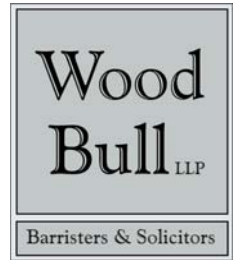


MUNICIPAL, PLANNING & DEVELOPMENT LAW

Expropriation Without Compensation? Property Rights vs. Governmental Control

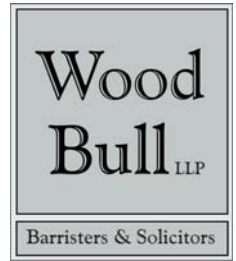
Presented by Dennis H. Wood

INTRODUCTION



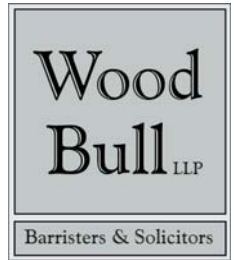
- The Right in Government to Take Land: Expropriation
- Right to Compensation for Taking a Property Right?
- General Concept of Compensation
- Compensation: Legislative Framework
 - *The Expropriation Procedures Act, 1962-63*
 - *The Expropriations Act, 1968-69*
 - *Expropriations Act, R.S.O. 1990*

INTRODUCTION, cont'd



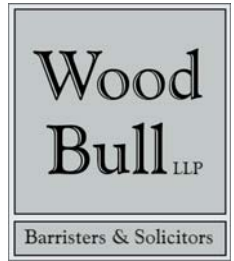
- Restricting Property Rights By Exercise of Statutory Authority
 - Official Plan Designations/Policies
 - Downzoning: Concept of Quasi-Expropriation Without Compensation
 - Conveyance for Park or Other Public Recreational Purposes
 - *Pacific National Investments Ltd. v. Victoria (City)*, Supreme Court of Canada (2000)
 - *Enterprises Sibeca Inc. v. Frelighsburg (Municipality)*, Supreme Court of Canada (2004)
 - Proposed Greenbelt Legislation

EXPROPRIATION TERMINOLOGY



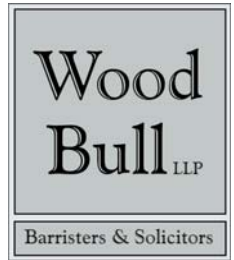
- Various terminology
 - Canada: “expropriate”, “expropriation”
 - England: “compulsory taking” or “compulsory purchase”
 - United States: “eminent domain” describes the right to take away private property for public purposes; “condemnation” describes the exercise of the right

THE RIGHT IN GOVERNMENT TO TAKE LAND: EXPROPRIATION



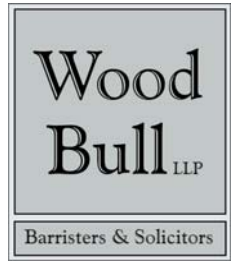
- Right of government authorities to take privately owned land for public purposes has existed since earliest times.
- Exercise of power of expropriation interferes drastically with property rights.
- Historically, taking was by the Crown or State exercising one of its prerogative powers of sovereignty.
- Modern expropriation law and practice is linked with the English railway boom of the mid-nineteenth century.

THE RIGHT IN GOVERNMENT TO TAKE LAND: EXPROPRIATION



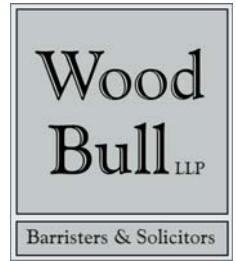
- Generally, expropriation embraces two concepts:
 - rules and procedures which govern the expropriating authority in taking privately owned land
 - principles which govern the determination of the compensation to be paid to the owner by the expropriating authority.

Right to Compensation for Taking a Property Right?



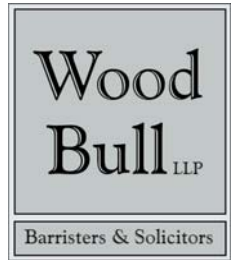
- Canada: No right to compensation unless conferred by statute.
- *Sisters of Charity of Rockingham v. The King*, [1922] 2 A.C. 315 (Privy Council):
 - “Compensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage on the ground that his land is “injuriously affected”, unless he can establish a statutory right.”

