

POLICY SERIES



Marcel Fouillard (L), son of Arthur Fouillard (R), of RM of Ellis (2005)

Expropriating for Economic Development

A Carte Blanche for Municipal Mismanagement

By Joseph Quesnel

About the Author



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Executive Summary

Canadians who live in provinces where expropriation is allowed for economic development face the danger of municipal abuse.

- One family, the Fouillards of Manitoba, serves as an example of a family that had a portion of its property expropriated for a tourism venture.
- The Rural Municipality of Ellice and the Town of St-Lazare have not made their intentions clear to the Fouillards. They have also entered into discussions with third parties to develop the property.
- The problems started in 1997 when the Conservative government of Manitoba allowed expropriation for economic development purposes.
- Prominent organizations that represent the vast majority of rural landowners, such as the Keystone Agricultural Producers and the Manitoba Cattle Producers Association, are greatly concerned about the potential abuse of this kind of expropriation in all rural communities.
- Prominent U.S. justices have noticed the great potential for abuse with these expropriations, noting that they can be very arbitrary and susceptible to local politics.
- While some provinces have taken note of these abuses, several U.S. states have already enacted legislation protecting individual landowners from these kinds of expropriations. Canadian provinces are lagging behind.
- While the preference is to remove economic development as a legal ground, at the very minimum, clear procedural safeguards should be in place to protect property owners.
- There should be more independent oversight of the process, with the possibility of a third-party review panel.
- Provincial legislators should also draft a landowner's bill of rights that can be used against governments. Consideration should also be given to the idea of requiring a good faith effort on the part of municipalities to seriously consider the independent inquiry report into the attempted expropriation.
- All provincial governments should include clauses in their municipal expropriation legislation that specify what may and may not be expropriated. This would limit the scope of the legislation.
- Instead of becoming directly involved in businesses, municipalities can better assist community economic development by focusing on broad-based tax relief for all businesses, and they should work with higher levels of government in improving the training and education of the local workforce.

Prominent organizations... are greatly concerned about the potential abuse of this kind of expropriation...

Background

Imagine you inherit a piece of land that overlooks the ocean in a picturesque section of a Maritime province. The land has been in the family for a few generations, so it also carries sentimental value. Eventually, you intend to develop the land into a home for your retirement.

Unfortunately, you are not the only one who noticed the potential and beauty of the property. Years ago, the local municipality identified your piece of family property as part of its local tourism development vision. One day you are served with an expropriation notice and are eventually forced to cede the land to the municipality. The compensation you receive does not make up for the dreams you had for developing the property.

To add insult, you hear years later that the municipality sold the land to a developer from outside the area—even after it told you it did not intend to bring private third parties into the expropriation. To make matters worse, the tourism venture never came about and left local ratepayers on the hook. In the end, you wonder what the whole point was. You were victimized by an arbitrary process that offered no real remedies: The government forcibly expropriated your property for someone else's profit.

This is the situation many Canadians could face if they live in a province, such as Manitoba, that allows municipalities to expropriate property on the dubious grounds of economic development.

The reality hits home in Manitoba

This scenario is not simply imaginary; it happened to one family in rural Manitoba near the Town of St-Lazare. In March 2005, the Fouillard family was served with a notice of expropriation. The family lived on pasture land, and the Rural Municipality of Ellice decided years before that it could develop the land better than the Fouillards could even though the family resided on and paid taxes on the land for half a century.

The problem was that the Fouillards lived on property that holds the remains of Fort Ellice (a historic Hudson's Bay fort site), and in 2001-2002, the municipality sought to develop the property as part of its tourism plans.¹ Although the only remnants left are cairns and a historic cemetery (which the Fouillards had always granted access to), the municipality set its

sights on the land. In fact, documents later obtained under Freedom of Information laws reveal the provincial government made no fewer than five formal requests to acquire the land.² The Fouillards, however, maintain that throughout the 1970s and 1980s, they tried to negotiate good-faith agreements with the province.

An independent inquiry was called to look into the expropriation. Although the officer assigned supported the expropriation, he clearly stated that the municipality required a much smaller parcel of land than they actually sought. Although the municipality wanted a staggering 288 acres of the pasture land (the Fouillards are cattle owners), the inquiry found it needed only 90 acres. However, under Manitoba law, municipalities are not required to pay heed to these independent inquiries; the

municipality did not, and it proceeded with its expropriation of the full 288-acre parcel. Just recently, the municipality has now offered to settle on a 145-acre expropriation, not the full 288. The Fouillards have yet to respond to the offer.

