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# Do Ontario School Boards Have Too Much Statutory Power? A Comparison of Expropriation and Eminent Domain in Ontario and Michigan

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Do Ontario School Boards Have Too Much Statutory Power? A  
Comparison of Expropriation and Eminent Domain in Ontario and  
Michigan

**Erratum**  
article

# DO ONTARIO SCHOOL BOARDS HAVE TOO MUCH STATUTORY POWER? A COMPARISON OF EXPROPRIATION AND EMINENT DOMAIN IN ONTARIO AND MICHIGAN

*Mario Marrelli<sup>†</sup> & Michael Valenti<sup>††</sup>*

ABSTRACT: The authors discuss the comparative law of expropriation, particularly as exercised by school boards in Ontario and Michigan. They suggest that the sweeping authority given to governments in Ontario to expropriate land should be reviewed and subjected to a stricter legal standard, possibly through a constitutionalization of a right to private property in Canada. In the United States, the Fifth Amendment protects an individual's right to private property and as such, the government must meet a much stricter standard before it lawfully takes an individual's land. Individuals in the United States who decide to litigate issues of expropriation when their land is targeted have a far greater chance of success.

## TABLE OF CONTENTS

I. Introduction.....	98
II. Ontario.....	101
A. The Law of Expropriation.....	101
B. Emotional Attachment to the Home.....	102
C. The Importance of Analyzing Expropriation for Educational Purposes .	103
D. The process by which sites for new schools are selected.....	104
E. The process of expropriation for educational purposes.....	106
III. Case Studies I.....	107
A. The Expropriation of Homes for the Expansion of St. Joseph Morrow Park High School.....	107
B. The Legal Implications of the Scott Park Expropriation.....	113
C. The Issue of Lack of Physical Space and Access for French-Speaking Schools in the GTA .....	115
D. Further Expropriation for Educational Purposes May Not be the Best Policy Solution for Ontario's Declining Enrollment nor the Lack of Access to French-speaking Schools.....	116
Iv. Michigan.....	120
A. Operative Law .....	120

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<sup>†</sup> J.D. Candidate, University of Windsor Faculty of Law, University of Detroit Mercy School of Law, Supervising Professor: Dr. Anneke Smit. I dedicate this article to my loving cousin Julia Mercuriano, lost well before her time, and to my loving sister Giuliana Marrelli, who have shown me in different ways that there is good to be found in each and every day.

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B. Public Use .....	121
1. Kelo v. City of New London, Connecticut.....	121
V. School Board Context .....	125
A. Necessity.....	125
1. Livonia Township School District v. Wilson.....	125
2. Board of Education of City of Grand Rapids v. Baczewski.....	126
VI. Case Studies II .....	128
A. Proposed High School Site in Bonita Springs .....	129
B. Proposed High School Site in Beaverton .....	131
C. Expropriation and Eminent Domain Harming the Poor.....	133
D. Scholarly Critique on Eminent Domain.....	134
VII. Will a Constitutionalization of the Right to Private Property Solve the Problem of Excessive Power Given to School Boards to Expropriate Lands? ..	137
VIII. Suggestions for Further Research.....	138
IX. Conclusion .....	140

## I. INTRODUCTION

Expropriation (or eminent domain as it is known by our southern neighbors) can bring very different responses depending on the party in a legal dispute. An arm of the Ontario provincial government is likely to have a jovial predisposition because it can exercise its statutory powers under the *Expropriations Act*.<sup>1</sup> Provided your land is within the province's jurisdiction, it can in effect be lawfully taken under the guise of the greater public good. For landowners, expropriation brings a very different feeling, one that pigeonholes an individual into making one of two decisions. Either retain counsel and attempt to litigate the matter (likely leading to a judgment in favor of the government) or accept fair market value and move; this leads to a series of other issues that will be discussed in the later sections of this article. Normally, if the government serves an individual with a notice to expropriate, the land will likely be taken. In rare circumstances, having political clout increases the chances of preventing expropriation.

The law of expropriation in Ontario and eminent domain in the State of Michigan provide the legal parameters whereby a government can in effect take possession of private property for the benefit of the public. The focus of this article is to analyze the broad statutory power of school boards to expropriate land for educational purposes, which is namely to expand or build new schools. Through an analysis of American jurisprudence and statutory law regarding eminent domain used by American school boards for educational purposes, it will be shown that the time has come for a re-examination of the statutory power that has been bestowed on school boards through expropriation legislation. The constitutional entrenchment of a right to private property under the Constitution

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<sup>1</sup> Expropriations Act, R.S.O. 1990, c E-26 (Can.) [hereinafter Expropriations Act].

of the State of Michigan<sup>2</sup> and the U.S. Constitution<sup>3</sup> protects individuals' right to private property, forcing the government at either the state or local level to meet significantly high legal thresholds to take possession of property under eminent domain. Unfortunately, the citizens of Ontario are afforded no such constitutional protection of their right to private property.

This article will begin with a section explaining the law of expropriation in Canada generally, and some of the landmark decisions that have been issued on the subject. The issue of emotional attachment to the home and how it relates to the issue of educational expropriation regarding school boards will then be discussed. Next, the article will provide an examination as to why a comparison of educational expropriation adds to existing literature on the subject. Following, the article will move into a discussion of the process by which Ontario school boards select sites for expropriation and the statutory provisions that provide the legal justification for the expropriation. The Ontario portion of this article will then present the study of the expropriation currently taking place for the expansion of the St. Joseph Morrow Park Catholic Secondary School in Toronto. This study has been added in order to demonstrate that education boards have too much statutory power with respect to their ability to expropriate. The second study takes the form of a case commentary regarding the Scott Park expropriation in Hamilton, Ontario and is designed to illustrate two points. First, it demonstrates the immense power that statutes confer to school boards in their ability to expropriate. Second, it explains some of the future adverse legal implications that may occur as a result of the excessive expropriating power that education boards have. The Ontario portion of the article will conclude with a discussion of the issue of lack of space for French language schools in Toronto, in addition to a discussion of the adverse policy effects associated with excessive statutory power conferred on school boards to expropriate.

This article seeks to advocate for stronger protection of private property in Ontario, in addition to shedding light on the excessive statutory power that has been given to school boards. As part of this advocacy, relevant comparisons to the system of eminent domain in the United States, and particularly in Michigan, shall be drawn in order to better illustrate how stronger protection of land is carried out in practice. The Michigan portion of this article will begin with a discussion on the operative law of eminent domain in both the State of Michigan and more broadly in the United States as a whole. The Takings Clause of the Fifth Amendment to the U.S. Constitution<sup>4</sup> is the starting point in the understanding of how eminent domain operates in the American context. Specific Michigan statutes and legislation direct the parameters of the eminent domain power at the state level and regulate the procedural aspects pertaining to condemnation proceedings. Government agencies or bodies are required to meet strict public use and necessity requirements in order to succeed in taking private

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<sup>2</sup> MICH. CONST. (1963).

<sup>3</sup> U.S. CONST.

<sup>4</sup> U.S. CONST. amend. V.

property for the public good. These concepts will all be discussed in detail throughout the article.

Moving beyond the operative standard of the relevant constitutional and statutory law, this article will further analyze the development of the common law over time which has shaped the contemporary understanding of eminent domain. The landmark U.S. Supreme Court case *Kelo v. City of New London, Connecticut*<sup>5</sup> will be explored in detail. *Kelo* presents the Court's interpretation of the public use requirement of the Takings Clause of the Fifth Amendment. In addition, the cases of *Livonia Township School District v. Wilson*<sup>6</sup> and *Board of Education of City of Grand Rapids v. Baczewski*<sup>7</sup> will be investigated to shape the understanding of the necessity requirement of eminent domain, and will also provide insight at the local level to determine how school boards function in Michigan and the limitations on their takings powers.

Once the statutory and common law have been explored in depth and the context of eminent domain for the purposes of education has been established, scholarly insight will be considered in order to paint a picture as to how important the home is to the individual in a broad sense. This will help to demonstrate the importance of private property rights and the need for proper limitations on eminent domain and expropriation powers.

Set against the legal backdrop of the importance of private property rights, this article will shift its focus to applying the established principles to relevant case studies. These case studies tell the stories of legal disputes between school boards and private property owners in an attempt to highlight the differences of takings powers in Ontario and Michigan. It becomes clear that as a result of constitutional protection to private property, Michiganders and Americans alike are afforded significantly more protection than Ontarians and Canadians as a whole. This article will allude to these differences with the goal of advocating for a stricter burden to be instituted in the Ontario system of regulation to make it more difficult for government bodies to expropriate private property, particularly in the realm of expropriation for educational purposes. Examples of these cases are provided from communities in Florida and Oregon.

Theories pertaining to the abusive power of eminent domain will be addressed. Established scholarly positions proclaim that instances of eminent domain for the purposes of economic development continue to target and severely impact underrepresented communities such as the poor, racial minorities, and the politically weak. These critiques of eminent domain provide unique insights on the real and potential harm that can stem from the abuse of government taking of real property, furthering the position that limitations on these powers are essential.

This section will conclude with a comparative discussion on the lack of constitutional protection of private property in the Canadian context. Moreover, this article advocates for a legislative discussion regarding a possible heightening

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<sup>5</sup> *Kelo v. City of New London, Conn.*, 545 U.S. 469, 472 (2005).

<sup>6</sup> *Livonia Tp. Sch. Dist. v. Wilson*, 64 N.W.2d 563, 563 (Mich. 1954).

<sup>7</sup> *Grand Rapids Bd. of Ed. v. Baczewski*, 65 N.W.2d 810 (Mich. 1954).

of the threshold standard that must be met before boards of education can expropriate land in Ontario. Finally, the article discusses suggestions for further research, specifically with respect to planning and administration strategies that the Ministry of Education may consider regarding the challenges associated with having four education boards functioning in various municipalities, i.e., a Catholic board, a public board, a French Catholic, and a French public board.

## II. ONTARIO

### A. The Law of Expropriation

Expropriation is “the taking of land without consent of the owner by an expropriating authority in the exercise of its statutory powers.”<sup>8</sup> In other words, expropriation is when the governing authority in effect takes your land (while paying you fair market value) for a public benefit. In Canada, unlike the United States, there is no constitutionally protected right to private property. Practically, this leads to a much lower standard that must be met by the government in order to expropriate. However, there is an English common law principle from *Attorney General v. De Keyser’s Royal Hotel* stating that “unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.”<sup>9</sup> This principle has found grounding in Canadian law.

Specifically, there are two types of expropriation in Canadian law. First is *de facto* expropriation, which is “state regulation of private property that has the effect of eliminating most if not all incidents of private ownership.”<sup>10</sup> The first case dealing with the issue of *de facto* expropriation is *R v. Manitoba Fisheries Ltd.*<sup>11</sup> In 1969 the Federal government passed the *Freshwater Fish Marketing Act*, granting the Freshwater Fish Marketing Corporation, a federal agency, a monopoly on the export of fish from Manitoba as well as other participating provinces.<sup>12</sup> The crown corporation was authorized to issue licenses to private firms, but did not do so in Manitoba. Manitoba Fisheries Ltd. was one of several private commercial distributors that were put out of business by the legislation, and brought an action against the federal government for compensation of their loss of business suffered as a result of the *Expropriations Act*.<sup>13</sup>

The Supreme Court of Canada developed a two-pronged test to determine whether there has been a regulatory taking: first, what the claimant has lost must be “property” in the context of the legislative scheme; second, the property must

<sup>8</sup> Expropriations Act, *supra*, note 1.

<sup>9</sup> *Attorney General v. De Keyser’s Royal Hotel*, [1920] AC 508 (HL) 542 (appeal taken from Eng.).

