

# **Everything you need to know about administrative procedure before the Land Value Appraisal Commission**

**Presented to  
the Civil Litigation and Municipal Law Sections  
of the Manitoba Bar Association**

**by  
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# TABLE OF CONTENTS

	<u>Page</u>
Creation and membership .....	1
Applicable legislation .....	2
Application to the LVAC .....	2
Inquiry process .....	3
Limitation period .....	5
Jurisdiction and function .....	7
Pre-hearing discovery .....	9
Setting dates for Hearings and pre-hearings .....	10
Outline of claim and documentary evidence .....	11
Conduct of Hearings .....	14
Post hearing procedures .....	17
Appeal rights .....	20

**Creation and membership**

The Land Value Appraisal Commission (“LVAC”) was created by the Progressive Conservative Government in 1965.

The LVAC is continued under section 13(1) of *The Land Acquisition Act*, C.C.S.M. c. L40. The LVAC, like other administrative tribunals, has the like protection and powers as are conferred on, or required of, commissioners appointed under part V of *The Manitoba Evidence Act* (see s. 13(6) of *The Land Acquisition Act*).

During hearings, there are usually three members of the LVAC on a panel. A decision of the majority of the panel constitutes the decision of the LVAC (see LVAC Rule 19). Two members constitute a quorum for a sitting of a panel of the commission (see s.13(10) of *The Land Acquisition Act*). All hearings of the LVAC are public and any party to a matter before the LVAC may be represented by counsel and may call witnesses, submit evidence and present arguments. The LVAC makes its own rules governing its procedures. The link to the website is as follows:  
<https://www.gov.mb.ca/mit/lvac/>

In May 2019, the Manitoba Law Reform Commission prepared a 29 page report authored by the previous LVAC chair, Cameron Harvey, Q.C. It is unknown as to which, if any, of the 10 recommended statutory amendments will be made. The link is: [137-full\\_report.pdf \(manitobalawreform.ca\)](https://www.manitobalawreform.ca/137-full-report.pdf).

**Applicable legislation**

The LVAC resolves valuation disputes with respect to various compulsory acquisitions including those by the Province of Manitoba, Manitoba Housing and Renewal Corporation, School Divisions, rural municipalities in Manitoba, Manitoba Hydro and the City of Winnipeg.

If acquisitions are made by the government or Hydro through *The Land Acquisition Act*, it is s. 14(1) of this legislation which governs the application process. Any certification pursuant to an application for a purchase under *The Land Acquisition Act* is binding on the government and on the utility. However the certification is not binding on the owner (see s. 14 of *The Land Acquisition Act*).

Most cases that will come to lawyers will be expropriation cases. Expropriations are initiated by a series of formal documents starting with a Notice of Intended Expropriation. It is section 15 of *The Expropriation Act* which governs the right to make an application. In an expropriation hearing, the amount which is certified by the LVAC is binding on the expropriating authority and on the owner.

**Application to the LVAC**

An application for a hearing, whether it be under *The Land Acquisition Act* or *The Expropriation Act* needs to meet the requirements in section 4 of the Rules of Procedure of the LVAC. Those rules require the applicant to give:

- (a) the correct name and mailing address of the claimant(s);
- (b) where the claimant is a corporation, the names of the officers should be given;

- (c) the name and correct mailing address of the acquiring authority;
- (d) the legal description or municipal address of the land being acquired;
- (e) the amount of land being acquired; and
- (f) the interest in the land being acquired.

We usually send that information by way of a form entitled “Application” and forward that Application to the LVAC by way of a letter. We ask that the LVAC acknowledge receipt of the Application. The LVAC assigns a file number which is to be referenced in all correspondence and filings with the LVAC.

#### **Inquiry process**

There is an inquiry process provided for under *The Expropriation Act*. The LVAC does not have jurisdiction to conduct that inquiry. An Inquiry Officer appointed by the Minister of Justice conducts the inquiry.