The court system was the Fouillards' last chance to save their land. However, a hearing before the Manitoba Court of Queen's Bench in 2006 and an appeal in 2007 did not succeed. Changes made to Manitoba's *Municipal Act* in 1997 by the Progressive Conservative government allowed for municipal expropriation for economic development purposes. From a strictly statutory point of view, the expropriation was legal and could proceed. The Supreme Court of Canada declined to hear an appeal, so the only chance the Fouillards have (and any one else placed in a similar dilemma) is to convince provincial legislators to recognize this problem and reform their municipal expropriation laws accordingly.

What is interesting is what has happened since. Marcel Fouillard, son of Arthur Fouillard who actually contested the original expropriation, stated in 2009 that he was told in court that the municipality did not intend to expropriate the land for private third parties. However, it is now known (through a provincial Freedom of Information request) that the Rural Municipality of Ellice and the Town of St-Lazare (partners in the development initiative) have approached or been approached by potential partners.³

At present, the municipality is seeking ways to develop the land, and it is likely seeking business partners.

It was confirmed by Guy Huberdeau, the Reeve of the RM of Ellice, that the Manitoba Métis Federation (MMF) or one of its local affiliates requested to speak with the municipality about the expropriated land.⁴ However, as of this writing, Huberdeau stated that no subsequent meetings were held. PowerPoint presentation notes were obtained through a Freedom of Information request and revealed the municipality had decided on two options: First, either abandon the expropriation, or second, find a partner.⁵ Stating that the "land is of great historical value and it is important for it to be available to the public," the municipality said it did not want to abandon it. On the next slide, it laid down the financial reality: Over \$200,000 was spent on the project to date and an additional \$115,000 would need to be spent to "walk away." It is clear the municipality will continue with its plans and involve whatever parties are necessary to avoid losing its investment. With \$315,000 at stake, the municipality has a financial incentive to stick to its plans, whatever they may be.

There is vagueness about what exactly the municipality intends to do with the land. Despite repeated requests, the Fouillards have yet to receive a copy of a concrete business plan from the municipality. Thus, they are in the dark about its ultimate intentions. Marcel Fouillard notes it is entirely possible that local taxpayers will eventually pay for the tourism project that comes out of this expropriation—especially if it is unsuccessful.

Problems with Manitoba expropriation legislation

The author of this report spoke with Huberdeau, who simply made vague references to “walking trails.” He expressed his preference for working with local parties in developing the land.⁶ Given this vagueness, it is entirely possible the municipality has no clear intentions at this point—or at least none it will share with the public. It is also possible the municipality will fail in any attempt at fostering economic development on the property.

If the municipality fails, the 288 acres the Fouillards have maintained and paid taxes on over the years will end up without any significant tourist development on it. If the municipality sells or grants the land to other parties to develop, this would make a mockery of the idea of *community* economic development because third parties would be the ones who would actually benefit from someone else’s expropriated land.

The legislation granting expropriation powers to the municipalities is quite sweeping. Currently, the legislation that allows expropriation for economic development in Manitoba places only minimum restrictions on municipalities that wish to engage in such activity. For example, the minimum requirement for a municipality is that it:

1. Demonstrate an attempt at negotiation between the parties;
2. Appoint an outside inquiry officer to review and report on the proposed expropriation;
3. “Consider” the report of the inquiry officer.

At present, the municipal legislation lacks any hearing wherein evidence is heard that would require the municipality to demonstrate a pressing need for an expropriation. As stated above, local governments are only required to demonstrate that they have “attempted” negotiations. This, too, is prone to abuse, as the municipality might not even enter these discussions in good faith. As the Manitoba Cattle Producers Association points out, this clause appoints a municipality as its own judge over its own expropriation project.

Given the broad interpretation of economic development in the Manitoba legislation and the lack of protection for individual property owners, this example demonstrates the need for clear legislative reform for individual property owners who find themselves in similar situations. A process to allow municipalities to expropriate for dubious economic development purposes also exists in other provinces and in jurisdictions outside Canada. However, there are encouraging signs in that many jurisdictions, particularly in the United States, have taken proactive steps to prevent this abuse of individual property rights; as such, they provide a model for the Canadian provinces.

“Local governments are only required to demonstrate that they have “attempted” negotiations. This, too, is prone to abuse...”