GENERAL CONCEPT OF COMPENSATION



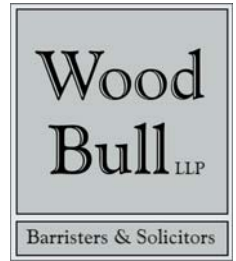
- In some countries, right to compensation for expropriated property is guaranteed expressly by the constitution.
 - United States, Fifth Amendment provides “... nor shall private property be taken for public use, without just compensation”
 - Australia, Constitution provides that the Commonwealth may make laws for the peace, order and good government with respect to: “The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.”
- No such constitutional guarantee in Canada.

COMPENSATION: LEGISLATIVE FRAMEWORK



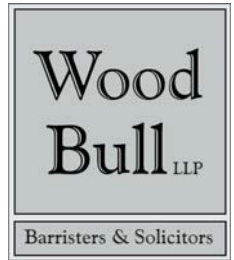
- In England, *Lands Clauses Consolidation Act* and *Railway Clauses Consolidation Act*, both of 1845, provided the method for determining compensation in the absence of agreement.
- English “Clauses” acts contained very little substantive law about the measure of compensation or the criteria by which it should be computed.
- As a result, common law principles helped to develop and evolve the measure and criteria for determining the amount of compensation.

COMPENSATION: LEGISLATIVE FRAMEWORK



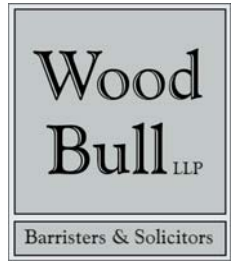
- England – prior to 1919, judicially devised concepts for determining compensation were referred to under the general rubric “value to the owner”.

COMPENSATION: LEGISLATIVE FRAMEWORK



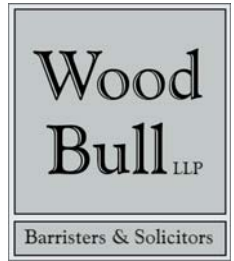
- Canada – in 1914, the Judicial Committee advised that the law of Canada concerning the principles upon which compensation was to be awarded was the same as the law of England. Accordingly, Canadian courts and arbitrators applied English judicial precedents which explained and elaborated the “value to the owner” principle”.
- England –The *Acquisition of Land Act, 1919* rejected the formula of “value to the owner” and more precise rules were adopted for determining compensation. These rules set the standard of market value plus damages for disturbance.
- Canada – After 1919 continued to use “value to the owner” approach.

COMPENSATION: LEGISLATIVE FRAMEWORK



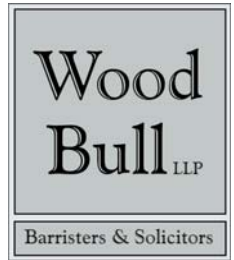
- Prior to January 1964, when *The Expropriations Act, 1962-63* came into effect, Ontario's expropriation law was spread over various statutes.
- Each statute contained powers of expropriation and individual procedural provisions.

COMPENSATION: LEGISLATIVE FRAMEWORK



- *The Expropriations Act, 1962-63* introduced uniform, detailed and comprehensive framework dealing with (1) procedural aspects of expropriation and (2) compensation.
- Power to expropriate remained in individual statutes, such as *Power Commission Act, Highway Improvement Act, Municipal Act* and *Schools Administration Act*.