In order to initiate the inquiry process, an owner must object to an intended expropriation within 30 days from the date the Notice of Intended Expropriation is served upon the owner or within 30 days from the date publication is made pursuant to Schedule A of *The Expropriation Act*, whichever is later. That objection must be served on the Justice Minister and the expropriating authority. This results in the holding of an inquiry.

However, these inquiry provisions do not apply where the Lieutenant Governor in Council passes an Order in Council waiving the requirement for an inquiry. The Province usually passes an Order In Council exempting itself from the inquiry process. However, the Lieutenant Governor in Council rarely exempts other

expropriating authorities from the inquiry process. Therefore expropriating authorities such as the City of Winnipeg, rural municipalities and school divisions will usually need to hold an inquiry if an objection is served by an owner.

The duties of the inquiry officer are to inquire whether the intended expropriation is fair and reasonably necessary for the achievement of the objectives of the expropriating authority (see s.2(2) of Schedule A to *The Expropriation Act*).

The report of the inquiry officer is not generally made public. The report is distributed to the parties who objected to the notice of intended expropriation and contains (see s.8 of Schedule A to *The Expropriation Act*):

1. a summary of the evidence and arguments of the parties,
2. the inquiry officer's determination of the facts,
3. his opinion on the question in issue, and
4. such other matters as he considers expedient and in the public interest including various recommendations to the expropriating authority.

After receiving the report, the expropriating authority "shall consider the report of the inquiry officer" and "where the order confirming the expropriation is not in accordance with the opinion of the inquiry officer, it shall state its reasons for making the order" (see s. 9(1) of Schedule A to *The Expropriation Act*).

This process is generally to explore whether there are other alternatives to the proposed taking or extent of the proposed taking from property owners.

**Limitation period**

S. 37(1.1) of *The Expropriation Act*, provides that the application to the LVAC needs to be filed not later than two years after the day the authority enters into possession of the land. Note that this date does not necessarily correspond with the date the owner received a declaration of expropriation. Quite often owners will be expropriated but the expropriating authority does not require immediate possession of the land which it has expropriated and to which it now has title.

You should ask the client when the expropriating authority entered into possession. In most cases, the expropriating authority will have served on the registered owner a Notice of Possession pursuant to s. 20 of *The Expropriation Act* and the date on which the expropriating authority entered into possession will correspond with the date specified in that Notice. This is not necessarily so and in some instances, the expropriating authority will have entered into possession with the consent of the owner without having served a Notice of Possession.

In an expropriation there is a mandatory s. 16(1) without prejudice offer on Market Value of the expropriated land. Market Value is only one of the four elements of due compensation. The four elements are listed in s. 26(1) as follows:

**Due compensation for land**

26(1)

Where land is expropriated, the due compensation payable to the owner therefor shall be the aggregate of

(a) the market value of the land determined as hereinafter set forth;

(b) the reasonable costs, expenses and losses arising out of or incidental to the owner's disturbance determined as hereinafter set forth;

(c) damages for injurious affection as hereinafter set forth; and

(d) the value to the owner of any special economic advantage to him arising out of or incidental to his actual occupation of the land, to the extent that no other provision is made therefor in due compensation.

Therefore, if you miss the limitation date, your client will be limited to receiving payment of the expropriating authority's view of the amount payable for market value. Usually, but not always, that value is lower than the amount claimed by the owner with respect to market value. Also, the other elements of compensation are sometimes multiples of the market value of the land.

I recommend not waiting to file an application. You don't need to have details of the compensation you are seeking to file an application.

It is important that, in the application, you identify all *owners*, defined as follows in *The Expropriation Act*.

**"owner"** includes:

the registered owner,

any person who has any estate or interest in the land,

any person who has any lien, charge, mortgage or encumbrance on the land, and

any person in actual occupation of the land and



(a) the heirs, executors, administrators and successors of an owner at the time an ownership of the land is material, and

(b) a person who was an owner immediately prior to the expropriation of the land;

This is key because at first glance one might only list the registered owner as the claimant. However, it is the owner as broadly defined, who should be listed as the claimant(s).

Thus, by way of example, the owner could be a combination of one or more of:

- personal ownership,
- a spouse who occupies a home,
- a tenant,
- an operational corporation (Op. Co.), and
- a holding corporation (Hold Co.).