<sup>10</sup> Anthony Sangiuliano, *Antrim Truck Centre v. Ontario (Transportation) and the Ethos of De Facto Expropriation*, CANLII CONNECTE (Aug. 8, 2015), <http://canliiconnects.org/fr/commentaires/30033>.

<sup>11</sup> *R v. Manitoba Fisheries Ltd.*, [1979] 1 S.C.R. 101 (Can.).

<sup>12</sup> *Id.* at 9.

<sup>13</sup> *Id.* at 6.

have been acquired by the government.<sup>14</sup> The holding was that: “the *Freshwater Fish Marketing Act* and the corporation created thereunder had the effect of depriving the appellant of its goodwill as a going concern and consequently rendering its physical assets virtually useless and that the goodwill so taken away constitutes property of the appellant for the loss of which no compensation whatever has been paid.”<sup>15</sup>

Second is formal expropriation whereby the governing authority pays fair market value for one’s land. This area of expropriation law is the subject of analysis for this article. In Ontario, formal expropriation is governed entirely by statute, i.e., the *Expropriations Act*. With respect to the individual school boards, the *Education Act*<sup>16</sup> works in unison with the *Expropriations Act* to provide the justificatory authority and procedure by which land is expropriated for educational purposes.

### B. Emotional Attachment to the Home

Emotional attachment to the home may not seem relevant to an analysis of school boards’ statutory power to expropriate. However, school boards must be held to a higher standard before they can expropriate land for educational purposes, particularly where the expropriation involves the taking of homes. This article calls attention to the issue of the excessive power given to school boards, and suggests that legislatures must reconsider the statutory power that they have provided to boards through the *Expropriations Act* and the *Education Act*. This is in part because of the adverse effects that the taking of homes can have on affected individuals.

It is relatively easy to treat the concept of government takings of real property as forms of business transactions. At the core of these takings, that is all they are; one party paying another in exchange for land. Some may argue that condemnations are relatively insignificant proceedings, seeing as the landowners are always justly compensated for their properties. It takes a deeper analysis beyond the face of eminent domain to understand the truly harmful consequences that can and do result from systems with too few limitations on the power of takings.

There is something inherently different about replacing houses, cabins, cottages, and parcels of land than say, an award for damages in a breach of contract. Money cannot always compensate for uprooting one’s life to a new location. It is a principle of property law to view one plot of dirt as unique from any other in the world. Each plot of land in the United States is different than even the land that borders it. Expropriation is a distinctive power that enables the State to infringe on the sacredness which is property ownership. In many cases the displacement from one’s home cannot be justly compensated by any sum of money and it is these instances which inspire the authors of this article to

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<sup>14</sup> *Id.* at 17-20.

<sup>15</sup> *Id.* at 36.

<sup>16</sup> Education Act, R.S.O. 1990, c E-2 (Can.).

advocate for stronger protections for property ownership and more stringent limitations on the powers of expropriation and eminent domain.

Janice Newton, a scholar and professor in Australia, has explored this concept of the home in significant detail. The idea of the home provides ontological security and is filled with emotion and attachment.<sup>17</sup> Home emphasizes the centrality of regularity and consistency in behavior.<sup>18</sup> The home implies a familiar sense of safety and spatial relations, one that is irreplaceable by money. Newton turns to the perspectives of David Clapham, who associates the establishment of the home as part of the search for identity:

“The search for a sense of identity through the family (whatever its form) in the setting of the home is increasingly important in a post-modern society in which the place and extent of change have led to increased risk and growing feelings of insecurity and isolation. It follows that the search for identity should be a major focus of the study of housing and be a major goal of housing policy.”<sup>19</sup>

This increasingly emphasizes the importance of providing homeowners in Ontario with greater protection of their private property.

### *C. The Importance of Analyzing Expropriation for Educational Purposes*

Expropriation for educational purposes by individual boards of education has a series of ramifications that do not arise when analyzing expropriation for other public benefits. This difference supports the argument that school boards have too much statutory power, and this power is not justified by the narrow public interest that they service. First, new schools have a very narrow interest, which is to educate. Other public support services such as hospitals and highways serve a broader interest. Hospitals have a variety of purposes beyond serving the physically ill. They service mental health, geriatrics, pediatrics, and provide both inpatient and outpatient programs. Land expropriated for hospitals thus provides broad reaching services for individuals. In other words, the government may argue that a hospital has a broad public use given its ability to service a large proportion of the population.

Similarly, the same broad use threshold applies to expropriation to construct a new highway. First, most people use highways because they are available to anyone with a valid driver’s license. Second, highways provide avenues for the movement of goods throughout the province, so they are critical to a functioning modern economy. Third, potential expropriation for new highways, particularly in the Greater Toronto Area (“GTA”), may alleviate issues regarding congestion, as currently the GTA is relying on roads built in the 1960s and 1970s to service a population that has grown exponentially since those times.

<sup>17</sup> Janice Newton, *Emotional Attachment to Home and Security for Permanent Residents in Caravan Parks in Melbourne*, 44 J. OF SOC. 219, 221 (2008).

<sup>18</sup> *Id.* at 222.

<sup>19</sup> DAVID FREDERICK CLAPHAM, *THE MEANING OF HOUSING: A PATHWAYS APPROACH* 46 (2005).

Schools are much different than both hospitals and highways. The school boards in question serve children aged four to eighteen. This is a relatively small portion of the population, even when early-age child care is also offered. Granted, in the very long term, child education rates are extremely important as they can lead to a more professionalized economy and a series of other benefits. However, in the short term, government taking of this land for such a narrow interest presents a series of problems in a variety of areas including public backlash, unnecessary spending of public funds, and disruption of traffic flows. As discussed above, the position advocated here is that the boards should adopt a more Americanized standard for expropriation. A higher standard is particularly relevant with respect to educational expropriation because of the narrow public interest that schools serve.

*D. The process by which sites for new schools are selected*

With respect to the various educational boards in Ontario, the process by which new schools are selected falls under the category of capital projects. Capital projects include expansion of schools and construction of new schools. The first step by which site selection for schools generally occurs is by answering a series of questions:

- 1) How accessible is the area to students (by public transportation, car, bicycle, school bus, or on foot)?
- 2) Is there a possibility for space sharing through community service partnerships?<sup>20</sup>

Upon analyzing the pros and cons of the preceding questions, boards will then look to a series of factors in order to determine sites for new schools such as location, property size, green space, nearby amenities, vehicular access, walkability, busing, parking, associated construction costs, and environmental considerations.<sup>21</sup> Environmental assessments are conducted to determine whether or not the area is appropriate for school placement.<sup>22</sup> These assessments involve a five-step process to determine feasibility based on environmental considerations under the *Environmental Assessment Act*.<sup>23</sup> Boards will also look to place schools in high density communities.<sup>24</sup> For example, in 2017, construction will begin at Block 31 (20 Brunel Court) in the Railway Lands in Toronto with an estimated

<sup>20</sup> LIMESTONE DISTRICT SCHOOL BOARD, KINGSTON INTERMEDIATE & SECONDARY SCHOOL [http://www.limestone.on.ca/schools/new\\_schools/CKingston%20home%20page](http://www.limestone.on.ca/schools/new_schools/CKingston%20home%20page) (April 21, 2015).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> MINISTRY OF THE ENV'T AND CLIMATE CHANGE: PREPARING ENV'T ASSESSMENTS. (2015).

<sup>24</sup> CITY OF TORONTO, BLOCK 31 IN THE RAILWAY LANDS, <http://www1.toronto.ca/wps/portal/contentonly?vgnextoid=d6097897e2a7b410VgnVCM10000071d60f89RCRD&vgnextchannel=5b1619f8602a0410VgnVCM10000071d60f89RCRD> (June 21, 2015).

completion date of 2019.<sup>25</sup> Block 31 is located south of Front Street between Spadina Avenue and Bathurst Street; the Railway Lands community is home to thousands of Torontonians.<sup>26</sup> The property is owned by the City of Toronto.<sup>27</sup> It will include a community center, child care center, and two elementary schools, one leased by the Toronto District School Board (“TDSB”) and the other leased by the Toronto Catholic District School Board (“TCDSB”).<sup>28</sup> According to the boards, part of the reasoning behind selecting this particular location was that it filled a need in the area for elementary schooling and the fact that the new community located there of approximately twenty thousand people lacks access to local schools.<sup>29</sup>

It is important to note that with respect to selecting new sites for schooling, the process is somewhat different for the TDSB, as “unlike other Ontario school boards, the TDSB is required to address the majority of infrastructure renewal and enrollment growth pressures (including building new schools) from its own sources.”<sup>30</sup> Practically, the TDSB has to generate revenue by either selling or leasing existing property.<sup>31</sup> Typically, if a board is facing growth issues, it will receive financial support from Education Development Charges (“EDCs”) levied on residential and non-residential development. EDCs provide school boards with funds to purchase school sites and cover all related costs regarding site preparation.<sup>32</sup> The TDSB does not receive this type of funding.<sup>33</sup> School boards must meet a series of criteria to receive EDCs, the first being that the school must show the board that the number of students that it needs to accommodate is larger than the space available.<sup>34</sup> The TDSB does not meet this requirement because there is space across the system.<sup>35</sup>

There is no single factor for determining site selection for new schools; rather it is a holistic approach that looks at a multitude of factors in order to decide where new schools will be built. If the site selected will require expropriation of land, then the board must follow the steps outlined in the preceding section. However, as the case study regarding the expansion of St. Joseph Morrow Park in Toronto reveals, the governing authority does not have to meet a high threshold to take individuals’ land.

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<sup>25</sup> *Id.*

<sup>26</sup> CITY OF TORONTO, BLOCK 31 IN THE RAILWAY LANDS: DEVELOPMENT AGREEMENT, UPDATE AND NEXT STEPS, <http://www.toronto.ca/legdocs/mmis/2014/ex/bgrd/backgroundfile-66237.pdf> (January 20, 2014).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> TORONTO DISTRICT SCHOOL BOARD: CAPITAL FACTS, BUILDING STRONG AND VIBRANT SCHOOL COMMUNITIES, <http://www.tdsb.on.ca/Portals/0/AboutUs/Budget/CapitalFacts.pdf> (2014).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

*E. The process of expropriation for educational purposes*

There are a series of procedural parameters that must be met by the various boards of education before they can lawfully expropriate land. The law governing the procedure is entirely statutory and comes from both the *Expropriations Act* and the *Education Act*. The *Education Act* provides that “no site for a new school board shall be acquired by a... separate school without approval of the site by the majority of the supporters of the rural separate school who are present at an annual or special meeting of the board.”<sup>36</sup> Provided this has been established, under s. 195 of the *Education Act*, “every board may select and may acquire, by purchase, lease or otherwise may expropriate, a school site that is within its area of jurisdiction.”<sup>37</sup>

The process of expropriation also requires that “an expropriating authority shall not expropriate land without the approval of the approving authority.”<sup>38</sup> Not surprisingly the approving authority for boards of education are boards of education.<sup>39</sup> After the approval has been applied for, “an expropriating authority shall serve a notice of its application for approval to expropriate upon each registered owner of the lands to be expropriated and shall publish the notice once a week for three consecutive weeks in a newspaper having general circulation in the locality in which the lands are situated.”<sup>40</sup> If the owners of the land that is to be expropriated desire a hearing then:

“[a]ny owner of lands in respect of which notice is given under subsection (1) who desires a hearing shall so notify the approving authority in writing,

(a) in the case of a registered owner, served personally or by registered mail, within thirty days after the registered owner is served with the notice, or, where the registered owner is being served with the notice by publication, within thirty days after the first publication of the notice;

(b) in the case of an owner who is not a registered owner, within thirty days after the first publication of the notice.”<sup>41</sup>

The *Expropriations Act* outlines that should a hearing be required by the homeowners, the inquiry officer (appointed under the *Expropriations Act*) will handle the administrative duties of that hearing.<sup>42</sup> The inquiry officer will determine at the meeting whether “the taking of the lands or any part of the lands of an owner or of more than one owner of the same lands is fair, sound and reasonably necessary in the achievement of the objectives of the expropriating

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<sup>36</sup> Education Act, *supra* note 16, § 90(3).