COMPENSATION: LEGISLATIVE FRAMEWORK

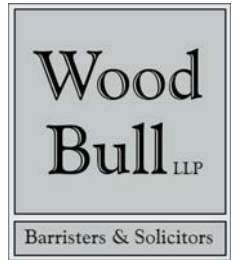


- *The Expropriation Procedures Act, 1962-63*

Section 6(1)

- Where land is expropriated or is injuriously affected by an expropriating authority in the exercise of its statutory powers, the expropriating authority shall make *due compensation* to the owner of the land *for the land expropriated or for any damage necessarily resulting* from the exercise of such powers, as the case may be, beyond any advantage that he may derive from any work for which the land was expropriated or injuriously affected. (emphasis added)

COMPENSATION: LEGISLATIVE FRAMEWORK

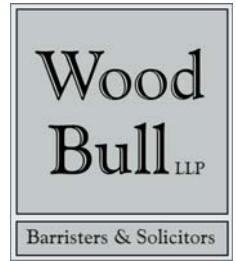


- *The Expropriation Procedures Act, 1962-63*

Section 6(1)

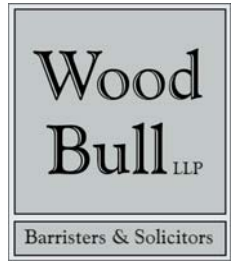
- “due compensation” to the owner for the lands taken or injuriously affected: this provision left room for the giving of damages where no land was taken
- Continued use of the formula “value to the owner” for determination of “due compensation”
- subjective test

COMPENSATION: LEGISLATIVE FRAMEWORK



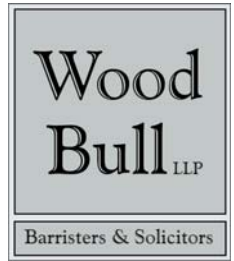
- *Report of the Ontario Law Reform Commission on the Basis for Compensation on Expropriation, 1967: Paramount policy consideration in fixing compensation should be indemnification for losses resulting from the expropriation*

COMPENSATION: LEGISLATIVE FRAMEWORK



- *The Expropriations Act, 1968-69*
- Replaced *The Expropriation Procedures Act, 1962-63*
- Departed from “value to the owner” formula
- Section 13(1)
 - Where land is expropriated, the expropriating authority shall pay the owner such compensation as is determined in accordance with this Act.
- Section 13(2)
 - Where the land of an owner is expropriated, the compensation payable to the owner shall be based upon,
 - (a) the market value of the land;
 - (b) the damages attributable to disturbance;
 - (c) damages for injurious affection; and

COMPENSATION: LEGISLATIVE FRAMEWORK



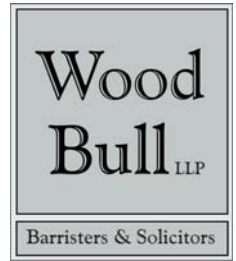
The Expropriations Act, 1968-69

- Section 13(2) cont'd
 - (d) any special difficulties in relocation, but, where the market value is based upon a use of the land other than the existing use, no compensation shall be paid under clause b for damages attributable to disturbance that would have been incurred by the owner in using the land for such other use.
- Section 21
 - A statutory authority shall compensate the owner of land for loss or damage caused by injurious affection.

Expropriations Act, R.S.O. 1990:

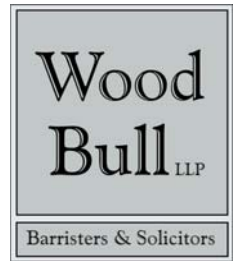
- Same as 1968-69 Act on matters of compensation.

RESTRICTING PROPERTY RIGHTS BY EXERCISE OF STATUTORY AUTHORITY



- *Planning Act*
 - *Planning Act* confers authority on municipal councils to adopt official plan to designate lands for a range of uses, including public uses.
 - *Planning Act* confers extensive powers on municipal councils to regulate the use of land, buildings and structures through zoning by-laws.
 - Concept of quasi-expropriation without compensation: where a zoning by-law takes away property rights or restricts the use of property, this has been described as confiscating such rights without compensation.

RESTRICTING PROPERTY RIGHTS BY EXERCISE OF STATUTORY AUTHORITY

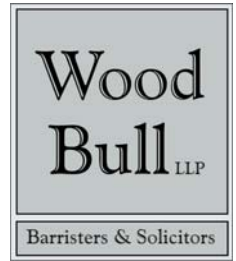


“The *Planning Act* clearly gives the municipality the right to pass the by-law in question and there is clear authority that such right does not carry with it a corresponding obligation to pay compensation absent bad faith on the part of the municipality or specific statutory obligation to this effect. As was stated by Estey J. in *The Queen in Right of the Province of British Columbia v. Tener et al.* [(1986), 17 D.L.R. (4th) 1 at 7], a decision of the Supreme Court of Canada,

‘Ordinarily in this country . . . compensation does not follow zoning either up or down’.”

