitant to share it)1 even if common sense says that less wealthy neighbourhoods are more likely to be targeted for these projects too. American academic observers are more explicit about these connections than their Canadian counterparts have been. In his book on the "urban crisis" in Detroit, for example, Sugrue (2005) argues that one can trace the historic location of African-American (and generally less wealthy) neighbourhoods by where the city's highways now run.

A preference for less-wealthy neighbourhoods for infrastructure-related expropriation will certainly be largely for economic reasons. Since the starting point for compensation in both Canada and the U.S. is fair market value, it will be less expensive to acquire property in neighbourhoods where property values are lower. Further, the higher the value of properties targeted for expropriation, the greater the negative impact on a government's tax base. (By contrast, when expropriation is used for urban renewal it is at least in part for the purposes of improving a municipality's tax base (Dana 2008)).

However, it must be asked whether poorer neighbourhoods are also more often chosen to bear the brunt of infrastructural sites and routes because it is perceived that they will provide less resistance to the expropriations than residents of wealthy neighbourhoods (where owners may be more educated and better-networked with the decision-makers involved in the planning of such large-scale projects). As Garnett has noted in the US context, neighbourhoods may be particularly at risk "when the would-be targets lack political clout" (Garnett 2006, p. 121). In Canada, too, expropriation plans have been abandoned in part as a result of effective pressure being exerted by articulate and well-positioned resident advocates. One well-known example is that of the Spadina Expressway, mentioned above, which was abandoned in part due to opposition led by urban activist Jane Jacobs and supported by other strong advocates including Canadian scholar and writer Marshall McLuhan (Robinson 2011).

Further, more affluent neighbourhoods may have other tools at their disposal which tend to favour them over less wealthy ones when it comes to avoiding expropriation. One such tool is the use of heritage designation, or at least a reliance on the heritage value of a home. In Canada heritage properties are generally

[1] The writer has in the past made inquiries of both the Ontario Ministry of Transport and the City of Toronto Planning Department, Expropriation Section. The Ontario Ministry of Transport declined to discuss the question, and the City of Toronto solicitor stated she was unaware of any such data being collected.

protected through provincial legislation (Ontario Heritage Act, British Columbia Heritage Conservation Act) which normally gives municipalities the power to designate properties as heritage properties or at least to maintain a register of properties with heritage significance. While designation as a heritage property does not generally remove the possibility of that property being expropriated, it does provide another political, if not legal, tool to combat a proposed expropriation. In the case of the land acquisition for the South Fraser Perimeter Road in Delta, British Columbia, the heritage significance, and ultimate designation, of the home seemed to be a factor in the successful push-back of some home-owners against the planned exclusion of their heritage homes in the expropriation plan (Surrey Now 2008). In 2007 while negotiations over the ultimate path of the Road were still being carried out, the city's Heritage Advisory Commission took the step of designating 22 properties it felt were at risk of expropriation in order to provide stronger protection against these properties being included in the property acquisition. While heritage properties are not always expensive ones in wealthy neighbourhoods, it seems reasonable to anticipate some connection. At a minimum, since heritage designations de facto usually happen at the instigation of homeowners themselves, knowing to apply for heritage designation normally requires a certain sophistication of knowledge about municipal and property law which may come with higher levels of education, civic engagement, and/or ability to pay lawyers' fees.

Of course, sometimes even well-organised, middle-class neighbourhoods are unable to make a dent in a government's expropriation plans. The Pickering owners' concerns were represented by a homeowner who was also a lawyer in Toronto and who subsequently became a national expert on expropriation, but the lands were nonetheless taken although the homeowners continue to fight the construction of an airport on their former lands some 40 years later (Reeves 2013). Suggesting that there are a number of factors which will push a "taker" (expropriating authority in Canadian terminology) to avoid expropriation a particular property, Garnett argues that "it is reasonable to assume that any of … political influence, subjective value, or community cohesiveness … increases the likelihood of [t]aker avoidance, although they certainly do not guarantee it" (Garnett 2006, p. 119).