The oft-given reasons for expropriation

In 1997, Manitoba's Progressive Conservative government amended the *Municipal Act* to include economic development as an acceptable ground for municipal expropriation. At the time, the provincial government believed it would encourage rural economic development, but it either did not foresee or consider the abuses that might result. The government was evidently interested in job creation—understandable given the rate of rural out-migration, but it was not cognizant of the threat these powers could pose to all landowners.

In their reading of the amendments to the Act, the trial judges who looked at the Fouillard case could not ignore the new powers granted to municipalities, as it was raised by the appellants that “expropriating for the purposes of creating a tourism industry is not an ordinary municipal power.” They also correctly pointed out that the best role for government is to “encourage” business, not take on an active role in the business itself.

However, the amended Section 258 (2) of the *Municipal Act* authorizes a council to “encourage” economic development “in any manner it considers appropriate.” Taken together with Section 250 (2) (c), which authorizes a municipality to “acquire, establish, maintain and operate services, facilities and utilities,” these provisions clearly grant the legal authority to take land for economic development purposes.

The issue of expropriation for economic development was raised by not only the Fouillards but also other interested parties throughout Manitoba.

Conservative MLA Blaine Pedersen took up their cause after he became alarmed about provisions in the Act. In 2008, he introduced a private member's bill to amend the *Municipal Act*. The bill specifically called for the removal of economic development as a ground for expropriation.

In discussing the private member's bill, which failed to pass, the government defended its position on the grounds that the provinces of Alberta, Saskatchewan, Ontario and New Brunswick allow expropriation for economic development purposes.⁷ However, the argument that everyone else does it, so we will as well does not address any substantive rights-based arguments against these practices.

Important rural organizations such as the Keystone Agricultural Producers and the Manitoba Cattle Producers Association are also greatly concerned about these expropriations.⁸ They represent the vast majority of rural landowners in the province, and they fear that municipalities may set their sights on their members' pasture lands for their own gain. Both bodies have pushed for amendments to the *Manitoba Municipal Act* to curtail the power of expropriation for economic development.

“The best role for government is to “encourage” business, not take on an active role in the business itself.”

Property rights abuse in Alberta: confiscating valuable land under false pretences

There is also evidence that municipalities are not above these abuses in this province. In his study of the matter, author Mark Milke discovered a similar situation occurred in rural Alberta.⁹

Bill Nilsson, a farmer near Edmonton, bought a 160-acre farm with a cattle and auction business in the 1950s. In 1974, Nilsson intended to build a mobile home park on his property, but the province denied his request. It instead designated his land a Restricted Development Area (RDA) for ostensible use as green space or parkland. Over the decades, Nilsson tried to sell his land to the government, as its actions prevented him from developing it. However, it was later determined in provincial court that the government's

original rationale for denying the trailer park development (i.e., the province claimed it would develop Nilsson's land into a park) was untrue. The province had always planned to build a ring road and utility corridor but did not tell Nilsson that, as expropriation for highways and utility corridors is more expensive for the government than is expropriation for parks. These findings did not emerge until much later and only after forced out in court.

Individual property owners need to be protected from this sort of government duplicity and abuse. In many cases, it is clearly a case of David versus Goliath where governments act as the latter with the ability to bully individuals into selling their land.

Expropriation for economic development in other jurisdictions

U.S. legislators and justices are noticing the abuse inherent in expropriation for economic development even if Canadian observers have been slow to understand or care about the problem. In the United States, some local governments have expropriated private land and turned it over to developers; those actions have created significant opposition.

In the 2005 case of *Kelo v. New London*, a number of homeowners moved to sue the City of New London, Connecticut, for using its expropriation powers to take land for the benefit of private corporations. Condemned property had been reclaimed by the City for its redevelopment plans. However, the decision was widely criticized

and led the president to issue an executive order prohibiting federal expropriation for the benefit of private third parties. The decision also led to congressional disapproval and is attributed to the movement on the part of state governments to protect their citizens from this kind of expropriation. Prior to the *Kelo* ruling, only eight states prohibited expropriation for economic development purposes. By 2007, 42 states had enacted some form of legislation that limited or banned the practice.¹⁰

The justification offered is that the resulting tax revenue places the expropriation within the "public purpose." However, the decision was also a 5-4 majority, which

makes the majority decision that much less secure. Although the majority of the U.S. Supreme Court agreed with this logic, Justice Sandra Day O'Connor gave a sharp rebuke to the majority opinion in the landmark case. In her dissent in the *Kelo v. New London* ruling in 2005, she wrote, "Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms."¹¹ Justice O'Connor continued: "The spectre of condemnation hangs over all property ... Nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carleton, any home with a shopping mall, or any farm with a factory."¹²

In other words, expropriation for economic development could very easily become a way for private commercial interests working in concert with local government to subvert due process. It can essentially become a battle of the deeper pockets and/or the stronger will. If developers want to change reality to suit their interests, all they need do is persuade a town or city council to do the work of buying the land—through the blunt instrument of expropriation, on their behalf.