Each of them has a potential claim to due compensation.

### **Jurisdiction and function**

Under section 14(1) of *The Land Acquisition Act*, the LVAC's role is to "determine and certify an amount which, in its opinion represents due compensation in respect of the acquisition". Under section 14(5) the LVAC, in certifying due compensation in respect of an acquisition of land may include in due compensation an amount for the costs incurred by the owner in appearing before, submitting

evidence to and presenting argument to the LVAC including expenses incurred by the owner for the purpose of preparing and presenting his case before the LVAC.

Due compensation is a defined term both under *The Land Acquisition Act* and under *The Expropriation Act*. The definitions are similar but not identical. The LVAC has, from time to time, certified due compensation in land acquisition proceedings which are more generous than they would award in an expropriation proceeding under *The Expropriation Act*.

The certification of due compensation and costs is the LVAC's sole jurisdiction. It does not have power to initiate land acquisitions or to stop or even alter them.

The LVAC is an adjudicative tribunal. It does not perform any mediation or conciliator roles.

The Court of Queen's Bench, and not the LVAC, has jurisdiction on Injurious Affection claims where no land is taken.

The LVAC may and has from time to time reported allegations of improprieties or complaints concerning the acquisition of the land brought to its attention. This role is specifically set out in Rule 23 as follows:

**23** The Commission may in writing through its Chairman report allegations of improprieties or complaints concerning the acquisition of the land which are brought to its attention during a hearing to the Minister responsible.

It is my experience that, if the LVAC takes the time to write to the Minister on a matter of concern, the Minister responsible takes any such report very seriously.

**Pre-hearing discovery**

The LVAC Rules were amended to remove pre-hearing discovery. This is in keeping with the intent of having an efficient and cost effective process leading to a hearing. Owners can file FIPPA requests to obtain documentary disclosure from an expropriating authority.

Both owners and expropriating authorities can issue a subpoena for documents or a subpoena for a witness with a requirement to bring documents so as to ensure disclosure of relevant documents not otherwise available. LVAC Rule 15 provides as follows:

**Subpoenas, Oaths, Recording of Evidence, Views**

15 Pursuant to subsection 13(6) of *The Land Acquisition Act* and sections 90 and 91 of *The Evidence Act* of Manitoba:

(a) Upon a party requesting a subpoena indicating to the Commission the scope of the evidence being sought and persuading the Commission of its relevance, the Commission may summon by subpoena witnesses to testify before the Commission or to submit documentary evidence to the Commission; any witnesses so required to testify shall be entitled to counsel;

In my experience, if the Subpoena speaks to the documents sought to be produced in a way which makes clear the relevance, the Subpoena will be issued without the necessity of an appearance. There may be instances where the LVAC

has issued a Subpoena and the witness appears represented by counsel explaining why there is an objection to producing specific documents. In that case, the LVAC will hear submissions and make an interim ruling on the issues being raised.

**Setting dates for Hearings and pre-hearings**

If a pre-hearing or hearing is required, parties contact each other and the LVAC to determine availability of dates.

This is consistent with the spirit of LVAC Rules 6, 7 and 8 which read as follows:

**Hearings Dates**

**6** Ordinarily the date(s) for a hearing will only be fixed with the concurrence of all parties.

**7** Upon the fixing of the date(s) for a hearing the Secretary of the Commission shall cause a notice to be sent forthwith to all parties concerned advising of the land and interest being acquired, the parties involved, the date(s), time, place, and consequences of the scheduled hearing, and that the Commission may proceed with the hearing even though persons to whom notice is sent fail to respond.

**8** The initial notice to the claimant(s) of a hearing shall be sent by "certified" mail with an acknowledgement of receipt card attached. All other notices and correspondence may be sent by regular mail.

Although the Rules do not specifically provide for pre-hearings, in my experience the LVAC continues to hold pre-hearings to deal with matters such as:

- setting dates for exchange and filing of evidence,

- the refusal by the expropriating authority to file all its evidence on the dates prescribed by the rules (e.g. attempt to split its case by waiting to see the evidence filed by the owner),
- the lack of cooperation by one of the parties to set a hearing date in a timely way.

