

Corporate bullying: Expropriating for private purposes in Nova Scotia

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Nova Scotia's Expropriation Act authorizes the taking of private land for public works and other public purposes. But expropriation in the province increasingly serves private purposes, helping international resource development companies acquire land at reduced prices. This article reviews recent expropriations for three private projects – the Black Point Aggregate Quarry, the Touquoy Gold Mine, and the Maritime Link Transmission Project.

Black Point Quarry

“Fogarty’s Cove,” the beloved Stan Rogers song, evokes the wind, waves, and sand of Nova Scotia’s coast and the life of a fisherman who loves both the sea and a woman on shore. But if the US-based Vulcan Materials Company and the local government have their way, the pristine cove will soon become part of an aggregate quarry, and the adjacent Chedabucto Bay will become a marine terminal.

Last October, the municipality of Guysborough expropriated the cove, which had been in the Fogarty family for 194 years. It gave the Fogartys virtually no warning. Indeed, the previous year, it had assured James Fogarty that it was not considering expropriating the land. Just six days before the municipal council meeting at which the decision to expropriate was to be made, James received an invitation to attend the meeting. He did so, spoke for about ten minutes, and was asked no questions before the unanimous vote was taken to expropriate his land. “They just blindsided us,” complained James’s cousin Brian. “Everybody’s arm shot up and that was it.”

Under Nova Scotia law, the family cannot appeal the expropriation. Although appeals are permitted in many provinces, including Ontario, whose expropriation law was the model for Nova Scotia’s, the province removed this key due-process provision when drafting its own legislation. The result, as Halifax real estate lawyer Mike Turner explained, is that “the *Expropriation Act* in Nova Scotia is not a very good act.”

The *Chronicle Herald* is likewise a harsh critic of the act. In a recent editorial, it blasted it as “a gross affront to the rights of every landowner and citizen in this province” and a “medieval mess of a statute,” arguing that “it’s time to bring it out of the dark ages.”

But Guysborough had few qualms about using the act. It had had its eye on a quarry in the area since 2006, believing it would generate jobs and contribute to the local tax base. It acquired some provincial land for the purpose through a land exchange. But it wasn’t able to purchase Fogarty’s Cove: James and his cousins simply weren’t interested in selling.

Guysborough had little sympathy for owners who wished to keep their land wild. In 2013, when it amended its planning strategy to open lands for new development, it specifically targeted private land that had been “held for generations without being sold or made available for development.”

Warden Vernon Pitts explained to the *Guysborough Journal* that the municipality feels it has to “provide opportunities for economic growth.” The warden has extraordinarily high hopes for the quarry: “It’s developments like this that allow us to keep our banks, to keep our hospitals open and staffed ..., (to keep) our seniors and nursing homes, drugstores. Investment like this pays for our policing, it pays for our education.”

But will the quarry really pay off? Guysborough won’t reveal its financial arrangements with Vulcan, which will operate the quarry, or with Morien Resources Corporation, the original developer. The municipality plans to lease the Fogartys’ 107 acres, along with its own land, to Vulcan, but it won’t say for how much. Nor has it revealed anticipated tax revenues from the operations. As the *Chronicle Herald* complained, “That’s no way to show it’s acting in the public interest.”

Who’s to say that the quarry is the highest valued use of Fogarty’s Cove? The Fogartys clearly believe its value as wilderness exceeds other uses. As Brian explained, “It’s a beautiful, beautiful property. It wouldn’t matter if they offered us \$15 million, it’s not for sale.” Others, too, question the value of the quarry. The local fishermen’s association warns of the quarry’s potential impacts on the 72 fishing licence holders and four lobster fishermen in the area. It compares the 60 jobs that may be created by the quarry to these “real, sustainable, existing jobs.” The quarry may also threaten the jobs in tourism that rely on unspoiled wilderness. The *Chronicle Herald* notes somewhat bitterly that “perhaps the public interest in grinding up scenery for gravel at least needs further debate.”

And debated it will be. The proposed Black Point Quarry Project is currently undergoing a federal environmental assessment. In February of this year, the proponent submitted an 82-page project description. The document, produced by Aecom, describes a granite quarry that will operate for 50 years, with as much as 7.5 million tonnes of aggregate taken from it in a year. The aggregate will be shipped to the US, and possibly on to the Caribbean.

The project description reviews potential environmental impacts of quarry construction and operation, including air emissions, noise, vibrations, and lighting, along with possible effects on forests, rare plants, wetlands, groundwater, wildlife, and sensitive bird populations. It also describes threats to fish and fish habitat from marine terminal construction and operation, and acknowledges the possibility of ballast water discharge or a shipping accident releasing invasive species or other contaminants into local waters. To this list, the Fogartys add their own concerns about family graves on the site, along with the foundation of homes or a church.