4. Recognising impact and improving protection

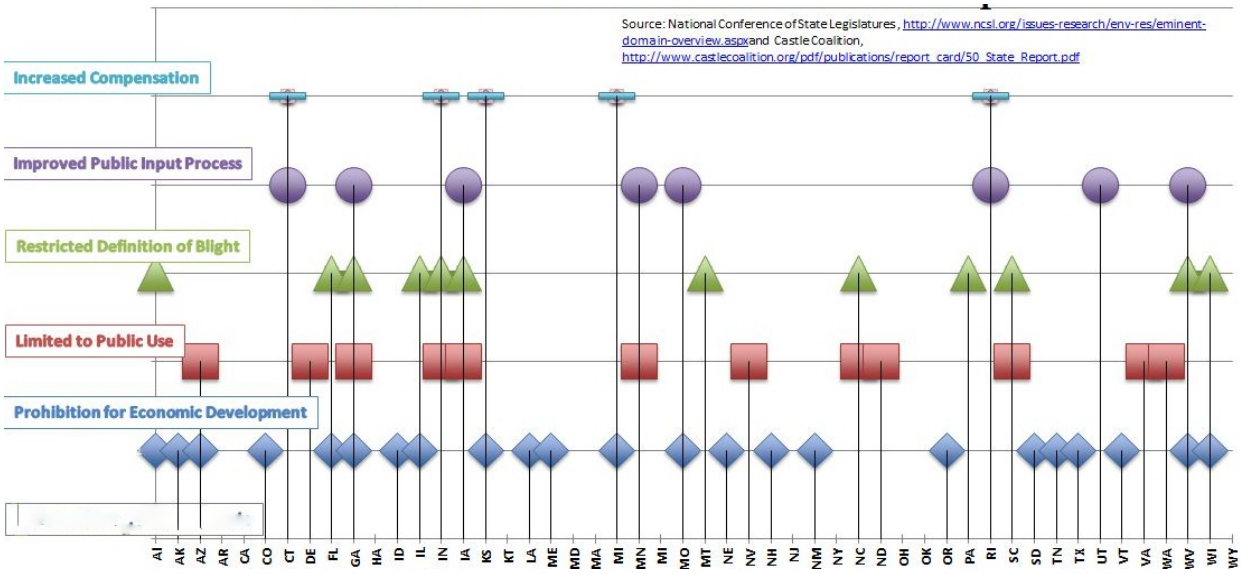
For any neighbourhood targeted for expropriation, the process brings upheaval and dislocation from both physical surroundings and community. Compensation is meant to make a homeowner "whole" following their loss; however, this does not change the fact that a psycho-social loss has been suffered (Garnett 2006, Smit 2015). This is as true for residents of economically-depressed neighbourhoods as it is for wealthy ones. In fact, one may argue that the loss of community may often be more strongly felt in poorer neighbourhoods where population density tends to be greater and people are required to live in closer proximity. The demolition, redesign and reconstruction of the Alexandra Park social housing development in Toronto, continuing in 2014, led to reportedly profound sensations of loss among long-term residents of the development (Friesen 2014). As an older example, the seminal Africville Relocation Report of 1973 quotes a number of former residents of that poverty-stricken community describing the grief they experienced in being forced to leave Africville. Likewise, the residents of Del Ray have been quoted expressing their trauma over losing their tight, if impoverished, community (Reindi *et al*. 2013). Garnett suggests that "community losses may have been the greatest tragedy of the urban-renewal/expressway era" (Garnett 2006).

Not all people, nor even all planners, agree that expropriation is a required tool for urban and land use planning. Anaheim, California, for example, has a "no eminent domain" policy (Bethune and Sanera 2008) and the 2013 Detroit Future City Plan (Reindi *et al*. 2013) also calls for urban renewal without the use of eminent domain (a stark contrast to the urban planning initiatives in that city of the Poletown era).