<sup>37</sup> *Id.* § 195.

<sup>38</sup> Expropriations Act, *supra* note 1, § 4(1).

<sup>39</sup> *Id.* § 5(1)(b).

<sup>40</sup> *Id.* § 6(1).

<sup>41</sup> *Id.* § 6(2).

<sup>42</sup> *Id.*

authority.”<sup>43</sup> Following this the inquiry officer will provide a report to the approving authority that contains (a) a summary of the evidence and arguments advanced by the parties; (b) the inquiry officer’s findings of fact; and (c) the inquiry officer’s opinion on the merits of the application for approval, and the reasons for the opinion.<sup>44</sup>

The *Expropriations Act* then prescribes that “the approving authority shall consider the report of the inquiry officer and shall approve or not approve the proposed expropriation or approve the proposed expropriation with such modifications as the approving authority considers proper, but an approval with modifications shall not affect the lands of a registered owner who is not or has not been made a party to the hearing.”<sup>45</sup> Following this the approval is properly certified. With respect to compensation, “where land is expropriated, the expropriating authority shall pay the owner such compensation as is determined in accordance with this Act.”<sup>46</sup> Moreover the *Expropriations Act* states:

“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 (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.”<sup>47</sup>

### III. CASE STUDIES I

#### A. *The Expropriation of Homes for the Expansion of St. Joseph Morrow Park High School*

A study of the expropriation of homes for the expansion of St. Joseph Morrow Park High School in Toronto will illustrate the various adverse effects that will likely occur when individual homes are expropriated for the building and/or expanding of school buildings for educational purposes. Specifically, this section is designed to demonstrate the overly broad power conferred on school boards in their ability to expropriate land for educational purposes. This section will proceed by first providing background facts on the expropriation, public opinion, and costs. Second, it will discuss the report written by the inquiry officer David R. Vine. Third, it will apply this article’s primary argument to this particular case study and advocate for why the TCDSB decision to expropriate seventeen homes is problematic.

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<sup>43</sup> *Id.*

<sup>44</sup> *Expropriations Act*, *supra* note 1, § 7(6).

<sup>45</sup> *Id.* § 8(1).

<sup>46</sup> *Id.* § 13(1).

<sup>47</sup> *Id.* § 13(2).

Since 1960, the St. Joseph Morrow Park High School has operated on leased lands from The Sisters of St. Joseph, a federated Roman Catholic congregation.<sup>48</sup> However, the property was sold to Tyndale University College and Seminary in 2006; the school continued to operate on short-term leases, but had to find a new location when the lease ended.<sup>49</sup> On August 27th 2015, the TCDSB voted in favor of expropriating seventeen homes in North York to expand St. Joseph.<sup>50</sup> The board explained that the entire process for selecting this site took eight years.<sup>51</sup> Nineteen sites were examined before this number was eventually narrowed down to three.<sup>52</sup> The board also considered consolidating Blessed Trinity Elementary School to make it a junior kindergarten to grade twelve school.<sup>53</sup> This route would have avoided much of the fiscal problems and public backlash that the TCDSB is now handling. It also received community support.<sup>54</sup> However, the Ministry of Education decided not to support or fund that plan.<sup>55</sup> In a puzzling decision, the Ministry decided to approve the purchase of land located on 500 Cummer Avenue in Toronto from the public-school board, totaling five acres.<sup>56</sup>

At a community meeting, residents of the area were presented with two options. The first was to build a three-story building on the five-acre lot, with the building placed behind but almost directly against the neighboring houses.<sup>57</sup> The second was to expropriate thirty homes to construct a wider two-story building.<sup>58</sup> Ultimately, the TCDSB settled on what it determined to be a middle-ground approach by expropriating seventeen homes.<sup>59</sup> The TCDSB argued that “the taking of land is necessary to provide two means of access and egress, a lower structure with room for expansion, a larger playing field, green space, and also to allow for more visibility with frontage on two main arterial roads. It also allows

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<sup>48</sup> Dominik Kurek, *North York Residents upset by Toronto District Catholic School Board Plan to Expropriate Homes*, INSIDE TORONTO (September 2, 2015), <http://www.insidetoronto.com/news-story/5824713-north-york-residents-upset-by-toronto-district-catholic-school-board-plan-to-expropriate-homes/> [hereinafter *Inside Toronto*].

<sup>49</sup> *Id.*

<sup>50</sup> *Catholic school Board Votes to Expropriate 17 Townhouses in North York*, CBC NEWS TORONTO (August 28, 2015), <http://www.cbc.ca/news/canada/toronto/toronto-catholic-school-board-votes-to-expropriate-17-townhouses-in-north-york-1.3206838>.

<sup>51</sup> David R. Vine, *Inquiry Hearing: In the matter of an application by Toronto Catholic District School Board for approval to expropriate lands for the purpose of acquiring in the jurisdiction a school site in the City of Toronto ancillary and necessary to the expansion of St. Joseph's Morrow Park Catholic Secondary School Site and works ancillary thereto* (2015), <https://www.thomsonrogers.com/wp-content/uploads/2015/03/Hearing-of-Necessity-Decision.pdf>. [hereinafter *Inquiry Report*].

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Inquiry Report*, *supra* note 51.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

the building to become a focal point for the community.”<sup>60</sup> The TCDSB concluded that it would have to pay between \$800 thousand and \$1 million per home in this instance.<sup>61</sup>

Total estimates for the entire project are for roughly \$30 million dollars; these costs are being incurred by a board that is currently in a deficit.<sup>62</sup> The expropriation will allow for the construction of a new 800-student all-girls high school at 500 Cummer Avenue. Interestingly, in a communication from the TCDSB, dated October 2013, the expropriation was not referred to as such: “The TCDSB is not expropriating, this is a voluntary sales and acquisition process.”<sup>63</sup> It was also claimed that “the TCDSB rarely, if ever exercises its power to expropriate land to build new schools and facilities.”<sup>64</sup> The homeowners, despite being fairly compensated for their homes, have expressed heartfelt disapproval regarding the taking of their land and the building of the school generally. Fiona Fu, a resident of the area for the last seventeen years, said she “[felt] like someone just snatched [her] house away. None of us want to be kicked out of our houses.”<sup>65</sup> She agreed that residents in all of the homes that are to be expropriated and residents who are unaffected are united in their opposition to the TCDSB’s plans.<sup>66</sup>

Repeated pleas to the TCDSB, the local Member of the Provincial Parliament, and the Ministry of Education have not resulted in any solutions to prevent the expropriation.<sup>67</sup> One of the biggest concerns that is raised by expropriation is the idea of displacement and the negative psychological impacts this can have on home residents.<sup>68</sup> A home is more than the physical space that provides shelter, but also provides emotional attachments that become part of our psychological makeup. Some may argue that the idea of displacement is not really a developed country’s problem; rather this is an issue that only applies to individuals who are displaced as a result of war. This is not necessarily true.

Human beings crave shelter and this is a primary condition of our ability to function as humans. Expropriation, particularly in these circumstances where the benefit that is being provided is so narrow, leads to many unfortunate and unnecessary problems. These are issues that are not resolvable through compensation. For example, the chair of the TCDSB, Michael Del Grande,

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<sup>60</sup> *Id.*

<sup>61</sup> *Toronto Catholic School Board’s decision to Expropriate Homes Unprecedented*, TORONTO METRO (August 29, 2015), <http://www.metronews.ca/news/toronto/2015/08/29/politicians-pan-catholic-school-board-s-decision-to-expropriate-.html> [hereinafter *Toronto Metro*].

<sup>62</sup> *Id.*

<sup>63</sup> John Del Grande, *Trustee of the Toronto Catholic District School Board, St. Joseph’s Morrow Park: In the Heart of Your Community* (October 2013), <https://www.tcdsb.org/Board/TrusteesoftheBoard/TrusteesArchives/Ward7Trustee/Communications/SJMPprint.pdf>.

<sup>64</sup> *Id.*

<sup>65</sup> *Inside Toronto*, *supra* note 48.

<sup>66</sup> *Id.*

<sup>67</sup> *Toronto Metro*, *supra* note 61.

<sup>68</sup> Newton, *supra* note 17, at 221.

claims that “we are paying top dollar for these homes, the legal fees are covered and the moving fees are covered.”<sup>69</sup> This does not solve problems such as those experienced by Fiona Fu and her mother, who is terminally ill and receives at-home care.<sup>70</sup> Fu is worried about her mother’s health, and about maintaining the same level of home care once she and her family are forced to move; she believes it is unlikely they will be able to stay in the neighborhood as most homes in the area cost more than their townhouse.<sup>71</sup>

Other residents have expressed similar problems that are not resolvable by compensation. Mahtab Mirmoez is worried she will be forced to move during the winter, when there are fewer homes on the market, making it harder to find a new home, and that the move will disrupt her son, whom she hopes will be able to stay in the same school.<sup>72</sup> She stated: “you cannot imagine how I feel right now. [I am] very nervous at this point. This is my first house in Canada so I really love it. [I am] going to miss it. I [cannot] believe it... I [do not] know if I can find the same features that I have in my house. This is a nice area. I love my neighborhood.”<sup>73</sup> The attachment that individuals form to their home almost rises to the level of dependency and when homes are unnecessarily expropriated these issues become pronounced.

A second issue with the TCDSB expropriation is that it serves a very narrow interest, i.e., an all-girls Catholic school. According to Del Grande:

“It was a very difficult situation. Prior to the vote, we had to take into consideration the adjudicator’s report into account, the timeline issues that were raised. At the end of the day, nobody likes to lose their home, but [it is] no different than when [you are] making a very difficult decision when [you are] putting in a subway or building an airport... For the greater public good, you sometimes have to expropriate.”<sup>74</sup>

The Supreme Court of Canada seems to find that the greater public good and/or public use in regards to expropriation is synonymous with public utility.<sup>75</sup> In other words, when a governing authority is exercising their authority as per the *Expropriations Act*, the public benefit must provide public utility or usability.<sup>76</sup> Respectfully, Del Grande’s comments comparing the St. Joseph Morrow Park expropriation as being no different from a subway or a highway are unfounded, since the expropriation at issue has a much narrower use. It is the position of the authors that perhaps the most logical way to understand public utility is on a scale. The greater the total number of individuals who can benefit,

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<sup>69</sup> *Inside Toronto*, *supra* note 48.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 S.C.R. 13, 38 (Can.).

<sup>76</sup> *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349 (Can.).

the higher the public utility. Whereas, the more restricted the population use, the lower the utility.

Different facilities constructed by the government will have varying levels of use. The *Expropriations Act*, in conjunction with the *Education Act*, gives the TCDSB the statutory power to expropriate lands for the benefit of educational purposes, which is a public use (albeit a relatively narrow one).<sup>77</sup> In comparison, a highway has a much broader public use. All individuals who have a valid driver's license can use it; it promotes inter-provincial trade and the movement of goods which are in the public interest as they are necessary to a functioning modern economy. In other words, it has a very high public utility. Similarly, a subway is open to all individuals and would place high on the scale of public utility. Particularly in Toronto, the subway is one of the fundamental methods of transportation carrying people from all over the GTA (i.e. from Finch or Downsview Station) into the downtown core for employment, schooling, etc.