### **Outline of claim and documentary evidence**

Parties will often exchange documentary evidence in advance of the requirements set out in the rules.

For expert evidence such as reports from appraisers, planners, accountants and Chartered Business Valuers, my practice is to exchange reports with the expropriating authority if the expropriating authority confirms that the reports have dealt with each relevant issue and undertakes to file those reports with the LVAC. By way of example if there is a partial expropriation and the owner's appraisal evidence addresses both market value and injurious affection on the remaining parcel, I will advise the expropriating authority that these two valuation issues need to be addressed by their appraiser in his or her report. One of the dangers of not proceeding in this manner is that:

- (re no report being exchanged) the expropriating authority keeps its appraisal report from being disclosed and either gets its report revised or does not use it and hires a different appraiser to file a report.
- (re no agreement to file and use the report at the LVAC) the expropriating authority discards its appraisal report and hires a new appraiser to file a new and different report which is drafted more as a critique of the owner's report than a truly independent report.

These outcomes may lead to an uneven playing field between experts.

Rule 10 sets out the following requirements with respect to the outline of the claim and the documentary evidence:

**Outline of Claim and Documentary Evidence**

**10**

(a) At least 10 working days prior to the commencement of a hearing, the claimants shall file with the Commission four copies of an outline of the (their) claim(s) and deliver one copy to the respondent.

(b) At least 10 working days prior to the commencement of a hearing, each party shall file with the Commission four copies of any documentary evidence, including any appraisal report, that will be tendered at the hearing, and deliver one copy to the other party.

(c) An appraisal report must contain a brief, but comprehensive summary of the report which may be submitted in the form set out in the attached Schedule. The summary shall include:

- (i) the valuation date,
- (ii) the valuation method used,
- (iii) the market value of the land,
- (iv) the dimensions of the land,
- (v) the amounts of other compensation (if any) involved.

I personally do not use the Summary form for appraisal evidence attached to the Rules. I ensure that the requirements of the rule are met in the Appraisal itself.

My practice is to prepare an indexed Book of Documents for the evidence which is relevant to the claim but not specifically adduced to prove the quantum of the claim. This includes the title, proof of corporate existence, all

expropriation documents received from the expropriating authority and any relevant evidence related to the reasonableness of the claim.

In addition, I prepare an Excel spreadsheet entitled Particulars of Claim. It is structured with headings and includes each of the 4 elements of due compensation (generally those in s. 26(1)) which are applicable.

Generally, the evidence on Market Value, Injurious Affection and Special Value will be via appraisal evidence.

There are often many issues and corresponding documentary evidence required under the Disturbance heading.

Disturbance is further defined in s. 28(1) as: “reasonable costs, expenses and losses as arise out of or are incidental to the expropriation, including...”

Examples of the types of claims which can be advanced under that heading are set out in a paper which I had prepared for and presented to the Appraisal Institute of Canada at one of its national conferences. [A Primer on Expropriation | TDS Law](#)

The Excel spreadsheet sets out each document numerically and is organized in brown expandable folders with tabs which correspond to the numbers in the Excel spreadsheet. The Disturbance portion of the Excel spreadsheet

includes relevant invoices and proof of payment, and quotes where expenses have not yet been incurred.

Organizing the Particulars of Claim in this manner allows for interim updates prior the actual filing. Totals of principal, PST, GST and interest are easily made with the use of Excel Spreadsheets.

### **Conduct of Hearings**

Generally, the matter is heard at the LVAC's offices in Winnipeg by a three member panel. Parties can request that a hearing be conducted in a community closest to the land in question if that land is more than 30 or 40 miles away from Winnipeg.

For the longest time, Cameron Harvey, Q.C. was the chair of the LVAC. If you conduct legal research you will find that the vast majority of decisions were rendered by him. For the last two decades the composition of the LVAC has changed with changes in government. Usually one of the members has some legal training. That member does not necessarily sit on the three member panel.