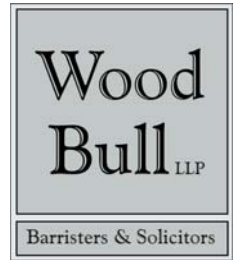
(Russell vs. Toronto, Dec.2000, Ont. Court of Appeal)

RESTRICTING PROPERTY RIGHTS BY EXERCISE OF STATUTORY AUTHORITY



- Traditional Ontario Municipal Board Approach: Open Space, Conservation or Recreational Uses
 - “This Board has always maintained that if lands in private ownership are to be zoned for conservation or recreational purposes for the benefit of the public as a whole, then the appropriate authority must be prepared to acquire the lands within a reasonable time otherwise the zoning will not be approved.”
(Nepean, 1978)

RESTRICTING PROPERTY RIGHTS BY EXERCISE OF STATUTORY AUTHORITY

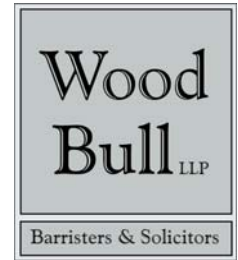


“Far from stating that a municipality cannot sterilize or "down-zone" private property without providing for compensation, the Review Panel asserted that the municipality can re-designate or re-zone for the public benefit to arrest a trend that is harmful or undesirable:

‘Where the health and safety of existing or future inhabitants are involved, where there are patent and imminent hazards to the well being of the community, the municipality should have the unfettered discretion to sterilize the use of lands, without the additional burden of compensation. In the present case, we have not heard from the counsel from the City or from Mr. Longo that development of the applicants' lands will attract or invite such considerations.’

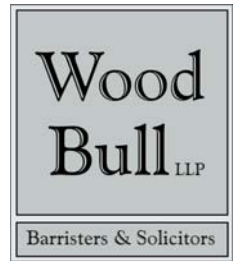
The Board was not taking issue with the ability of the municipality to pass such a by-law. Rather, it was asserting its own independent jurisdiction to insist upon a justification for such a drastic action.” (Russell, 2000)

RESTRICTING PROPERTY RIGHTS BY EXERCISE OF STATUTORY AUTHORITY



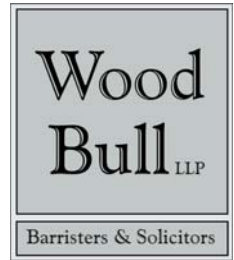
- Official Plan Policies: Open Space
 - City of Cambridge Official Plan
 - Section 12.6: Acquisition of Designated Open Space for Public Purposes
 - “It is the policy of the City that the designation of privately-owned lands in this plan as Class 1, 2 or 3 Open Space District shall not be construed as requiring the City or any other agency to acquire such lands; and subject to the provisions of Section 2 of this plan, Council may pass by-laws or otherwise facilitate the redesignation and development of such lands for any other purpose for which provision is made in this plan.”

RESTRICTING PROPERTY RIGHTS BY EXERCISE OF STATUTORY AUTHORITY



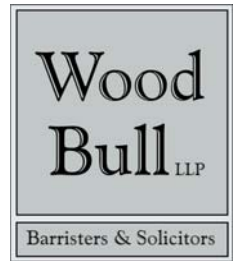
“There was further argument that the municipality has the right to down zone without paying compensation. I am of the opinion, that unless there is legislation specifically permitting this, that the Board should not normally countenance the downgrading of properties for the purpose of freezing its development and thereby accomplishing its acquisition for a lesser sum, which is really what is being attempted in the subject circumstances. If there are other material considerations that would warrant this step, the Board should take them into consideration, but they are not present here.”
(Tollefson, 1976)