Taking the public utility scale framework and applying it to the TCDSB's expropriation, it seems that the public utility is relatively low, at least in comparison with a highway or a subway. From a general view, the school is an educational institution and obviously provides utility. However, that utility is still narrow. St. Joseph's is a single-gender Catholic high school; only female individuals aged fourteen to eighteen make use of it. The TCDSB has claimed that demographics projections would support an 800-student enrollment for the new school. However, the inquiry report has drawn very different conclusions:

"I also do not find the demographic predictions of this neighborhood very convincing... there is no way of knowing how many of the families moving into the area will be Catholic School supporters, how many will have secondary school aged daughters and how many of those will wish to attend a single-gender school. Also, the current enrollment at St. Joseph's Morrow Park is 500+. The new school is using 800 pupil places as the replacement number. In fact, the school has to rebuild its enrolment to reach that number."<sup>78</sup>

This article is not arguing that the new school does not provide a public use; only that given the narrowness of the population being catered to, its level of utility is relatively low. The Supreme Court, in the two cases discussed, views usability (i.e., utility) as a critical aspect needed to justify expropriation in the public use. The justification by the TCDSB to expand St. Joseph does not seem to meet the standard of utility discussed by the Supreme Court, or in the alternative, does not provide broad enough usability for the public good to justify the disadvantages being experienced by the individuals who are being removed from their homes.

The test by which the inquiry officer makes his assessment of the expropriation is whether the "taking of the land herein is not fair, sound and

<sup>77</sup> Education Act, *supra* note 16; see also, Expropriations Act, *supra* note 1.

<sup>78</sup> *Inquiry Report*, *supra* note 51.

reasonably necessary, in the achievement of the objectives of the expropriating authority.”<sup>79</sup> In this case, it was found that the expropriation by the TCDSB did not meet the parameters of this test.<sup>80</sup> The TCDSB is not bound by this report and as such it is not prevented from continuing the expropriation. The logic behind the inquiry hearing is to provide a legal opinion regarding whether the expropriating authority should proceed with the expropriation. In this case, clearly the answer is no. The TCDSB is well within its legal rights to ignore the recommendations by the inquiry officer, but should it have? Given what has transpired between the petitions, the hefty \$30 million cost borne by taxpayers, and the immense public backlash, it seems that the TCDSB would have been well advised to research other potential avenues rather than pursuing the current expropriation plan.

Although not an incidence of expropriation by a school board, the expropriation of Frank Meyers’s farmland in Quinte West, Ontario, by the federal government shows the significant statutory power bestowed on various levels of government in the realm of expropriation.<sup>81</sup> The land was considered a piece of Ontario history, as Meyers is the direct descendent of Captain John Walden Meyers (a loyalist war hero), who was assigned the land by a Crown land patent in 1798.<sup>82</sup> Sadly, despite considerable anti-expropriation pressure on social media (including 57,000 followers on Facebook) and eight years of unsuccessful litigation, on May 28th, 2014, the demolition of the farm land began in the name of military purposes.<sup>83</sup> An analysis of the public uses regarding expropriation for military purposes is beyond the scope of this article, as the focus here is on expropriation involving Ontario school boards. However, the relevance of this example lies in demonstrating the immense power of governing authorities in their ability to expropriate, even if it means stripping away pieces of Canadian heritage, as it did in this case.

Returning to the study of the expansion of St. Joseph Morrow Park, the next question is why expropriation is even necessary in such a case? Ontario has experienced declining enrollment in schools over the last several years; can the taking of more land for schools be a solution to a lack of enrollment? An exhaustive analysis of school board public administration is not possible here. The approval of the TCDSB’s expropriation for St. Joseph Morrow Park is puzzling from both a legal and public relations perspective. Regardless, the TCDSB will have to cross its bureaucratic fingers and hope that its demographic projections hold. If not, there will be even more empty spaces on land that was taken on potentially unjust bases.

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Michael Friscolanti, *Demolition Has Started on Frank Meyer’s Historic Farm*, MACLEANS (May 28, 2014), <http://www.macleans.ca/news/canada/demolition-has-started-on-frank-meyerss-historic-farm>.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

*B. The Legal Implications of the Scott Park Expropriation*

The study of the expropriation of homes to expand St. Joseph Morrow Park was designed to illustrate the various problems associated with unnecessary expropriation as well as general problems that are inherent in expropriation in Ontario. This next case study is similar as it is meant to illustrate the claim that school boards have too much statutory power in their ability to expropriate land for educational purposes in the province. In addition, this study sheds light on some of the potential adverse legal implications that may occur as a result of the excessive expropriating power that boards of education have. The Scott Park expropriation by the Hamilton-Wentworth District School Board (“HWDSB”) reveals that current statutory regimes give too much power to the boards in their ability to expropriate. In 2013, the HWDSB expropriated land in order to build a new school and related amenities.<sup>84</sup>

From 1968 to 2001, the HWDSB used the Scott Park property as a secondary school.<sup>85</sup> In December 2011, Jamil Kara purchased the property from the HWDSB in order to build a seniors’ center.<sup>86</sup> In spring 2013, Kara was advised that the HWDSB would be expropriating the land for the purposes of building a new school and moving to convey all lands to the City of Hamilton “for purposes of the City operating a seniors’ center similar to the one that was going to be built by Kara.”<sup>87</sup> Moreover, the property would be conveyed to the City without providing Kara the right of first refusal.

The primary issue in the case became whether the HWDSB could lawfully convey the property to the City after having expropriated the land. The HWDSB argued that it had not found the expropriated lands to be unnecessary, as its intention was still to construct a new school on at least part of the land and the City intended to build a recreation center facility on the south part of the property. HWDSB also contended that the original Notice of Expropriation served to Kara indicated that “the purpose of the construction was the operation of a new school and related amenities.”<sup>88</sup> The HWDSB further argued that the facilities to be built by the City fall into the related amenities prescription in the Notice of Expropriation and thus are lawful, even though they will be owned and constructed by the City.<sup>89</sup> Related amenities include the recreational facilities and the pool and as such are lawful because they are necessary to the construction of the school.<sup>90</sup>

The Court found that Kara was unable to demonstrate that “[he] will suffer irreparable harm that will not be compensated by damages.”<sup>91</sup> With respect to the term related amenities, “courts should be reluctant to interfere with school board

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<sup>84</sup> Ontario Inc. v. Hamilton-Wentworth Dist. Sch. Bd., 2015 ONSC 1442, ¶ 3 (Can.).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* ¶ 10.

<sup>89</sup> Ontario Inc. v. Hamilton-Wentworth Dist. Sch. Bd., 2015 ONSC 1442 (Can.).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* ¶ 11.

policy choices regarding whether or not facilities such as parking lots, pools, and recreation centers are preferable to the term ‘related amenities’ as that was used in the Notice of Expropriation.<sup>92</sup> Further, s. 42 of the *Expropriations Act*<sup>93</sup> did not apply to this case because the expropriated lands were still required for their original purposes, as a result of which there was no requirement on the part of the HWDSB to provide Kara with the right of first refusal.<sup>94</sup> The Court held for the HWDSB.<sup>95</sup>

This case seems to affirm the assertion that Ontario school boards have too much statutory power with respect to their ability to expropriate land. First, the Court interpreted the term “related amenities” too broadly. In practice, the term can be interpreted by the school board to mean a variety of pieces of educational infrastructure and may provide them with the ability to take more land than is reasonably necessary during expropriation projects. For example, if a school board intended to expropriate land and claimed in its original Notice of Expropriation that the project would include related amenities, conceivably it could increase the amount of land expropriated. Perhaps the school wants a regulation-sized soccer field, a pool, or a parking lot that has larger accommodations capabilities. These additions technically could fall under the definition of related amenities and may lead to the risk of unnecessary expropriation.

Second, the decision now seems to allow various school boards to expropriate lands and then convey them to other arms of government for other purposes, so long as these purposes are reasonably concurrent with the purposes of the board. The Court’s holding here is short-sighted as it fails to consider the fact that this outcome can lead to mistrust of government on the part of the general public. In this case, an individual purchased land from the board, had the land expropriated from him for a school, and then the land was transferred to a third party to build the very same type of facility (in addition to other facilities) that the original owner intended to construct. The holding here basically allows for the collusion of governing authorities with respect to the government taking of land, which in the long term does not support good community relations.

Third, this ruling muddles the meaning of s. 42 of the *Expropriations Act* in that it may allow for expropriating authorities, particularly school boards, to shift their purposes from those prescribed in the original Notice of Expropriation. In this case, clearly the original purpose was the building of a school but through the use of the term related amenities, s. 42 was interpreted not to apply. Section 42 is clear that if the purpose shifts, the owner must be given the right of first

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<sup>92</sup> *Id.* ¶ 12.

<sup>93</sup> Section 42 of the *Expropriations Act* provides that if expropriated lands are found to no longer be required for the expropriating authority purposes under the Notice of Expropriation before the lands are dispensed, the owner from whom the land was expropriated must have the first chance to repurchase the lands. In other words, the prior owner of the land has the right of first refusal if the land is no longer needed for the purposes prescribed by the expropriating authority; see *Expropriations Act*, *supra* note 1, § 42.

<sup>94</sup> *Ontario Inc. v. Hamilton-Wentworth Dist. Sch. Bd.*, 2015 ONSC 1442, ¶ 14 (Can.).

<sup>95</sup> *Id.* ¶ 15.

refusal. The risk now exists for school boards to shift their purposes during expropriation which may lead to unnecessary taking and unjust results for original owners who are not provided with their statutory right of first refusal. Between the *Education Act* and the *Expropriations Act*, school boards already have significant power with respect to expropriation; the ruling in this case extends their legal authority even further.

*C. The Issue of Lack of Physical Space and Access for French-Speaking Schools in the GTA*

In Ontario, another issue related to the excessive statutory power provided to school boards is the lack of French-language schools in the GTA and the lack of property that is available for these schools. School boards seem to want to fix this problem by exercising their power to expropriate lands, which may not be the best policy solution to solve this problem (this argument will be discussed in the following section). However, current behaviour does not imply that the issue of lack of space should be ignored. These shortages have created serious on-the-ground problems for Francophone parents, or parents generally, who want to enroll their children in French-language schooling.<sup>96</sup>

In November 2010, a Francophone parent living in Toronto filed a complaint with the Office of the French Language Services Commissioner (“OFSC”).<sup>97</sup> Her complaint alleged that there was a shortage of French-language schools in Toronto.<sup>98</sup> Unfortunately, in order for this parent’s children to continue their education in French, the travel time would be over two hours to the next closest French-language school.<sup>99</sup> This state of affairs meant that her only choice was to enroll her children in an easily accessible English secondary school, leading to inequitable access to French education.<sup>100</sup> This parent, along with many others, filed complaints with the OFSC that alleged a serious obstruction on their children’s right to French-language education.<sup>101</sup>

One such complaint stated:

“The elementary school (Pierre-Elliott-Trudeau) my children currently attend is too small. Despite adding two portables, we continue to lack space. The gym is too small. There is no space for extracurricular activities. The Grade 5 and 6 students are forced to eat in the younger students’ classrooms. It is ridiculous! The secondary school (Collège français) that my son will attend next year is in temporary accommodations for Grades 7 and 8, and the accommodations for the other grades are much too small and just inadequate. We are lucky to have access to French-

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<sup>96</sup> OFFICE OF THE FRENCH LANGUAGE SERVICES COMMISSIONER, INVESTIGATION REPORT: FRENCH-LANGUAGE SCHOOLS IN THE GREATER TORONTO AREA – WHEN THE MOST ELEMENTARY BECOMES SECONDARY (2011).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

language instruction, but it is far from being in the same league as what is available for English-language instruction. English-language students have access to far greater course selection, sports fields, and large enough premises to meet their needs, rather than having to squeeze in together. Come down to visit the Collège on Carlton St., then compare with an English secondary school. The difference is clear as day. The TDSB should let the public French-language school board acquire some of its premises that are either empty or aren't being used as schools, and the Ministry should finance these acquisitions. In passing, it is just absurd for a school board to sell for millions of dollars a school that it purchased with public funds to another school board, which must then repurchase it using public funds. Why do tax payers need to pay for the same premises twice?"<sup>102</sup>

Statistics show that there is a shortage of ten French-language schools in Toronto.<sup>103</sup> There are certain English-speaking schools which are under-enrolled, leading to a possibility for future consolidation. The recommendations of the report are that the Ministry of Education:

- a) build or provide new facilities in under-served areas of the GTA in order to close the gap in the number of schools versus the number of French-language students;
- b) direct all French-language boards in the GTA to work cooperatively in order to close that gap; and
- c) use, from now on, the Inclusive Definition of Francophone ("IDF") to identify French-language education needs.<sup>104</sup>

*D. Further Expropriation for Educational Purposes May Not be the Best Policy Solution for Ontario's Declining Enrollment nor the Lack of Access to French-speaking Schools*

Following the publication of the investigation report, the provincial government announced plans to build nine additional French-language schools in the GTA.<sup>105</sup> However, this example of lack of space for educational purposes represents an inherent problem in the approach taken by other boards of education (that will be discussed in a later section of the article), namely that the board is trying to solve one problem by creating another.