The Fogartys would like to see their land declared a protected wilderness area. But James Fogarty doesn’t sound optimistic. Referring to Vulcan, North America’s largest producer of construction aggregates, he asks, “You realize how much money’s behind this company that wants that land? The truth of the matter is that it’s always been whoever has the most money wins.”

Touquoy Gold Mine

Guysborough is not the first Nova Scotia community to put resource developers' interests before private property rights and the environment. In 2012, the Nova Scotia government expropriated part of a Christmas tree farm in Moose River in order to accommodate DDV Gold Limited, a subsidiary of Australia's Atlantic Gold NL. The owners of the tree farm – the Higgins family – had refused to sell their land, which had been in the family for more than 120 years and included their great-grandparents' homestead. They asked DDV, which will be developing an open-pit mine called Touquoy, to work around the land instead of taking it. But the company balked, and the province, seduced by the company's plans to employ as many as 150 people, backed the company. "This sets a dangerous precedent," Cleve Higgins warned. "It says to Nova Scotia landowners that a mining company can just come along and take away your land because it wants to."

The taking occurred under the *Mineral Resources Act*, which allows the Minister of Natural Resources to grant a "vesting order" transferring ownership of land from one party to another. The act facilitates mineral exploration, development and production, and affords little protection to landowners. It does not set out any process for the government to follow when depriving someone of his land – the procedure is left to the Minister's discretion.

In 2013, the Nova Scotia Court of Appeal supported the province's decision to transfer ownership from one private party to another. The Higgins hoped to take their case to the Supreme Court of Canada. But this year, the Supreme Court dismissed their application for leave to appeal.

Despite their legal setbacks, the Higgins haven't given up hope that their land may be restored to them. Cleve Higgins points out that mining is a risky and speculative business, and that many a mine has not gone ahead as planned. Investors may lose confidence as their costs go up or the price of gold falls. A number of large mining companies have seen their share prices drop and have faced unexpected political delays.

Still, if the Touquoy mine does go ahead, there will be nothing left of the Higgins' land. Nor, Cleve Higgins warns, will his family be the only ones to suffer. An open-pit gold mine can pose serious threats to the environment and leave the land irreparably scarred. As early as 2007, the Halifax Watershed Advisory Board raised the alarm about the large quantities of arsenic-contaminated waste rock and sludge that will have to be monitored well beyond the five-to-seven-year life of the project.

The Eastern Shore Forest Watch Association is likewise deeply concerned about the mine's potential impacts. It dismisses the environmental assessment, approved in 2008, as inadequate. It warns of the release of arsenic, copper, and other contaminants into local waters, and of cyanide gas and acid-rain compounds into the air. And it notes that an effluent spill or a tailings pond dam failure could poison the entire watershed.

Cleve Higgins objects to governments expropriating on behalf of environmentally destructive industries. "There are only three laws in Nova Scotia that allow a private company to request a government-issued expropriation: the *Mineral Resource Act*, the *Petroleum Resource Act* and the *Pipelines Act*," he wrote in August. "In other words, these extractive industries have a special status in the Nova Scotia legal system, with privileges that are granted to no one else.... A real respect for the land and landowners' rights demands an end to these expropriations."

Maritime Link Transmission Project

In pointing to the special privileges granted to resource development companies, Cleve Higgins overlooked the *Maritime Link Act*, a provincial law facilitating a high voltage transmission line from Newfoundland and Labrador to Nova Scotia. The act, as amended last December, enables the developer of the line to expropriate any land it “considers necessary or useful” for the project.

The Maritime Link is part of a mega transmission system that will bring electricity from the Muskrat Falls hydroelectric development on the lower Churchill River in Labrador, across the island of Newfoundland, under the sea to Nova Scotia, and from there on to mainland North America. Just one-third of the power carried by the link is expected to be used in Nova Scotia – and the need for that power is uncertain, given the anticipated decline in energy demand in the province. The balance of the power carried by the link will be shipped to Atlantic Canada or New England.

The Maritime Link is being developed by NSP Maritime Link Inc., a subsidiary of Emera Inc., an international energy and services company with over \$9 billion in assets and \$2 billion in annual revenues. Despite its financial strength, Emera has received a generous subsidy for the project from federal taxpayers in the form of a \$1.3 billion loan guarantee. The need for such a guarantee calls into question the viability of the project and the suitability of expropriation for it: Why has the province allowed a private firm to expropriate for a financially risky project that may primarily serve American electricity markets?

But expropriating it is. In July, Nova Scotia approved the expropriation of easements on 57 properties in Cape Breton. Later that month, NSP Maritime Link Inc. applied to expropriate easements on 30 more Cape Breton properties. The firm claims that landowners are largely willing to reach agreements, that it expropriates only as a last resort, and that even then, “It’s almost like a friendly expropriation.” Some landowners beg to differ. Farmer Eddie Rendell complained, “this is just corporate bullying. I got the land and they can take it off me; I don’t think that’s right.”

(Thanks to Robin Reym for her assistance in researching Nova Scotia expropriations.)



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