RESTRICTING PROPERTY RIGHTS BY EXERCISE OF STATUTORY AUTHORITY



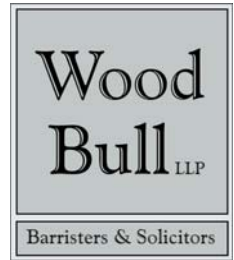
- “The question of "down-zoning" is a question which comes to the Board more and more frequently. The action taken by a Municipal Council must have the support of substantial planning reasons if it is to be acceptable to the Board and the community. The principle which the Board follows in matters where a change in land use results in what is normally referred to as "down-zoning" is well set out in the case of *Re City of Toronto Restricted Area By-Laws 234-75 and 300-75* (1977), 7 O.M.B.R. 344 at p. 349 where the Board had this to say:

RESTRICTING PROPERTY RIGHTS BY EXERCISE OF STATUTORY AUTHORITY



‘But the burden is on the municipality attempting such an exercise to satisfy the Board that the effect of down-zoning will result in a greater benefit to the public at large than the harm or injury to the owner of the property. The Board has to weigh the damage, injury or harm to the owner, the loss suffered by the owner, as a result of the down-zoning, against the gain, profit or benefit accruing to the public at large. And in our view once the municipality has demonstrated merit in its proposal, the burden of establishing damage or loss that offsets the merit in some way shifts to the opponent of the down-zoning.’” (Ottawa, 1981/Rizmi, 2001)

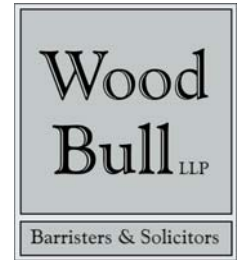
RESTRICTING PROPERTY RIGHTS BY EXERCISE OF STATUTORY AUTHORITY



“The Board and other tribunals have frequently commented on the matter of down zoning and the related question of the unreasonable taking of rights through land use planning decisions. ...Down zoning is not by itself a compensable taking. In Canada and Ontario we do not compensate for loss, nor do we tax the betterment or gain achieved by a favourable planning approval.

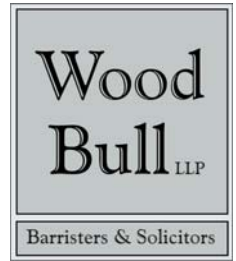
Nevertheless, the Board and the courts have developed several principles applicable to the question of down zoning. In the first place, down zoning should not be considered lightly or undertaken in bad faith or for wrong reasons. Furthermore, it is well established that zoning and planning designations cannot be used to create public parks or publicly accessible open spaces. This requires that the lands be legally acquired by consent or through due process, and that fair compensation be paid. And finally it should only be undertaken with care and with a strong and compelling public justification following a very careful consideration of the impact of the reduced rights of the landowner.” (Spellman,2002)

RESTRICTING PROPERTY RIGHTS BY EXERCISE OF STATUTORY AUTHORITY



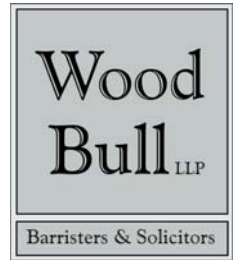
- Other powers to acquire land for public purposes without paying compensation:
 - *Planning Act* gives council authority to require that land be conveyed to the municipality for park or other public recreational purposes in certain situations:
 - as a condition to the approval of a plan of subdivision (ss.51(25)(a), 51.1(1) of *Planning Act*)
 - as a condition to the granting of a provisional consent (ss.53(12), 51(25)(a), 51.1(1) of *Planning Act*)
 - as a condition of development or redevelopment: site plan approval (s.41(1) of *Planning Act*)

RESTRICTING PROPERTY RIGHTS BY EXERCISE OF STATUTORY AUTHORITY



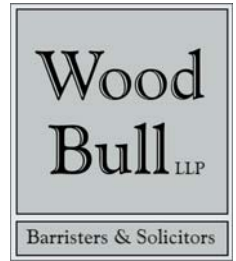
- The *Planning Act*
 - If proposed for commercial or industrial purposes, 2% (ss.42(1), 51.1(1) of *Planning Act*).
 - In all other cases, 5% (ss.42(1), 51.1(1) of *Planning Act*).
 - Alternatively, if proposed for residential purposes, and if official plan contains specific policies dealing with provision of lands for park or other public recreational purposes, one hectare for each 300 dwelling units proposed or lesser rate as determined by municipality (ss.42(3), 42(4), 51.1(2) of *Planning Act*).