For many, however, expropriation is considered a necessary evil – in particular for infrastructural projects but also, sometimes at least, for economic rejuvenation. But it is unjust if differences in socio-economic status leave some neighbourhoods more at risk than wealthier ones when routes and sites for infrastructural projects are contemplated. And it causes even more indignation to think that the social fabric of economically depressed or blighted neighbourhoods has often been specifically targeted and sacrificed, either for the explicit purpose of creating a new neighbourhood in its place (as was more the 1960s' style justification) or for the more modern "economic improvement" or "community development" justification.

In both Canada and the U.S., there are few avenues for less-wealthy neighbourhoods to combat what may be a heightened vulnerability to expropriation. This last section makes an initial foray into consideration of the types of legal tools which may be put in place to allow such neighbourhoods a better possibility to resist expropriation, or at least to engage with expropriating authorities with more balanced bargaining power concerning possible non-consensual property acquisitions.

Determining how law and policy should respond to this inequality of effect is not easy. Ironically, the urban renewal issue may be the easier of the two to address. As mentioned above, in United States legislative change has begun that process. Following the Supreme Court decision in Kelo, the majority of U.S. states have passed amendments to their state constitutions which make it harder or impossible to take private property for economic rejuvenation purposes. These amendments get at the problem in a variety of ways: some increase the amount of compensation to be paid if the taking is for an economic redevelopment purpose; some prevent takings if taken property would be transferred to another private party; others have strengthened the public use requirement in other ways to limit the ease with which economically depressed (and other) neighbourhoods may be flattened in pursuance of other priorities. In some cities, urban development policies have been agreed which severely restrict or completely eliminate the use of eminent domain for urban renewal (Pringle 2007). The below chart gives an overview of the types of legislative amendments which have been adopted by U.S. state governments in response to Kelo:



(Image edited from original at www.perc.org, posted 2012)

In Canada no such legislative measures have been taken. As discussed in the introduction to this article, almost all Canadian expropriation legislation lacks an explicit "public interest" or public purpose requirement. Neither the federal legislation (empowering the federal government to expropriate for purposes within its constitutional spheres of power) nor the provincial expropriation statutes forbid

expropriation for the purposes of transferring property rights to another private party. In fact, the province of New Brunswick's expropriation legislation explicitly permits expropriation by a private entity of property owned by another private party (Brubaker 2014). Further, as Brubaker outlines in detail, the power to expropriate in order to benefit another private party is littered throughout the Canadian expropriation framework: as she reports, the federal government alone has granted expropriation powers to more than 1200 private entities, including railway companies and utility providers (Brubaker 2014, p. 9). Judicial decisions such as Hertzman and Legoyeau affirm that there is little besides, perhaps, an eventual shift in public opinion and changing trends in urban planning to stop governments from expropriating economically depressed neighbourhoods for the purposes of urban renewal. Canada would do well to adopt the types of measures being adopted in the United States to ensure that in this country, too, less-wealthy neighbourhoods are not being sacrificed for the (often pipe) dream of economically more vibrant ones.

In addition, more focus on the "public" aspect of redevelopment/renewal projects is warranted. Even short of banning "private" expropriations, other procedural and planning safeguards can be put into place. These might include inserting an explicit "public interest" requirement into all legislation enabling expropriation (and including a definition of public interest which is much narrower than that of "public use" accepted by the US Supreme Court in *Kelo*). It might also require placing less decision-making power about the location and scope of a redevelopment project in the hands of developers, who may not have the greater good in mind as much as their own financial bottom line.

