

WITH Antoine Hacault, Lawyer, Thompson Dorfman Sweatman, LLP



Antoine Hacault is a partner in the legal firm Thompson Dorfman Sweatman in Winnipeg with experience at all court levels - Court of Queen's Bench, Manitoba Court of Appeal, Supreme Court of Canada and Federal Court of Canada. Antoine is a member of Canadian Property Tax Association Inc. He was elected to the Manitoba Bar Association Council executive in 2003 and is now its President and is the co-chair of the Franco-phone Affairs Committee and the past president of the French Lawyers Association. He is the Chair of membership services of the Canadian Bar Association. He is a member of the Provincial Legal Aid Advisory Committee. He has presented seminars on various other issues including Expropriation Law, Banking Law, Municipal Assessment and Municipal Law. He is an occasional lecturer at University of Manitoba on Municipal Law and has been invited to speak to Superior Court judges both in Manitoba and Alberta at their continuing education seminars. He has presented continuing education courses for the Appraisal Institute of

Canada and for the International Right of Way Association. Antoine Hacault was interviewed after his Breakfast on the Frontier speech on December 10, 2007.

Frontier Centre: Why should Manitobans and maybe even Canadians be concerned about this Fouillard expropriation case?

Antoine Hacault: Because it's a dangerous precedent as to what municipalities do. Up until now generally, they've been able to encourage projects. Now they are actually undertaking a project and saying they're going to be in this business and take it away from somebody.

FC: So the precedent setting nature of this is the government actually expropriating land for the purposes of engaging in business?

AH: That's right. And if they can do that then they can do what's happening in the States. In the States, if they don't like a particular area and they want to put a Walgreen's in they'll hire a developer to do some development. In fact, one of the cases a developer in the States went and blackmailed the owner and said "If you don't agree to sell it to me and pay me \$800,000 to avoid the expropriation I've got the backing of the government and I'm going to expropriate you and a Walgreen's is going to go here."

FC: Is this a case of what French economist Frederic Bastiat would have called "legalized plunder"?

AH: Well some certainly may view it that way. The municipality had a few choices here, it could have chosen to help the family gravel the road, they could have built a road, the families had to build the road, to gravel it, the families had to operate the site and now that everything was established and operating successfully for several decades and now it's slowed down the municipality says "I can do a better job of it. I'm going to take it away from you."

FC: In 1997, the *Municipal Act* was changed to broaden the powers of expropriation. What changed?

AH: I don't know that anybody who did that *Act* actually thought that the power of expropriation was going to expand. But what's happened is that the Courts have interpreted, changed their way of interpreting sections of that *Act*.

FC: So the legislation itself didn't actually change? It's the interpretation of the *Act*?

AH: It's the approach of the Courts because the legislation says it's limited to encouraging economic development. Economic development is defined as establishing, continuing or expanding a business. So that encouraging somebody to expand, encouraging someone to establish, encouraging someone to continue is quite different than continuing and actually engaging in something. Municipal governments in my view were never intended to run businesses; they were intended to help encourage businesses.

FC: Now in a normal market place, it's willing buyers and sellers who determine the price of something through negotiation. Who decides the value of someone's property when there isn't a willing buyer or seller? And what's considered fair price then?

AH: There are principles set out in the *Expropriation Act* and the process is you file a claim with the Land Value Appraisal Commission. The Land Value Appraisal Commission consists of three people who will decide what fair compensation is and there's a set of rules. For example, here if somebody built a road 30 years ago and it costs them \$60,000 to do that that might not necessarily be what the market pays for it. And if the market doesn't recognize this because you've got private roads going to a farm yard, you may get paid what the market is paying for it but you might not get paid what you had to incur 50 or 60 years ago to build that road.

FC: If we don't have a willing seller shouldn't the amount be above market value? Perhaps double?

AH: Well that's policy decision by the governments. When they set the definition as to you have to pretend that there is a willing buyer and a willing seller and that's the definition set out in the *Act*.