RESTRICTING PROPERTY RIGHTS BY EXERCISE OF STATUTORY AUTHORITY



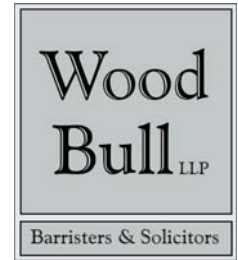
- The *Planning Act*, contd.
 - In lieu of conveyance, municipality may require payment of money to value of the land (ss.42(6), 51.1(3) of *Planning Act*).
 - Municipality may sell land conveyed for park or other public recreational purposes (ss.41(5), 51.1(5) of *Planning Act*).
 - Monies received in lieu of conveyance or from sale of conveyed land can be spent only for acquisition of land to be used for park or other public recreational purposes (ss.41(15), 51.1(5) of *Planning Act*).

RESTRICTING PROPERTY RIGHTS BY EXERCISE OF STATUTORY AUTHORITY



- Official Plan Policies: Parkland Acquisition
 - City of Stratford Official Plan
 - City attempts to ensure minimum of 5 hectares per 1000 population of parkland and open space.
 - Actual location and amount of parkland dedication determine at time development is proposed or at time community improvement schemes are considered.

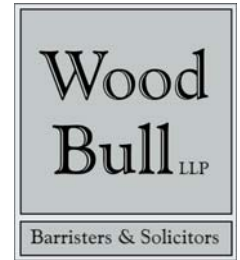
RESTRICTING PROPERTY RIGHTS BY EXERCISE OF STATUTORY AUTHORITY



- Official Plan Policies: Parkland Acquisition
 - City of Stratford Official Plan
 - Policy 6.6.13: Parkland Acquisition

“The City shall use the provisions of the *Planning Act* with regards to land dedications for park or other recreational purposes. In the case of residential lands, the dedication is limited to 5% of the lands being developed or subdivided. In the case of commercial and industrial subdivisions or development, the dedication is limited to 2% of the lands being developed or subdivided. Alternatively, in the case of medium and high density residential development, the City may require that lands be dedicated to the municipality for park or other recreational purposes at the rate of 1 hectare for each 300 dwelling units in accordance with the provisions of the *Planning Act*.”

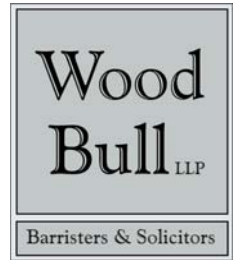
RESTRICTING PROPERTY RIGHTS BY EXERCISE OF STATUTORY AUTHORITY



Do Agreements Matter?

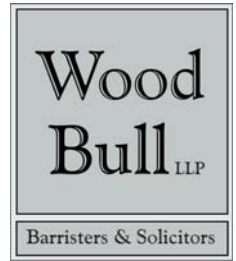
- *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919
 - Pacific National Investments (PNI) entered into agreement to purchase lands from Crown corporation. Agreement was binding only if City of Victoria granted subdivision of lands and passed requisite zoning to enable PNI to construct commercial and residential development on the land.
 - As agreed, City granted subdivision and passed zoning that permitted mixed commercial and residential uses.

RESTRICTING PROPERTY RIGHTS BY EXERCISE OF STATUTORY AUTHORITY



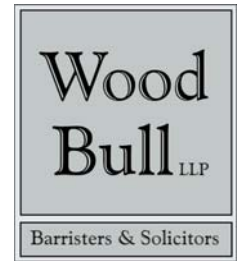
- *Pacific National Investments Ltd. v. Victoria (City)*, cont'd
 - PNI first developed and sold three lots. PNI then brought forth plans for remaining two water lots. Following opposition, City rezoned water lots to prevent additional residential development.
 - PNI argued that “down-zoning” was in breach of City’s obligations. PNI argued that City was bound by an implied term to keep zoning in place for number of years and pay damages if zoning was modified.
 - PNI claimed damages for breach of contract or, alternatively, restitution for unjust enrichment.