Perhaps trickier is the issue of expropriation for infrastructural projects. If it is difficult to assail the validity of the public use justification in urban/economic renewal projects, it is largely a non-issue when it comes to infrastructural projects, where the benefit to the public is often much more self-evident. However, when difficult choices have to be made about the location or route of a proposed project, how can we ensure that we are not explicitly or inadvertently privileging wealthy neighbourhoods at the expense of less well-off ones? Four starting points are considered here: a) explicit consideration of neighbourhood character as a factor in expropriation decision-making; b) increased compensation as a deterrent to expropriation of inexpensive properties (and perhaps an explicit inclusion of a community loss premium); c) explicit obligation to replace the low-cost housing lost through expropriation of poor neighbourhoods; and d) increased legal assistance for home-owners subject to expropriation. Each of these is discussed briefly below; undoubtedly a much deeper discussion than can be attempted here is warranted and will be the subject of continuing research by the author.

4.1. Consideration of neighbourhood character

The character of a neighbourhood, and strength of its community ties, should be a relevant factor in decision-making about whether it is to be expropriated. The consideration should be not only about house prices but also the relationships between residents. One possibility would be a requirement that a neighbourhood assessment be done (similar to environmental assessments currently required in many jurisdictions before planning approval will be given). Such a neighbourhood assessment would give planners better tools to determine what would be lost by home-owners should their properties be expropriated and their neighbourhood destroyed. This would assist with difficult decisions about which – if any – neighbourhoods are suitable targets for expropriation, either for the purpose of improving the neighbourhood itself or for permitting the creation of large-scale infrastructural projects. There are examples of neighbourhood assessments being undertaken in Canada for such projects; for example the Detroit River International Crossing (DRIC) partnership conducted a social impact assessment in the early stages of consideration of the new parkway and Canada-U.S. bridge border crossing

in Windsor (DRIC 2008). The study was undertaken to address the "Protection of Community and Neighbourhood Characteristics" in the implementation of the preferred parkway and bridge route. This, however, is not a part of the Ontario *Environmental Assessment Act*'s required assessment process for large-scale public works projects; in fact, the social impact of infrastructural projects is mentioned only once in the entire *Act* (*Environmental Assessment Act,* s.1).

4.2. Compensation

Compensation for expropriation has not been the primary focus of this paper. Yet in discussions of expropriation policy (which, again, are far more common and nuanced in the U.S. than those in Canada for the most part), the question of compensation is often at the core of the discussion. This is understandable given that once an expropriation project is given final approval (and in Canada even before it is fully approved), compensation is often one of few ways in which homeowners may be made "whole" for their loss. Therefore, it is worth asking here whether, when expropriations which destroy whole neighbourhoods must or do go ahead, compensation should include a premium for neighbourhood loss.

Against this position, Lee argues that there can be no adequate compensation to an individual home-owner for community loss, since the loss of a community is felt by society as a whole. As he states, "Because society cannot compensate itself, just as I cannot compensate myself for an injury that I have suffered, the community's elimination is pure loss" (Lee 2013, p. 605). Yet this ignores the fact that the loss of a community is not felt so much by society as a whole as it is by the individual member(s) of the particular community. It therefore falls within the category of losses which individuals suffer in aid of the public interest and thus seems very reasonable that this loss would be compensable.[2]

4.3. Replacement of lost low-cost housing

It has been noted above that one of the side-effects of the direct or indirect targeting of less-wealthy neighbourhoods (and perhaps in particular poor neighbourhoods) for expropriation is the loss of low-income housing. In the case of community improvement projects, an explicit requirement that the expropriating authority recreate an amount of modestly-priced housing equal to that which is lost through the redevelopment would be a welcome development. This would first lessen the impact of the expropriation on low-income neighbourhoods as they may be able to find replacement properties in their price range. Further, such a requirement to rebuild could increase the costs to the expropriating authority of the expropriation/development project, perhaps thereby providing a financial disincentive to expropriation and minimizing the financial advantage to choosing a low-income neighbourhood for the location of an urban renewal or infrastructural project.