From a public benefit perspective, expropriating land to enlarge a school seems problematic where most, if not all, reports have indicated that it is a) unnecessary, b) impractical, and c) displaces people. In other words, there is a clearly underserved educational population in the GTA, so why devote resources

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Gyula Kovacs, *Commissioner Boileau applauds government action to address lack of French-language Schools in Greater Toronto Area*, OFFICE OF THE FRENCH LANGUAGE SERVICES COMMISSIONER (March 20, 2012), <http://csfontario.ca/en/articles/3936>.

to an unnecessary expropriation rather than directing those funds into school conflation? “The sad reality is in Ontario, the population of school-age children has been declining for more than a decade.”<sup>106</sup> The average school size has dropped from 879 students in 2001 to 775 as of 2012.<sup>107</sup> In elementary school, the average school size in 1998 was 365 students and as of 2012 it was 329.<sup>108</sup> Smaller school population sizes can produce a series of problems including:

- a) Two-thirds of provincial funding is based on numbers of students, which makes it harder to staff smaller schools, resulting in fewer course choices and less access to specialists.
- b) There are limited economies of scale in smaller schools.
- c) Funding for special education declines, for the most part, as student numbers decline. However, the number of students with special needs is not shrinking at the same rate as the overall student population.<sup>109</sup>

Herein lies the primary issue with any further expropriation for schools by boards. If statistics show that the student enrollment population for publicly funded schools is declining, it seems problematic that the next possible solution is to expropriate more land to either a) build more schools, or b) increase the enrollment capacity (by increasing the physical size) of existing schools. If you do not have enough water to fill a cooler, the solution is not to buy (or in this case take) more coolers, but rather to figure out alternative means to fill the existing cooler. In other words, it is not in the interest of public policy to expropriate more land for schools and take on the additional issues that usually accompany acts of expropriation, but rather to look for alternative solutions to fill existing schools.

One possible solution is to research the possibility of increased school conflation. Look to merge schools that are relatively close geographically and serve similar populations. From the boards’ perspective, the advantages include a) not having to undertake the onerous process arising from expropriation (including additional cost, poor public relations, etc.), and b) perhaps somewhat mitigating the issue of lack of access to French-speaking schools. The empty buildings from conflated schools can be easily transitioned into French-speaking schools without taking additional land.

Another interesting yet novel approach lies in alternative forms of educational delivery. Given today’s ever-evolving telecommunications and information technology environment, perhaps there may not be as much of a pressing need for physical space that would take the form of a school. One of the

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<sup>106</sup> Annual Report on Ontario’s Publicly Funded Schools, *Mind the Gap: Inequality in Ontario’s Schools*, PEOPLE FOR EDUCATION (2013), <http://www.peopleforeducation.ca/wp-content/uploads/2013/05/annual-report-2013-WEB.pdf>.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

recommendations made in a report presented to the Ministry of Education called for an increase in “e-learning and alternative program delivery.”<sup>110</sup> The report acknowledged some potential in educational delivery through information technology. “These approaches can form an important part of program delivery for all boards, but particularly those experiencing declining enrollment.”<sup>111</sup>

The boards should attempt to take advantage of the use of technology as it can increase access to education without any additional need for land for school purposes. However, this approach is not free from limitations. Particularly in instances of alternative access to education, this approach would require significant funding and a revamping of existing forms of education delivery. This does not imply that the solution is without merit, only that it will require strong, collaborative working relationships between teachers and the boards. In order to achieve the best prospects of success, e-learning will require strong public-private partnerships between the boards and tech-companies that can provide the necessary telecommunications groundwork to apply e-learning.

The Cisco Systems Connected North Program is one such example of a public-private partnership that uses collaboration technology to connect people in the North to essential educational programs.<sup>112</sup> The program officially launched on April 2nd, 2014. The program works through high-definition video via telepresence over satellite.<sup>113</sup> “It allows for the ability to provide face-to-face access to experts in education.”<sup>114</sup> Training programs prepare teachers to facilitate science lessons with remote experts and nurses to support providers at a distance.<sup>115</sup> “Students also connect with peers of the same age throughout Canada as part of the program’s ‘Classroom Connect’ component, to share rich educational and cultural experiences.”<sup>116</sup> Teachers are also able to make use of the technology for professional development workshops and mentoring opportunities.<sup>117</sup>

In a study conducted by York University on the impact of the program, preliminary research results showed that both teachers and students view the program positively.<sup>118</sup> A majority (eighty-nine percent) of students reported that

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<sup>110</sup> Report, *Planning and Possibilities*, DECLINING ENROLLMENT WORKING GROUP, 32 (March 2009), <http://www.edu.gov.on.ca/eng/policyfunding/DEWG.pdf>.

<sup>111</sup> *Id.*

<sup>112</sup> *CSR Program: Connected North* (2015), CISCO SYSTEMS, <http://csr.cisco.com/casestudy/connected-north> [hereinafter Cisco Systems]

<sup>113</sup> Cisco’s Telepresence is a range of products developed by Cisco Systems designed to link to physically separated rooms so they resemble single conference room regardless of location, see Tim Szigeti et al., *Cisco Telepresence Fundamentals* (2009), CISCO SYSTEMS [http://ptgmedia.pearsoncmg.com/images/9781587055935/samplepages/1587055937\\_Sample.pdf](http://ptgmedia.pearsoncmg.com/images/9781587055935/samplepages/1587055937_Sample.pdf).

<sup>114</sup> Cisco Systems, *supra* note 112.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Report, *CSR Program: Connected North – Using Technology to Strengthen and Support Healthcare and Education Resources in Northern Canadian Communities* (2014), CISCO SYSTEMS, <http://www.cisco.com/web/CA/events/connectednorth/index.html#~education>.

<sup>118</sup> *Id.*

“the remote learning experience made science more enjoyable” and eighty-one percent said “they felt they learned more in the virtual sessions than they did through traditional classroom learning.”<sup>119</sup> This article’s focus is not public-private partnerships, nor how to bring education to under-serviced populations in Northern Canada. Rather, the relevance of this example lies in an examination of physical space. Ontario’s education system is presented with a complicated problem. On the one hand, there is a declining student population; on the other hand, French-language schools have had issues in the past with lack of convenient space. The idea of e-learning and alternative means of educational delivery may help manage these issues, while at the same time avoiding expropriation that can lead to a series of problems, as discussed in the example of St. Joseph Morrow Park. While Connected North was applied to service populations who have limited access to education in Canada’s North, perhaps a similar model of connecting French students with one another across the GTA may work as well.

Practically speaking, such modifications are a way around expropriation and limits the needed amount of physical space. If anything, these changes may offer a more beneficial approach as they can connect most, if not all, French-speaking students across the GTA. One of the primary complaints amongst French-speaking families was the issue of long commutes for schooling; in theory, e-learning and other alternatives would mitigate this problem. With respect to the declining student population, a two-pronged approach to e-learning may be required. First, boards could merge schools that have low enrolment levels. Second, board-owned schools that need to be closed could be transformed into e-learning hubs that could facilitate e-learning programs across the city. The advantage to this approach is that it requires no additional space.

An in-depth discussion of alternative modes of educational distribution is not possible here. Significantly more research will be required to determine if approaches grounded in e-learning would even be possible given current funding regimes in Ontario and the allocation of resources among the boards. Expending resources on exploring these opportunities would be a worthwhile investment on the part of the provincial Ministry of Education. At the very least, technology gives us the ability to export services (for example, education) to many people without having to occupy or take additional physical space. The key here is educating many more students without having to operate more schools. “Ontario’s elementary and secondary schools have significant energy costs – nearly half a billion dollars each year.”<sup>120</sup> A focus on e-learning may lead to a cost-saving and more energy-efficient education system in Ontario.

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<sup>119</sup> *Id.*

<sup>120</sup> *Report, Capital Investments – Improving Ontario’s Schools* (2 November 2015), ONTARIO MINISTRY OF EDUCATION, <http://www.edu.gov.on.ca/eng/parents/capital.html>.

## IV. MICHIGAN

## A. Operative Law

This article seeks to advocate for stronger protection of private property in Ontario, in addition to highlighting the fact that school boards have excessive statutory power in their ability to expropriate land for educational purposes. As part of this advocacy, relevant comparisons to the system of eminent domain in the United States, and particularly in Michigan, shall be drawn in order to better illustrate how stronger protection of land is carried out in practice. American law may provide some analytical insight into the fact that Ontario school boards do have too much statutory power. The State of Michigan possesses the power to take private property for a public purpose so long as the government pays just compensation to the owner of the seized property. This power is known as eminent domain and is directly comparable to the power of expropriation in Canada.<sup>121</sup> The State Constitution of Michigan provides that all private property, real and personal, and any interest therein, is held subject to the power of eminent domain which is typically exercised through proceedings referred to as condemnation actions.<sup>122</sup> Eminent domain and condemnation of private property are part of an understandably controversial area of law in Michigan, as is also the case in Ontario. In essence, this power permits the state to force families and individuals out of their homes in absence of mutual consent.

The Fifth Amendment to the U.S. Constitution provides that no person shall be deprived of life, liberty, or property without due process of law.<sup>123</sup> This is an important provision because it provides a constitutional guarantee to the right of private property ownership. This distinction will become important as this article progresses into the comparison of condemnation laws in Canada, and specifically in Ontario. The Fifth Amendment also provides the power for the federal and state governments to exercise eminent domain: "... nor shall private property be taken for public use, without just compensation."<sup>124</sup> This framework limits the power of eminent domain by ensuring that the government cannot condemn private property without first providing just compensation to the owner of the property being acquired. This provision of the Constitution is known as the Takings Clause, and operates in a similar fashion to the State Constitution of Michigan.

The U.S. Constitution enumerates and provides the general framework for the exercising of eminent domain, but the State of Michigan has enacted its own rules and regulations pertaining to the matter. The starting point for the understanding of eminent domain in the Michigan context is §213.23 of the *Michigan Compiled Laws*.<sup>125</sup> This portion of the legislation sets forth the power

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<sup>121</sup> JACK K. LEVIN, *Special Types of Actions and Proceedings: Eminent Domain* §72.64, in MICHIGAN PLEADING AND PRACTICE (2015).