RESTRICTING PROPERTY RIGHTS BY EXERCISE OF STATUTORY AUTHORITY



- *Pacific National Investments Ltd. v. Victoria (City)*, cont'd
 - Supreme Court of Canada found that City did not have capacity to make and be bound by contractual term to keep zoning in place.
 - Zoning is legislative power. No power to constrain future use of this legislative power.
 - Supreme Court of Canada rejected claim for damages for breach of contract. Issue of restitution for unjust enrichment was remitted for trial.

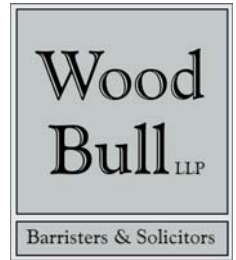
RESTRICTING PROPERTY RIGHTS BY EXERCISE OF STATUTORY AUTHORITY



Do Prior Approvals Matter?

- *Enterprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 S.C.C. 61
 - Developer purchased lot in municipality in Quebec. Developer made plans for residential development. Subdivision permits, permits to cut trees and build roads were issued. Three building permits for three model homes were also issued.
 - Due to various factors, project faced numerous delays.
 - Municipality amended zoning by-law after building permits expired. Amendment required developer to submit comprehensive development programme with further requirement relating to location of proposed buildings.

RESTRICTING PROPERTY RIGHTS BY EXERCISE OF STATUTORY AUTHORITY



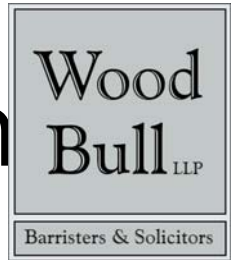
- *Enterprises Sibeca Inc. v. Frelighsburg (Municipality)*, 2004 S.C.C. 61
 - Developer subdivided land, sold it piece by piece, and sued municipality for loss of profits.
 - Supreme Court of Canada held that zoning by-law amendment does not itself trigger liability even if value of land is reduced.
 - Municipality enjoys broad discretion. In public law, not liable if it acts in good faith or if exercise of power cannot be characterized as irrational.

Greenbelt Protection Legislation



- *Greenbelt Protection Act, 2004* (Bill 27)
 - Royal Assent on June 24, 2004.
 - Establishes greenbelt study area (s.2 of *Greenbelt Protection Act*).
 - One-year moratorium on new urban development on lands outside urban settlement areas (ss.4, 5, 7 of *Greenbelt Protection Act*).
 - Moratorium retroactive to date of introduction of Bill 27 (December 16, 2003) (ss.4(4), 5(3), 7(5)).
 - *Greenbelt Protection Act* to be repealed on December 16, 2004.

Greenbelt Protection Legislation



- *Greenbelt Protection Act, 2004* (Bill 27)

Limitations on remedies

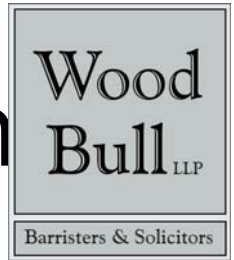
12.(1) No cause of action arises as a direct or indirect result of,

- (a) the enactment or repeal of any provision of this Act;
- (b) the making or revocation of any provision of the regulations made under this Act; or
- (c) anything done or not done in accordance with this Act or the regulations made under it.

No remedy

12.(2) No costs, compensation or damages are owing or payable to any person and no remedy, including but not limited to a remedy in contract, restitution, tort or trust, is available to any person in connection with anything referred to in subsection (1).

Greenbelt Protection Legislation



- *Greenbelt Protection Act, 2004* (Bill 27)

Proceedings barred

12.(3) No proceeding, including but not limited to any proceeding in contract, restitution, tort or trust, that is directly or indirectly based on or related to anything referred to in subsection (1) may be brought or maintained against any person.