4.4. Legal support for low-income property owners

Another means of avoiding a disproportionate effect of expropriation on low-income neighbourhoods may be through support for effective legal advice and representation. Limited funding is generally provided for legal costs incurred while opposing expropriation in Canada. Property owners must therefore often be in a position to fund their own litigation or submission if they should challenge the expropriation through a preliminary hearing or before a tribunal. Given this expense, low-income homeowners may be in the position of not being able to mount as effective an opposition to the expropriation of their properties as more wealthy property owners (in addition to perhaps being less able to organise a

[2] For a more detailed discussion of compensation for expropriation in Canada, and in particular on compensation for the emotional loss associated with the loss of "home" through expropriation, see Smit (2015).

community-based, unified public opposition to the project). Financial support for legal representation in expropriation cases could help to remedy this.

This could happen through a number of avenues. One would be by expanding funding for legal costs to those facing expropriation. At present in Ontario, the "hearing of necessity" provided for under s.7 of the Expropriations Act is the primary formal opportunity a property owner has to challenge the planned expropriation of his/her property, yet only $200 is available to the property owner to help to cover legal expenses. While s.32 of the Ontario Expropriations Act provides for the expropriating authority to cover legal costs if a property owner challenges the quantum of compensation, this does not apply to attempts to challenge the actual expropriation. (As Sperduti (2004) explores, this is somewhat more generous under the Alberta legislation where a greater portion of the property owner's legal costs is covered by the expropriating authority). In Ontario at least, this effectively prohibits many low- and middle-income owners from challenging the expropriation. This is of course a sensitive subject given the existing crisis in funding for legal assistance in Canada as elsewhere: in Ontario, for example, owning property is one factor which may eliminate or reduce and individual's eligibility for legal aid, and property claims do not normally fall within the range of legal processes for which one may receive legal aid funding (Getting Legal Help).

Another option, short of funding for full legal representation and therefore probably more realistic, is to appoint an arms-length advocacy body to assist homeowners at risk of expropriation. The province of Alberta has taken this step; following a public consultation process on the protection of private property rights, the government created the position of Property Rights Advocate and appointed its first one in 2012 (PRAO website). The Advocate does not provide legal representation but may provide advice to landowners facing expropriation, and may provide legal opinions on the proposed expropriation. It is too early to assess fairly the impact of this initiative, but it has the potential to help property owners be better informed as to their rights and the public interest goals of the expropriating authority, and to wade through the procedures associated with expropriation. Such a position could be particularly useful if its mandate makes clear that the Advocate is to have special responsibility for vulnerable property owners – those who are lower-income as well as those who have disabilities or are elderly. It might also be helpful for the Advocate to have a mandate to work together with numerous owners in a particular community, to help the community or neighbourhood as a whole to launch an effective opposition to expropriation, where deemed necessary.

Lastly, an Ombudsperson for Property Rights/Expropriation could be appointed at both provincial and federal levels, or the mandate of the current Ombudsperson, in provinces where one exists, could be expanded to include oversight over expropriation processes (including the initial consensual sale negotiations). In this way, there would be a non-judicial means of requesting an investigation of government handling of expropriation processes. This would be far less resource-intensive than legal aid for all or even some property owners but would allow an arms-length third party to investigate complaints of abuse raised by owners.

5. Conclusion

Allen (2008) writes that in the United Kingdom, the debate over expropriation (compulsory purchase) powers is a much softer and less militant one than in the U.S.; the same could be said for Canada. However, he also points to a number of U.K. legislative provisions which he argues strengthen the position of the expropriated property owner in that country by comparison with the U.S. context, perhaps explaining the lack of resistance. It is hard to make this argument in Canada (for example, legally-mandated compensation is, if anything, less generous in Canada and there is not greater governmental control over private developer-led projects than in the U.S.). As stated at the outset, the purpose of this article is not

to advocate for the adoption by communities and neighbourhoods in Canada of the rhetoric and lobbying tools of the United States property-rights lobby. However expropriations in Canada should be subjected to greater scrutiny to ensure that some members of our society are not required to bear more than their share of the public interest burden through expropriation. Further, greater tools must be placed in the hands of homeowners in lower and middle-income communities in both Canada to challenge the inequitable effects of expropriation processes.

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