S. 13(11) of *The Land Acquisition Act* provides for a statutory right to be represented by counsel and submit evidence and argument as follows:

### **Public hearings**

#### 13(11)

All hearings of the commission shall be public; and any party to a matter before the commission may be represented by counsel and may call witnesses, submit evidence, and present argument.



This public hearing is recorded by the hearing officer. If parties wish to have a transcript prepared, arrangements can be made with LVAC staff to send the recording to a Court Reporter who will be able to prepare a transcript of the proceeding.

The order of proceeding is not dependent on who filed the application for hearing with the LVAC. Ordinarily it is the expropriating authority who presents first. Rule 11 provides:

**Order of Presentation**

**11** Notwithstanding on whom may be the burden of proof, ordinarily the acquiring authority will be expected to present its evidence first; if the acquiring authority requests that the claimant(s) precede the acquiring authority in the presentation of evidence, the Commission will ordinarily accede to the request; if the acquiring authority is going to make such a request it shall give reasonable notice of its intention prior to the hearing to the claimant(s) and to the Commission.

Notwithstanding the order of presentation of the evidence, the onus of proof is on the owner.

Hearings are informal. The rules of evidence are not strictly applied. This being said my experience is that the LVAC does wish to have relevant persuasive evidence in a hearing which is conducted in a way which is fair to the parties.

Witnesses are sworn or affirmed prior to giving evidence. Although counsel rarely request an exclusion of witnesses, the LVAC will generally accede to such a request.

The process is generally the same as in a Court proceeding. Witnesses are cross-examined after their direct testimony and can be re-examined. Once the expropriating authority has closed its case, the owner will present its case. If there are issues requiring rebuttal evidence, the expropriating authority will be allowed to adduce that evidence.

Depending on the complexity of the case the LVAC will request that parties provide it with submissions in writing. Pre-Covid, parties were also allowed to present oral arguments.

LVAC Rule 20 provides that the LVAC “may” give reasons for decision. However, the LVAC will invariably reserve and then issue its reasons for decision in due course. In fact, I have not had one hearing over the 35 plus years of practice before the LVAC for which reasons for decision were not given. Almost invariably, an expropriation has a significant and severe impact on owners and their lives. In addition, their fundamental property rights are impacted for the benefit of a public project. Providing comprehensive reasons for decision is certainly consistent with the recent direction by the S.C.C. in *Vavilov* at paragraph 133:

Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an

individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention.

### **Post hearing procedures**

As previously indicated, the LVAC also has jurisdiction to fix legal, appraisal and other consulting costs (see s. 14(5) of *The Land Acquisition Act* and s. 15(6) and (7) of *The Expropriation Act* reproduced below).

### **Commission may award costs**

#### 14(5)

In certifying due compensation in respect of an acquisition of land, the commission may include in due compensation an amount for the costs incurred by the owner in appearing before, submitting evidence to and presenting argument to the commission including expenses incurred by the owner for the purpose of preparing and presenting his case before the commission.

### **Authority to pay costs of owner**

#### 15(6)

The authority shall pay reasonable appraisal, legal and other costs that are reasonably incurred by an owner for the purpose of determining the compensation payable under this Act for an expropriation.

### **Commission may determine costs**

#### 15(7)

Where the amount of compensation payable under this Act for an expropriation is settled by the authority and an owner without a hearing or is determined by the

commission, the commission may, on application by the authority or owner, determine the costs.

Although the LVAC has ruled that all that is expected is the usual formatting which is used by those billing owners for legal fees, appraisal fees and consulting costs, expropriating authorities, especially as it relates to legal fees, expect detailed time entries.

*The Interpretation Act* provides:

**Law is "always speaking"**

5 When a provision of an Act or regulation is expressed in the present tense, it applies to the circumstances as they arise.

**Imperative and permissive language**

15 In the English version of an Act or regulation, "shall" and "must" are imperative and "may" is permissive and empowering.