<sup>122</sup> *Id.*

<sup>123</sup> U.S. CONST. amend. V.

<sup>124</sup> *Id.*

<sup>125</sup> 149 MICH. COMP. LAWS. §213.23 (1911).

of acquisition of property by state agencies and public corporations.<sup>126</sup> “Any public corporation or state agency is authorized to take private property necessary for a public improvement or for the purposes of its incorporation or for public use and to institute and prosecute proceedings for that purpose.”<sup>127</sup> For the purposes of this article, it must be determined if the public corporation or state agency definition extends to school boards in municipalities across Michigan. *The Revised School Code* §380.11a sets forth and establishes the general power of school districts.<sup>128</sup> The Code further establishes that school districts maintain the right of “[a]cquiring, constructing, maintaining, repairing, renovating, disposing of, or conveying school property, facilities, equipment, technology, or furnishings.”<sup>129</sup> Therefore, the Code provides that a school district expressly maintains the right to exercise the power of eminent domain in accordance with the Fifth Amendment of the U.S. Constitution and §213.23 of the *Michigan Compiled Laws*.

### B. Public Use

Similar to the context in Ontario, government bodies in Michigan seeking to use the power of eminent domain must meet required elements in order to succeed in their takings. The public use requirement and necessity requirement will be defined and explained through relevant case law in this portion of the article with an insistence on comparing the level of protection of private property afforded to Michiganders versus that of Ontarians. The right of eminent domain held by the Government is one of broad and sweeping power. It expressly gives the State the right to displace individuals and families from their homes without mutual consent. It is the position of the authors that this is a power that should be used as infrequently as possible by the state, and all measures should be in place to ensure that eminent domain does not get abused. Part of this process of limiting an abuse of power rests in the public use portion of the eminent domain power. The governing Michigan legislation, in addition to the Fifth Amendment, explicitly states that in order for the State to condemn private property it must be doing so with the direct objective of making a public improvement or incorporating public use into that land.<sup>130</sup> The Courts have struggled to agree on the definition and application of what constitutes public use or public improvement.

#### 1. *Kelo v. City of New London, Connecticut*

The requirement of proving a public use in an eminent domain proceeding differs slightly from proving a public use through expropriation in Ontario. Though the concepts of public use essentially remain the same on both sides of the border, the constitutional entrenchment of private property rights in the

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> The Revised School Code Act, 451 § 380.11a (1976).

<sup>129</sup> *Id.*

<sup>130</sup> MICH. COMP. LAWS. §213.23, *supra* note 125.

United States leads to a stricter requirement of proving both public use and necessity. The Supreme Court's decision in *Kelo*<sup>131</sup> will be the starting point for this analysis on what constitutes a public use. In 2000, the City of New London approved an economic development plan that was projected to create hundreds of jobs, increase tax and other local revenues, and revitalize an economically distressed city, including its waterfront and downtown areas.<sup>132</sup> In its attempt to assemble the required land to exercise the plan, the City purchased property from willing sellers and proposed to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation.<sup>133</sup> The inherent issue in this highly contested case was whether the City's proposed plan of taking the property from unwilling sellers qualified as a public use within the scope of the Takings Clause of the Fifth Amendment.<sup>134</sup>

Poor economic and living conditions prompted state and local officials to target New London for a revitalization project.<sup>135</sup> There were several parcels of land that were intended for the new project. Within these parcels the development team planned to erect an array of facilities to cater to the public with the objective of bringing in new jobs, tourism, and recreational opportunities to the residents of New London. Susette Kelo was the named petitioner in the case and was joined by eight other petitioners who collectively owned fifteen properties in the planned development area; four properties rested in parcel 3 of the development plan and eleven rested in parcel 4.<sup>136</sup> Ten of the properties owned by the petitioners were occupied by the owner or a family member, while the other five were held as investment properties.<sup>137</sup> There were no allegations or evidence that any of the properties were in poor condition; rather, they were condemned solely because they were located in the development area.<sup>138</sup> The petitioners challenged the City on the grounds that the taking of their properties would violate the public use restriction in the Takings Clause.<sup>139</sup> Ultimately, the petitioners were unsuccessful as the Court ruled in favor of the City. The Supreme Court of the United States held that such economic development qualified for expropriation under both the federal and state Constitutions.<sup>140</sup>

The *Kelo* decision is troubling in many ways. Expanding the power of eminent domain is dangerous as doing so continues to chip away at the protection guaranteed to private property owners in the United States. No reasonable argument can be made in support of the complete eradication of eminent domain powers, but one can certainly be made to limit the scope of this

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<sup>131</sup> *Kelo v. City of New London, Conn.*, 545 U.S.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 475.

<sup>137</sup> *Id.* at 472.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

power to effectively protect the individuals who have invested time and money into creating and establishing their homes. There is a human element to this case which seems to be wildly overlooked by the Court in favor of providing the opportunity to large scale commercial developments. Ms. Kelo had lived in the affected area since 1997 and made extensive improvements to her house, which she prized for its waterfront location and impeccable view.<sup>141</sup> Wilhelmina Dery, another petitioner, was born in her home in 1918 and had lived there her entire life. Her husband, Charles, had lived in the house since they had married some sixty years prior.<sup>142</sup> To force these individuals out of their long-time homes was something that should only be done in extremely limited circumstances. There is little doubt that the improvements set out in the City's plan would be beneficial to many parties, but the idea of forcing families to leave their homes in order for third parties to profit from their removal is surely contrary to the designated purpose of the Takings Clause and should not be tolerated, let alone encouraged, by the highest Court in the country.

Four justices dissented in this case. All four advocate for a heightened standard of judicial review for takings justified by economic development.<sup>143</sup> The reasoning found in the dissents are extremely valuable and should be put into practice when government agencies set out to use their eminent domain power. The dissenting opinions find the takings to be unconstitutional as a result of a failure on behalf of the City to adduce clear and convincing evidence that the economic benefits of the plan would in fact come into fruition.<sup>144</sup> This is precisely the type of limitation that must be placed on instances of condemnation that seek to take land for the purpose of investing in commercial development. Justice Thomas presented an eloquent dissent that encompasses the reasoning of this article. He quoted William Blackstone in saying "the law of the land... postpone(s) even public necessity to the sacred and inviolable rights of private property."<sup>145</sup> Thomas continued that the Framers of the U.S. Constitution embodied this principle by restricting takings to legitimate and rational purposes.<sup>146</sup> By shifting phrases and language, Justice Thomas asserted that the Court enabled itself to decide "against all common sense that a costly urban-renewal project whose stated purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a public use."<sup>147</sup> In perhaps his most influential commentary of this dissent, Justice Thomas also argued that "[i]n my view, it is imperative that the Court maintain absolute fidelity to the Clause's express limit on the power of the government over the individual, no less than with every other

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 477.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 505.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

liberty expressly enumerated in the Fifth Amendment or the Bill of Rights more generally.”<sup>148</sup>

This strong opposition to the majority opinion represented a weakness in a decision whose main thrust may be to erode long-standing principles of private property and eminent domain in the United States. In her dissent, Justice O’Connor presented a meticulous analysis into the misguided principles that shaped the *Kelo* decision. Through case law, the power of eminent domain has been reduced into three categories that comply with the public use requirement.<sup>149</sup> First, private property may be transferred by the sovereign to public ownership such as roads, hospitals, or military bases.<sup>150</sup> Second, property may be transferred by the sovereign to private parties who make the property available for the public’s use such as railroads or public utilities.<sup>151</sup> Third, the category of property at issue in this case, in certain circumstances (and to meet specific demands), may also satisfy the Constitution even if the property is destined for subsequent private use.<sup>152</sup> Precedent exists at the Supreme Court level prior to *Kelo* regarding the line between public and private use and condemning property with the intent to convey to private parties. These cases have held that a purely private taking cannot withstand the scrutiny of the public use requirement; it would serve no purpose of legitimate government and would thus be void.<sup>153</sup> The language found in the *Thompson v. Consol. Gas Utilities Corp.* decision is highly relevant in this context and is relied on by the Supreme Court in these instances: “[o]ne person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.”<sup>154</sup> Thus, precedent shapes the principle that underlies the Public Use Clause. In both *Berman v. Parker*, 348 U.S. 26 and *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, condemnation of land and subsequent transfer to private parties was allowed due solely to an inflicted affirmative harm on society in the absence of any taking.<sup>155</sup> A public purpose was afforded when the harmful uses in existence were eliminated.

Following these precedents, the Supreme Court was in clear defiance of its previous reasoning and abandoned the rigid principles in place to protect Americans such as Ms. Kelo. In closing, Justice O’Connor highlighted the dangers of this decision and what they mean for the future of the public use requirement, properly summarizing the current state of affairs regarding the eminent domain power:

“...the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 497.

<sup>150</sup> *Old Dominion Land Co. v. U.S.*, 269 U.S. 55, 66 (1925).

<sup>151</sup> *Natl. R.R. Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407, 423 (1992).

<sup>152</sup> *Berman v. Parker*, 348 U.S. 26, 33 (1954).

<sup>153</sup> *Id.*; see also *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984).

<sup>154</sup> *Thompson v. Consol. Gas Utilities Corp.*, 300 U.S. 55, 80 (1937).

<sup>155</sup> *Kelo v. City of New London, Conn.*, 545 U.S. at 500.

private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public – such as increased tax revenue, more jobs, maybe even esthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side effects are enough to render transfer from one private party to another constitutional, then the words ‘for public use’ do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power.”<sup>156</sup>

It is of absolute importance that the protections of the Takings Clause be as closely safeguarded as the other liberties guaranteed in the U.S. Constitution. The takings permitted in this case push the boundaries of eminent domain too far and thus act to erode the protections guaranteed in the Constitution.

## V. SCHOOL BOARD CONTEXT

Despite the lack of deference to its own court’s precedent, the *Kelo* decision still exemplifies the importance of abiding by the U.S. Constitution in instances of eminent domain. In Canada, no such protection of private property exists in the Canadian Constitution. The system of expropriation operates similarly to that of eminent domain, but the lack of a constitutional guarantee to private property further opens the door to erroneous governmental takings of property and abuses of power. The St. Joseph Morrow Park Secondary School and Scott Park case studies in the Ontario context display the consequences resulting from a lack of reasonable protection of private property for Canadians. Though the U.S. Supreme Court can interpret and expand the purview of the eminent domain power, the U.S. Constitution remains the ultimate arbiter between the people and the state and its inclusion within the realm of eminent domain is essential to the avoidance of irrational government action. This article will analyze a series of judicial opinions within the state of Michigan pertaining to eminent domain conflicts between school boards and the public as examples of the process of heightened protection in practice with the purpose of advocating for a stricter burden to be met by the government of Ontario in its expropriation cases.