It appears the debate over municipal expropriation for economic development has reached Ontario and Alberta, with a stronger movement in the latter. In 2007, the Alberta Property Rights Initiative was founded. This Calgary-based organization was established to raise awareness about attacks on rural landowners' rights. In Ontario (particularly rural Ontario), landowners formed the Ontario Landowners Association, modelled after the successful Lanark Landowners Association in eastern Ontario. While these organizations are very concerned about issues related to

greenbelt expansion in Ontario, they are also highly attuned to all expropriation issues.

A review of the literature, however, shows that at least in Ontario the debate has chiefly settled on the question of fair compensation for the landowner. While this is obviously a crucial and important question, it is unfortunate the debate does not appear to extend to the justice of the expropriation process in its entirety. It is unfortunate that the issue of whether it is right to take land away from someone for political purposes is not given a full hearing.

According to Milke, in his research for the Alberta Property Rights Initiative, several U.S. states have adopted reforms that seek to restore the balance between government expropriation and the property rights of individuals.¹³

- In 2005, for instance, the Alabama State Legislature adopted legislation that prohibited cities and counties from using eminent domain (the common law right of the national government to seize citizens' private property with compensation, but without their consent) for private development or for enhancing tax revenue. Alaska passed legislation that prohibits the use of eminent domain for economic development purposes. This Alaskan law prohibits the use of eminent domain to acquire the primary residence of a landowner for the use of an indoor or outdoor recreational facility or project.
- Colorado passed a clear law that allowed for expropriation to remove urban blight but also established that tax revenue and economic enhancement do not constitute public uses.
- Both Idaho and Illinois passed similar legislation that prohibits the use of eminent domain for a public use that is merely a pretext for transferring the

property to another private entity, or for promoting economic development.

- Since 2006, Kansas, Maine, New Hampshire, Oregon, Texas and Vermont have passed laws that limit expropriation for economic development purposes or prohibit it altogether.

Other states are looking into similar legislation, as there is a growing recognition that this power may be interpreted too broadly and that it needs to be curbed to protect property owners.

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The need for reform

Ultimately, economic development should be removed from provincial and municipal expropriation acts as a ground for expropriation. Such expropriation creates significant temptation for politicians and policymakers to engage in business ventures that they are not qualified to run and, in any event, will take land from one economic interest (the present owner) and deliver it to another interest (the city or third party) without the consent of the existing owner—and does so with the powers of the government, and thus creates a lopsided bargaining table. While job creation and community economic development are useful goods to pursue, they do not justify government encroachment on private land. Such encroachment is too arbitrary, and it leaves individuals and families too vulnerable to the government’s substantial powers.

Problematically, the empirical data show that municipal governments, like many governments, are not very good at picking winners and losers in business ventures.¹⁴ These enterprises should be left up to the private sector. Strong evidence exists to support the conclusion that governments are best able to help business and economic development by providing a level playing field for all businesses and by providing tax relief. Governments can, of course, also build and maintain critical public infrastructure that assists all businesses. Governments can also be concerned with the level of training and education in a community. After all, new business ventures require trained workers, although educational development should be left up to the provincial and federal levels, given the reality of migration between cities and provinces.

Lastly, broad grounds for expropriation tilt the balance in property rights away from individual landowners and toward government, both the politicians as the Alberta case demonstrated (where the provincial cabinet was aware of the disingenuous reasons given the Nilsson family) and the civil service, which may have its own agenda.

The assumption of this study is that primary rights should belong to individual property owners. Any restrictions to these rights should be narrowly circumscribed. If expropriation is allowed, it should be limited to clearly public purposes such as the building of essential roads and highways and other public infrastructure. Expropriation should only be used to construct what some refer to as “non-excludable public goods,” i.e., those goods that will benefit everyone.¹⁵

As Milke points out in his paper, individual property owners do not have the legal

resources and funds that are readily available to government actors.¹⁶ Thus, the onus should fall on the government and the civil service to prove an airtight case for expropriation and in every case to provide fair compensation.