Therefore, it is my view that there is an ongoing obligation by expropriating authorities to pay owners for their reasonable appraisal, legal and other costs on a periodic interim basis. Also, statutory interest on bills sent to owners is due 30 days from the date of submission to the expropriating authority. So, it is important to not only send bills to the owners but to also send a copy of the bill to the expropriating authority. There is also the possibility to seek interest actually charged to owners on these bills.

Most expropriating authorities will provide owners with interim reimbursements of their legal costs. Most expropriating authorities will also provide owners with interim reimbursement of appraisal and consulting costs. More recently, the Province has become the exception to this policy.

The Province, has fairly recently implemented a policy as to the maximum hourly rate of legal fees it will reimburse on an interim basis. The Province has set an hourly rate. In the writer's view this approach of setting an hourly rate is inconsistent with what was written by the then Chair, Cameron Harvey, at page 2 of his memo on Legal fees:

Respecting the hourly rate the Commission will not operate on the basis of set hourly rates. The Commission will employ the hourly rate used in the bill in question if indeed it is the lawyer's usual hourly rate.

It is the writer's view that this written direction provided by the LVAC is consistent with its rulings on the issue.

However, in an expropriation, there is no authority for the LVAC to certify compensation for legal fees, appraisal fees and consulting fees prior to a settlement or prior to a hearing on the merits of the claim.

Generally, parties are able to settle the issue of legal, appraisal and consulting fees. However, if necessary, the LVAC after receiving a s. 15(7) application, will reconvene to certify the amount payable to the owner with respect

to those costs. It is my view that the law supports that the assessment of those accounts is based on a solicitor and own client basis provided it is the lawyer's usual hourly rate.

Another area which is inconsistent with usual practice is the concern of the City of Winnipeg with respect to the use of associates on a file. In my other areas of practice, clients expect me to delegate to other lawyers if the work can be done in a more efficient and cost effective manner. Doing so necessarily requires some overlap where I provide instruction and supervision. I raise this so you are aware of the City's policy. It may change that policy, but until it does you should be aware that delegating to a junior lawyer will likely be an area of contention when the City is asked to reimburse the owner for legal fees.

### **Appeal rights**

Historically, the LVAC rendered non-binding decisions and there was the possibility of having a hearing *de novo* by the Court of Queen's Bench. Any appeal was of the decision rendered by the Court of Queen's Bench. That was changed in the 1990. The LVAC became the tribunal with the sole and exclusive jurisdiction to determine due compensation with respect to expropriations. However, the appeal rights remained the same. Although the Court of Appeal has not yet ruled on the impact of *Vavilov*, [2019 SCC 65 \(CanLII\) | Canada \(Minister of Citizenship and Immigration\) v. Vavilov | CanLII](#) on the standard of review, it is my view that appeals of an LVAC decision are governed by *Housen* [2002 SCC 33 \(CanLII\) | Housen v. Nikolaisen | CanLII](#).

This is so because a statutory appeal, which remained unchanged, is allowed on questions of law, fact or mixed fact and law pursuant to s. 44 of *The Expropriation Act* which reads as follows:

### **Appeal of certified amount to Court of Appeal**

44(1) A party to a proceeding before the commission may appeal the amount certified as compensation payable to The Court of Appeal within 40 days after the day the commission certifies the amount under subsection 15(2), or within seven days from the day the commission issues a decision or certifies an amount under subsection 15(5), whichever is the later.

### **Powers of Court of Appeal**

44(2) An appeal under subsection (1) may be made on questions of law or fact or mixed law and fact, and The Court of Appeal may

(a) refer any matter back to the commission for determination; or

(b) make any determination that the commission has the power to make.

The Court of Appeal has not provided much guidance on what principles it applies in exercising its discretion to award costs on an appeal. S. 44(3) provides:

### **Costs**

44(3) The costs of an appeal are in the discretion of The Court of Appeal, and the court may order that costs be awarded to the owner and assessed in accordance with subsection 15(6) where the owner's appeal is successful or where the appeal of an authority is unsuccessful.

Although the Court of Appeal may not seize the opportunity to clarify the law as to which principles will govern the exercise its discretion, there is an appeal expected to be heard in the next months in which it will have the opportunity do so.