### A. Necessity

#### 1. *Livonia Township School District v. Wilson*

Not unlike school boards in Ontario, school boards in Michigan still possess broad and sweeping powers to take private land for educational purposes. In essence, property owners in Michigan are provided with stronger artillery in defending against instances of frivolous eminent domain proceedings. As a result, it is possible to point to cases in which school boards are unsuccessful in their takings, which is rarely seen in Ontario. In *Livonia Township School District v. Wilson*, the Supreme Court of Michigan decision dealt with a

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<sup>156</sup> *Id.* at 501.

constitutional analysis and determination of necessity on the part of the school district's attempt to exercise its eminent domain power. The Livonia Township School District of Wayne County, Michigan brought forth a petition in the circuit court of Wayne County for the acquisition of private land by eminent domain.<sup>157</sup> The Trial Court ordered that the plaintiff's petition for condemnation be dismissed.<sup>158</sup> The case eventually made its way up to the Supreme Court of Michigan for a final judgment. The Court quoted the *Bd. of Health of Portage Tp. v. Van Hoesen* decision, stating that the right to condemn land for public purpose is a vital right of every government.<sup>159</sup> To elaborate on the limitations on this government power, the Court relied on *Jennings v. State Hwy. Comm.*, which stated that "[i]t is a general principle that the legislature cannot authorize the taking of property in excess of that required for public use."<sup>160</sup> This decision forms the basis for the understanding that the Constitution implicitly forbids the taking for public use of what is not necessary for such use, and that the power to take is in any case curtailed to such.<sup>161</sup>

Since private property is not to be taken without a public use, no more property is to be condemned than the public use needs, therefore identifying a necessity requirement for eminent domain in the Michigan context.<sup>162</sup> In following this rationale, the Court concluded that the school district did not possess the requisite necessity to condemn the portion of land they were seeking: "[i]n all condemnation proceedings there must be a finding of necessity for the proposed improvement. Failure to establish necessity is fatal to the proceeding."<sup>163</sup> The Supreme Court of Michigan ultimately found that there was a lack of reasonable necessity and therefore the Constitution and precedent prohibited the use of eminent domain in such instances.

As illustrated by the Ontario case studies, this reversal is something that is rarely seen in the Canadian context. It is much more difficult to rebuff a government agency's attempt to take private property and this must be explained by an absence of a constitutional protection of private property in Canada. However, *Livonia* does not represent the only example of a school district's unsuccessful attempt in condemning private property for the public use.

## 2. *Board of Education of City of Grand Rapids v. Baczewski*

Like the aforementioned case, *Board of Education of City of Grand Rapids v. Baczewski* is provided to offer additional support to the argument that school boards in Michigan are more restricted in their assertion of condemnation power than are their Ontario counterparts. This case, another Supreme Court of Michigan decision, further expands on the limitations in place under the

<sup>157</sup> *Livonia Tp. Sch. Dist. v. Wilson*, 64 N.W.2d.

<sup>158</sup> *Id.* at 565.

<sup>159</sup> *Bd. of Health of Portage Tp. v. Van Hoesen*, 49 N.W. 894, 896 (Mich. 1891).

<sup>160</sup> *Jennings v. State Hwy. Comm.*, 110 S.E. 583 (N.C. Ct. App. 1922).

<sup>161</sup> *Wilton v. St. Johns County*, 123 So. 527, 535 (Fla. 1929).

<sup>162</sup> *Lowell v. City of Boston*, 111 Mass. 454, 463 (1873).

<sup>163</sup> *Livonia Tp. Sch. Dist. v. Wilson*, 64 N.W.2d at 566.

Michigan Constitution, mandating a showing of necessity before a government agency, or in this context a school board, can exercise eminent domain. The Board of Education of the City of Grand Rapids, Michigan brought forth a proceeding to condemn land for the purpose of erecting a high school.<sup>164</sup> The Superior Court of Grand Rapids originally found in favor of the Board of Education, but after a meticulous review of the appeal, the Supreme Court of Michigan reversed this decision and ruled in favor of the property owners whose land was targeted for condemnation.<sup>165</sup>

The school in question was Union High School in Grand Rapids, which had an enrolment of 1500 students.<sup>166</sup> The school itself is a city square block in size and is located on the west side of Grand Rapids, near the appellant's property.<sup>167</sup> This property was vacant, undeveloped, and surrounded by many newly built homes.<sup>168</sup> The board officially plans to build a high school on this parcel of land at some indefinite time in the future when Union High School has outlived its usefulness.<sup>169</sup> The Trial Court seemed to breeze over the warning signs presented in this plan and the Supreme Court later criticized this error. It is clear that the Board of Education's plan was to acquire adjacent land far ahead of when it would be needed in order to secure the land at a much lower price than when the project was in a position to actually move forward. This behaviour should be treated as serious misconduct and not be even remotely permitted by the courts. The State has no business displacing families from their homes in the absence of an actual, demonstrated need for the property within a reasonable time-frame.

There was no present need for the board to use the appellants' land as a site on which to erect a high school.<sup>170</sup> The board stated in its brief that in the interval between the acquisition of the property and the construction of the planned high school, the site would be used for playground purposes.<sup>171</sup> However, there existed nothing in the record to justify the taking of the private property for the purposes of building a playground. This was a clear attempt to acquire land through a loophole of sorts, and fortunately, the Court saw through it. If necessity were to have been established, it would have to be necessity of acquisition for the direct purpose of building a high school in a reasonable time frame, not an indefinite time in the future.<sup>172</sup> Justice Kelly summarized:

“The words ‘necessity for using such property’ in our Constitution does not mean an indefinite, remote or speculative future necessity, but means a necessity now existing or to exist in the near future... In condemnation proceedings in this State petitioner should prove that the property will

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<sup>164</sup> *Grand Rapids Bd. of Ed. v. Baczewski*, 65 N.W.2d.

<sup>165</sup> *Id.* at 810.

<sup>166</sup> *Id.* at 811.

<sup>167</sup> *Id.* at 810, 811.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

either be immediately used for the purpose for which it is sought to be condemned or within a period of time that the jury determines to be the 'near future' or a 'reasonably immediate use.'<sup>173</sup>

This assertion was also supported by cases from the Supreme Courts of Minnesota, California, and Louisiana; deference was shown by the Superior Court of Michigan to the reasoning of those courts.<sup>174</sup>

This decision was yet another example in which the defendant was successful in preventing the condemnation of their property from a school district. Again, there was strong emphasis on the meeting of the necessity and public use requirements of the Constitution. Though both principles are still relevant in expropriation cases in Ontario, neither is entrenched in the Canadian Constitution, which effectively makes it much more difficult for individuals to defend against governmental takings of their properties. A direct comparison can be drawn from these Michigan decisions to the Scott Park case study in Ontario.

In Michigan, a direct requirement exists for the state to prove that the property would be used immediately for the purpose in which it was sought to be condemned. This was not the case in Hamilton, Ontario where the Hamilton-Wentworth District School Board expropriated private property for the purposes of education and proceeded to convey a portion of this land to the City for alternative purposes.<sup>175</sup> Clearly, there was an absence of proof that the property would be used for the purpose for which it was originally sought in Ontario, or at the minimum, these requirements are not held to any strict interpretation. It is rare to see a defendant succeed at halting expropriation proceedings in Ontario, and yet there have been two clear examples in Michigan where property owners were able to avoid condemnation by school boards due to the public use and necessity requirements of the Constitution. Such an example of government abuse would not likely be successful in Michigan given the relevant Constitutional protections afforded to Americans and Michiganders alike, thus exemplifying the importance of constitutional protection of private property in Canada.

## VI. CASE STUDIES II

Following the historical overview of relevant Michigan case law that both defines the public use and necessity requirements in the school board context, the discussion will turn to current case studies within the United States that support the overall conclusion of this article; school boards in Ontario have too much power and Ontarians should be afforded better protection of private property.

<sup>173</sup> *Id.* at 810, 811, 813.

<sup>174</sup> *State v. Duluth St. Ry. Co.*, 229 N.W. 883, 883 (Minn. 1930). *See also* *Kern County Union High Sch. Dist. v. McDonald*, 179 P. 180, 181 (Cal. 1919). *See also* *City of New Orleans v. Moeglich*, 126 So. 675, 676 (La. 1930).

<sup>175</sup> Emma Reilly, *Developer vows to appeal Scott Park expropriation ruling*, THE HAMILTON SPECTATOR (Mar. 17, 2015), <http://www.thespec.com/news-story/5481062-developer-vows-to-appeal-scott-park-expropriation-ruling/> [hereinafter *Reilly*].

*A. Proposed High School Site in Bonita Springs*

Perhaps it is due to the harsh economic conditions that currently plague the State of Michigan that no concrete or current examples of new schools being built exist. However, to demonstrate the operability of Constitutional protection in the United States, a contemporary case study in Florida will be analyzed against the comparative backdrop of the previous case studies pertaining to Ontario covered in this article.

The municipality of Bonita Springs is located within the boundaries of Lee County, Florida. The Lee County Public School District is dealing with a rapidly growing student population in its already overcrowded south zone and is forced to expand its facilities in order to properly handle current growth.<sup>176</sup> In recent years the student population has grown so quickly that the public school district was pressed for time in locating a new site for the school so that construction could commence.

The seminal issue in this case study is the controversial location that has been proposed for the siting of the new high school. The board's primary concern was the construction of a building as quickly as possible to accommodate the new demand of high school-aged students. As it stood, the freshman class of the new school would begin their high school careers in a set of portables behind the current high school which served the community.<sup>177</sup> The board's plan would allow the new students to start their sophomore year inside a new brick-and-mortar school in the city.<sup>178</sup> Chairwoman of the board, Cathleen O'Daniel Morgan, explained the importance of building the school as soon as possible:

“We cannot operate a second high school out of Estero High beyond one year. To be candid, if we are going to be looking beyond 2018 [to open a school], we're going to have to make a decision as a board about what we are going to do. The time constraint is real. If we can't build in some area of this county, kids are going to go to school year round or in double sessions.”<sup>179</sup>

With urgent time constraints as described by Morgan, it may logically flow that eminent domain may be the most effective way to acquire land for a school site in a short period of time, especially considering the lack of vacant available sites. However, this is not the route the board chose to explore. Superintendent Greg Adkins spoke of the possibility of using eminent domain and said that the District would be required to compensate fourteen different owners and that it could take three to four years. Greg Adkins stated that “the legal advice that we

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<sup>176</sup> Melhor Leonor, *Bonita school site no gem, but it may be the only option*, NAPLES DAILY NEWS (Nov. 3 2015), <http://www.naplesnews.com/news/education/bonita-school-site-no-gem-but-it-may-be-the-only-option-23a5fb72-1d43-5395-e053-0100007fd8f4-340007851.html>.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

have received is that it is a very lengthy process and would go well outside of what we have the ability to pay.”<sup>180</sup> Part of this legal process would also involve the board demonstrating necessity and public use. Surely, they would be able to succeed on the public use front, but the idea of necessity would be significantly harder for the board to prove successfully.

Certainly, this is a factor in the district’s decision not to use eminent domain, despite severe public backlash against the proposed construction of the school site that would be obtained without eminent domain. This situation speaks volumes to the barriers that the board would have to overcome in order to bring an effective condemnation proceeding. Marc Mora, the district’s director of planning, growth, and school capacity, had the following to say regarding the proposed location: “[i]s this the perfect site for Lee County? It’s pretty easy to say, probably not. But that’s what’s available right now in Bonita Springs. I wish we had that magic property that would just appear. It just doesn’t.”<sup>181</sup> The magic property alluded to in that statement does exist, it just happens to be owned and occupied by fourteen collective owners and residents.

When comparisons are drawn to the two Ontario case studies, major differences become apparent. In the St. Joseph Morrow example, objective findings concluded that the land being expropriated may not be necessary to the expansion of the school, as the neighborhood itself will not likely sustain the planned expansion. This is very different from the situation in Bonita Springs and yet the expropriation there is moving forward.<sup>182</sup> Moving to Scott Park, the expropriating school board eventually conveyed the condemned land to the municipality for uses not directly related to building a school, and yet no barriers to the expropriation existed.<sup>183</sup> By contrast, in the Florida case, a school board desperately in need of land chose not to exercise their power of eminent domain. This is because it may not result in successfully proving the necessity requirement, and the land itself would be extremely costly on the taxpayers of Lee County.