FC: You have said that the judges changed the meanings of certain definitions in this legislation. Which definitions did they change?

AH: Well in my view, the word "encourage" has been changed. In fact it's curious because when the Court had to justify its reasons, it didn't use the word encourage again. It said "engage" in business related undertakings such as

tourism. Now it's curious that to be able to decide the way that they did, that they had to use a different word than the word encourage.

FC: Have any provincial politicians taken an interest in this case? They're the ones that make the law and shouldn't they be interested in seeing how the legislation actually works in practice, not only in theory?

AH: I'm aware of the Critic of Intergovernmental Affairs asking questions of Minister Ashton and that can be found on their site, I guess, as to what happened in that exchange. My understanding is that he said something to the effect "Well if a municipality has a viable project that they should be able to proceed with it." His words will speak for himself though. The question is there's never been any business plan for this. We don't even know if it's viable.

FC: Are we going to see more property expropriated in this manner following this type of economic rationale?

AH: Well there's certainly the potential there because this, in my view, was a test case for the Bilingual Municipality Economic Development Corporation. And if they can do it in this case then I'm sure they will knock on other doors. And it may be like in the United States in that example that I gave you, "If you don't sell it to me or pay me money to keep your land, I'm going to do it."

FC: Now one of the arguments that government officials and politicians sometimes come back and say if government didn't have the power to expropriate, they would never be able to get anything done. Is that a reasonable argument?

AH: As I've said, in my view, municipalities aren't there to engage in business they are there to encourage. If you look at federal government and provincial government, you've got the Manitoba Human Rights Museum that's being started by the Aspers. If they took the same attitude and you say "well listen you've got a nice project there. I'm going to take it and I'm going to take all the credit for it." No. It doesn't have to work that way. The community, if it's encouraged and the proper parameters are set there's a lot of good projects that happen, look at the MTS Centre. Again, private funds the Chipman's get together with the municipal government, the City of Winnipeg in one hand, and the provincial government and other government levels and you've got a project there that works well and is handled by the people in the community as opposed to the Council or the Municipality or the City.

FC: Would having property rights in our federal Constitution have made a difference in this case? Or does it need to be spelled out more clearly in other legislation as well?

AH: It certainly would help if we had federal legislation that made it clearer such as in the *Charter* that your property rights were sacrosanct and that you couldn't use these as a municipality to engage in a business, that it had to be for public projects such as water, sewer, and roads. In this case, given the wide interpretation given by the Courts, their approach is not, is it clear that they can expropriate, the approach is that the Municipality can do it unless it's clear that they are told that they can't do it. So in this case, since their approach has changed, the approach to drafting the legislation has to change and there has to be a clear provision that says you cannot expropriate for tourism projects and you cannot expropriate to engage in business related enterprise.

FC: What do you think is the state of property rights in general in Canada right now?

AH: Given this decision, which represents in my view a new approach, they are certainly deteriorating because before as I explained, the general interpretation principle was unless it was very clear a government didn't have the power to do an expropriation. It had to be very clear that it had the authority to do so, now an approach which is totally different from that has been taken. It is that unless it specifically stated they can't do it, they're allowed to do it.

FC: As a follow-up, what do you think is the stated of freedom in Canada today? It seems like every time we turn around there's a whole new set of laws that either restrict or take away our freedom. In your opinion, are we freer today or less free today than we once were?

AH: With respect to property rights, it is certainly more restrictive. This family had been operating this site for a long time and all of a sudden they are told that somebody else thinks that they can advertise it better, run it better and attract more tourists.

FC: What do you think the chances are of getting the Fouillard case heard in front of the Supreme Court?

AH: I believe this is a national issue. I think we've seen what happened in the States once you went down this road and I think that the judges need to clarify whether or not this is going to happen in Canada as to whether or not governments are going to be able to engage in business and engage in development and they're going to have to decide whether municipalities are going to be able to go further than they have in the past.