Same

12.(4) Subsection (3) applies regardless of whether the cause of action on which the proceeding is purportedly based arose before or after the coming into force of this Act.

Greenbelt Protection Legislation



- *Greenbelt Protection Act, 2004* (Bill 27)

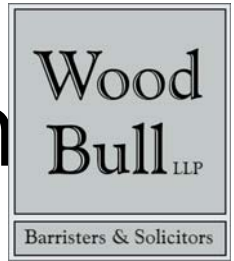
Proceedings set aside

12.(5) Any proceeding referred to in subsection (3) commenced before the day this Act comes into force shall be deemed to have been dismissed, without costs, on the day this Act comes into force and any decision in a proceeding referred to in subsection (3) made on or after December 16, 2003 is of no effect.

No expropriation or injurious affection

12.(6) Nothing done or not done in accordance with this Act or the regulations under it constitutes an expropriation or injurious affection for the purposes of the *Expropriations Act* or otherwise at law.

Greenbelt Protection Legislation



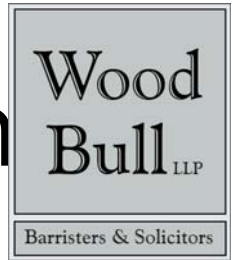
- Bill 135 (*Greenbelt Act*)
 - Bill 135 introduced October 28, 2004.
 - Second Reading debates began November 15, 2004.
 - Lieutenant Governor in Council may designate areas as Greenbelt Areas. Regulation may be retroactive to December 16, 2004 (s.2 of Bill 135).
 - Lieutenant Governor in Council may establish Greenbelt Plan (s.3 of Bill 135).

Greenbelt Protection Legislation



- Bill 135 (*Greenbelt Act*)
 - Greenbelt Plan prevails in case of conflict with official plans, zoning by-laws or policy statements (s.8 of Bill 135).
 - Planning decisions must conform with Greenbelt Plan: Section 7

Greenbelt Protection Legislation



- Bill 135 (*Greenbelt Act*)
- **Limitations on remedies**

19. (1) No cause of action arises as a direct or indirect result of,

- (a) the enactment or repeal of any provision of this Act;
- (b) the making or revocation of any provision of the regulations made under this Act;
- (c) the making of a plan or an amendment to a plan under the *Ontario Planning and Development Act, 1994* in relation to lands to which the Greenbelt Plan applies; or
- (d) anything done or not done in accordance with this Act or the regulations made under it.

Greenbelt Protection Legislation



- Bill 135 (*Greenbelt Act*)
- **No remedy**

19. (2) No costs, compensation or damages are owing or payable to any person and no remedy, including but not limited to a remedy in contract, restitution, tort or trust, is available to any person in connection with anything referred to in subsection (1).
- **Proceedings barred**

19. (3) No proceeding, including but not limited to any proceeding in contract, restitution, tort or trust, that is directly or indirectly based on or related to anything referred to in subsection (1) may be brought or maintained against any person.

Greenbelt Protection Legislation

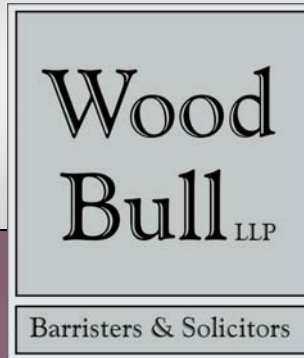


- Bill 135 (*Greenbelt Act*)
- **Same**
 19. (4) Subsection (3) applies regardless of whether the cause of action on which the proceeding is purportedly based arose before or after the coming into force of this Act.
- **Proceedings set aside**
 19. (5) Any proceeding referred to in subsection (3) commenced before the day this Act comes into force shall be deemed to have been dismissed, without costs, on the day this Act comes into force.

Greenbelt Protection Legislation



- Bill 135 (*Greenbelt Act*)
- **No expropriation or injurious affection**
19. (6) Nothing done or not done in accordance with this Act or the regulations made under it constitutes an expropriation or injurious affection for the purposes of the *Expropriations Act* or otherwise at law.



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