At a minimum, the legislation and process in place that allow for expropriation for economic development can be improved.¹⁷ It needs more procedural safeguards for individual landowners. The broad and sweeping powers to expropriate for economic reasons ought to be strictly curtailed. Governments should not be allowed to expropriate simply because they believe they can operate a business better than the present owners can—precisely what appears to have happened and is continuing to happen to the Fouillards in Manitoba. They are still not sure what the local government intends to do with their land.

If expropriation is allowed, it should be limited to clearly public purposes such as the building of essential roads and highways and other public infrastructure.

Recommendations

This report contends that the Manitoba government, and any other provincial government, should seriously consider the recommendations put forward, some of which were promoted by the Manitoba Cattle Producers Association.

One central recommendation is the possible **adoption of an individual landowner's bill of rights**, which clearly specifies certain identifiable rights landowners have, including rights to full disclosure of all government plans for the property in question. It would also include rights to appeal any expropriation to an independent body.

- If legislation remains to allow expropriation for economic development, it should be amended to allow for more checks and balances in favour of the landowner, including **establishing a third-party review process for any expropriation**. The municipality involved should have to show an independent body why it needs to expropriate the land. It must also prove that the expropriation is not for the benefit of a third party.
- The Manitoba government should also **amend the legislation so that municipalities are required to demonstrate a good faith attempt to consider the inquiry officer's report on the expropriation**. At present, a municipality can simply ignore most or all of the officer's findings and continue with its expropriation. Some municipalities may never even intend to give such an inquiry any due consideration. This situation of potential municipal abuse should be prevented outright.
- Manitoba and all other Canadian provinces should consider examples from U.S. states **where expropriation legislation lays out clauses that clearly identify what municipalities may take and what they may not**. These kinds of clauses can be discussed and hammered out by competent legislators who have heard from all relevant stakeholders. At present, vague references to "economic development" expose any kind of business venture to revenue-hungry municipalities.

“One central recommendation is the possible adoption of an individual landowner's bill of rights, which clearly specifies certain identifiable rights landowners have...”

Conclusion

Expropriation has always been a hot-button policy issue. However, the matter of expropriating for economic development purposes raises the stakes to a higher level. The broad scope of these powers, as well as the great potential for abuse at the hands of governments, prompted several U.S. states to adopt legislation that seeks to remove or at least limit this power.

With the case study of Manitoba in mind, it is clear this level of abuse exists in Canada. Major Canadian provinces allow for this activity, and there is growing evidence that many people, particularly from rural regions, know the problems too well. The ongoing situation of the Fouillard family in rural Manitoba demonstrates the potential for abuse. Because of a clearly written law that allows local governments to expropriate for wide reasons, Manitoba judges are restricted in what they can do to protect individuals and their property. Thus, it is now up to legislators to understand the potential abuse these laws present and to act accordingly. Simply pointing out that everyone else is doing it fails the test of fairness.

Economic development as a legal ground for municipal-level (and provincial) expropriation is a serious offence against individual property rights and should be severely restricted. It should only be permitted for clear public purposes—critical public infrastructure, such as highways. Other grounds, including removing so-called urban blight, should be considered, but strictly evaluated.

As well, procedural safeguards for property owners must be instituted, including the possibility of third-party review and appeal of any expropriation on “public purpose” grounds, including the removal of urban blight. The onus should always be on Canada’s governments, which possess tremendous fiscal and legal resources vis-à-vis individual families, to prove clearly why they must do what they intend to do. And that reason cannot include a government-induced benefit to third parties at the expense of the existing landowner. Anything less than limited reform threatens the property of all landowners, urban and rural.

The ongoing situation of the Fouillard family in rural Manitoba demonstrates the potential for abuse.

Because of a clearly written law that allows local governments to expropriate for wide reasons, Manitoba judges are restricted in what they can do to protect individuals and their property.

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Further Reading



Your Land is not Your Land: A Manitoba Farmer Feels the Sting of Expropriation

Notes from the Frontier article introducing the RM Fort Ellis expropriation.

http://www.fcpp.org/main/publication_detail.php?PubID=1916



Your Land Is Not Your Land

Dedicated website with the full 16 minute Fouillard video discussing alarming property rights precedent in Canada.

<http://www.yourlandisnotyourland.ca>



California eminent domain parallel

Video from Reason.TV

http://www.fcpp.org/main/media_file_detail.php?StreamID=749

For more see

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