There is a recurring theme evident here: there are not enough limitations on expropriating bodies in Ontario. The U.S. Constitution protects the property owners of Lee County and subjects the state to a stricter burden to be met when planning to exercise its power of eminent domain. This rigor safeguards the interests of the people and of the right of private property more broadly; something that is essential to advancing the interests of freedom and liberty in a democratic society. The board in Lee County is saving taxpayer money and avoiding costly litigation which it has a strong possibility of losing in the face of backlash from other residents over the proposed location. If this exact scenario were imported into Ontario, the expropriating body would likely have their ideal selection of land and would face few obstacles in pursuing its goal.

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Inquiry Report, supra* note 51.

<sup>183</sup> *Reilly, supra* note 175.

Of course, not all cases of eminent domain can be defended against. The majority of instances will result in the State meeting the required legal burdens and proceeding with their takings power. However, one issue is usually fiercely contested in these proceedings, and protection for said issue remains strong in the United States. The issue of negotiating just compensation will be explored in the following case study.

*B. Proposed High School Site in Beaverton*

This case study presents a rare example of an eminent domain proceeding that resulted in a trial. The eminent domain was not completely defended, but the amount of compensation awarded was far greater than what was initially offered by the governing body. The case involved a feud between the Beaverton School District of Oregon and the Crescent Grove Cemetery Association, a non-profit organization.<sup>184</sup> The problem arose when the district used eminent domain to file a condemnation complaint in Washington County Circuit Court against the cemetery for a parcel of land stretching fifteen acres.<sup>185</sup> The district claimed that it required the property in order to add to an adjacent thirty acres of land that they had previously required to create a forty-five-acre high school site.<sup>186</sup> Ultimately the high school would become the largest in the municipality of Beaverton, boasting a capacity for 2200 students.<sup>187</sup> This dispute does not involve procedural questions of meeting the necessity or the public use requirements. It involves the amount of compensation that the cemetery association would receive for the fifteen acres of property.<sup>188</sup> The two parties were far apart from each other on their valuations of the property in question.

Jim Zupancic was the attorney representing the cemetery association.<sup>189</sup> The association had been planning to sell this portion of the property to developers along with fifty-three adjacent acres and thus, had figures already in mind as to the value of the land.<sup>190</sup> Zupancic's office made a formal statement as to how the association came up with its target figure: "the cemetery association has received multiple proposals from developers to buy the property and has been advised that the property is valued as high as ten million eight hundred thousand dollars."<sup>191</sup> In furtherance of this point, the association previously concluded an agreement with a development company, Arbor Homes, prior to the condemnation proceedings in excess of nine million dollars.<sup>192</sup> Jim O'Connor, chairman of the cemetery association board, said: "[w]hy would our non-profit association sell

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<sup>184</sup> Wendy Owen, *Beaverton School District eminent domain case may end up in trial*, THE OREGONIAN (Dec. 5 2013), [http://www.oregonlive.com/beaverton/index.ssf/2013/12/beaverton\\_school\\_district\\_emin.htm](http://www.oregonlive.com/beaverton/index.ssf/2013/12/beaverton_school_district_emin.htm).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

this land to the School District for a bargain basement price when Arbor Homes had already agreed to buy it for five times their offer?" He could not have a more valid point. If just compensation is to exist as a concept of law, then it must take into account principles of fairness and equity. Having a legally binding agreement to sell the land to a developer for five times the price that the school district offered should be a fine indicator as to what just compensation consists of in this context.

The school district's offer stood at a measly \$1.8 million for the property in question.<sup>193</sup> This figure represented a gap of around \$9 million between the figures sought by both parties. Ultimately, an agreement could not be reached between them, but instead of the school district prevailing, the dispute ended up proceeding to trial. Fortunately, the school district did not get away with making such a lowball and unfair offer.<sup>194</sup> The trial itself lasted twelve days and the jury deliberated for close to ten hours before setting the final figure.<sup>195</sup> The verdict saw the jury determine the value of the land to be \$6.7 million.<sup>196</sup> This is obviously significantly higher than what the school district tried to offer the cemetery and illustrates how property owners can prevail in valuation negotiations through the court system. The system of value negotiation is one of the only areas that property owners in Ontario maintain some leverage over the expropriating body.

Zupancic noted that the board was satisfied with the decision.<sup>197</sup> He went on to say: "it represented a very thoughtful effort on the part of the jury."<sup>198</sup> A significant amount of deliberation went into this decision and it represents an overwhelming sense of fairness in defending against a government agency who were determined to be unfair from the onset of the condemnation proceedings. "The jury looked at the evidence, and they felt that this was fair given this is property that is obviously going to be developed. They felt it was worth far more than farmland price," Zupancic added of the verdict.<sup>199</sup> In addition to the \$6.7 million for the fifteen acres of property that the school district condemned, the district was also required to cover the legal fees for both sides, something sure to carry a hefty price tag.<sup>200</sup> This is another overall victory to the property owner as not only did they receive an award much higher than what the district offered to pay, they also avoided covering the expensive legal costs associated with defending their property which is extremely significant.<sup>201</sup> O'Connor summarized the matter effectively: "this land was held for investment for nearly

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<sup>193</sup> Wendy Owen, *Beaverton School District eminent domain trial ends with \$6.7 million verdict*, THE OREGONIAN (May 2, 2014), [http://www.oregonlive.com/beaverton/index.ssf/2014/05/beaverton\\_school\\_district\\_emin\\_1.html](http://www.oregonlive.com/beaverton/index.ssf/2014/05/beaverton_school_district_emin_1.html).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

fifty years by Crescent Grove. We felt strongly that the Association should be treated fairly and were prepared to stand up for what we believed to be right.”<sup>202</sup> In the end, justice was properly played out. This demonstrates that not only does the Constitution provide a rigid right of private property ownership in defending claims against eminent domain, it also provides effective remedial support in ensuring that actual just compensation is agreed upon and paid out by the government agency involved in the taking.

### *C. Expropriation and Eminent Domain Harming the Poor*

Further to the issue of a lack of protection for homeowners in Ontario, there exists an unfortunate trend that tends to target condemnation of land to areas of low economic status. It is difficult enough for property owners of the middle class to deal with the forced sale of their homes, but issues of relocation and an absence of available housing are amplified when these takings occur to individuals of lower economic status. Ilya Somin, a professor of law at George Mason University, provides a unique perspective of some of the harms that eminent domain can produce, especially against underrepresented members of the United States.<sup>203</sup> Somin highlights the unique aspect of eminent domain that allows those on the political right and left to agree, granted for different reasons entirely, that eminent domain abuse is a serious problem.<sup>204</sup> In the context of the *Kelo* decision, Somin had this to say:

“[t]his June is the tenth anniversary of *Kelo v. City of New London*. The controversial Supreme Court decision held that it is permissible for the government to use eminent domain to take private property and transfer it to other private interests in order to promote ‘economic development’. Not surprisingly, the ruling was opposed by libertarians and conservatives because it undermines property rights. But it has also met with strong criticism from many on the left, including Ralph Nader, the [National Association for the Advancement of Colored People], and former president Bill Clinton.”<sup>205</sup>

The unusual cross-ideological consensus arose due to the fact that takings that transfer land to private or third party interests often tend to victimize the poor, racial minorities, and generally those who are politically weak.<sup>206</sup> Hilary Shelton of the National Association for the Advancement of Colored People advanced this notion in testimony before the Senate Judiciary Committee: “allowing municipalities to pursue eminent domain for private economic development [has]... a disparate impact on African Americans and other

<sup>202</sup> *Id.*

<sup>203</sup> Ilya Somin, *How Eminent Domain Abuse Harms the Poor*, THE WASHINGTON POST (May 26, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/26/my-article-on-how-eminent-domain-abuse-harms-the-poor/>.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

minorities...<sup>207</sup> A strong and insightful analysis on this very issue is advanced by Somin in his article:

“[w]hen advising the governments of underdeveloped nations, American foreign aid agencies emphasize that secure and stable property rights are critical for long-term economic development. We would do well to apply the same wisdom at home. In the long run, protecting property rights helps stimulate investment and the creation of social capital crucial for genuine development and poverty alleviation... Real progress has been made since *Kelo*. Eminent domain abuse has come under fire from critics across the political spectrum. And there is growing recognition that we need not condemn economically troubled neighborhoods in order to save them.”<sup>208</sup>

The hypocrisy of the formal stance of the American government in advising foreign nations versus what is practiced on the home front is problematic. This disconnect contributes to unfairness and creates undue burdens on members of economically disadvantaged communities in America. This is continuously contributing to a lack of faith in individual branches of government and erodes the relationship between the government and its people more generally. The systems that are in place in the United States and in particular in Michigan are still more firm and rigid than those in Canada, and yet expropriations as described by Somin are still regularly occurring. This further exemplifies the importance of establishing and maintaining strong protection for private property ownership rights, and a constitutional entrenchment of these rights in Canada would afford Canadians with the same legal protection and safeguards that our southern neighbors enjoy. However, one must recognize that constitutional entrenchment of a right to private property in Canada is not the only means by which individual land rights can be given greater protection when faced with expropriation by a school board. This argument will be further elaborated upon in the final sections of this article.

#### *D. Scholarly Critique on Eminent Domain*

The opposition to the use of eminent domain and expropriation generally, as well as outside of the school board context, is a stance shared by others in the academic community. This consensus is important to support the underlying assertion of this article. Nadia Nedzel and Walter Block criticize the widespread use of eminent domain in a contribution in the University of Maryland Law Journal of Race, Religion, Gender and Class.<sup>209</sup> Their article advocates for a blanket ban on eminent domain, calling it unnecessary, ill-conceived, and something that should be eliminated from practice.<sup>210</sup> Though our position does not advocate for the complete eradication of eminent domain and simply

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Nadia E. Nedzel & Walter Block, *Eminent Domain: A Legal and Economic Critique*, 7 U. MD. L.J. RACE, RELIG., GENDER & CLASS 140 (2007) [hereinafter Nedzel & Block].

<sup>210</sup> *Id.* at 140.

promotes a stronger protection on private property through limiting the scope of governmental takings, the principles cited by Nedzel and Block can still be of value. Their article refers to instances of eminent domain for the purposes of economic redevelopment that have failed drastically. In commenting on *Kelo*, the authors had this to say:

“*Kelo* has resulted in widespread debate on the fiscal and ethical consequences of using economic development to justify the exercise of eminent domain. The fiscal concern is that such government-sponsored redevelopment projects are both costly and unsuccessful. In other words, the use of eminent domain to take property from one private entity and give it to another with the aim of promoting economic development is counterproductive as well as unconstitutional.”<sup>211</sup>

It is interesting to note that a justice of the Connecticut Supreme Court who ruled against *Kelo* has subsequently apologized for the condemnation,<sup>212</sup> as did the municipality of New London itself.<sup>213</sup> The article proceeds to cite examples of failed economic redevelopment projects similar to the plan that was executed in New London.<sup>214</sup> A Washington D.C. redevelopment project that was the issue of contention in *Berman v. Parker* in 1954 ultimately failed and the legislation that created it was repealed.<sup>215</sup> In the Michigan context, a similar redevelopment plan was instituted in the Poletown neighborhood of Detroit.<sup>216</sup> The ultimate failure of it left a strip of abandoned and burned out properties instead of the busy commercial area that existed prior to the taking.<sup>217</sup> What resulted was the taking of people’s property only to result in a complete failure and a downturn in the composition of the neighborhood originally targeted for “improvement.” Similarly, in another case the downtown area of Cincinnati was left with only a parking lot following Nordstrom’s decision to back out of a redevelopment plan after properties were already taken by the municipality.<sup>218</sup>

“The mere declaration of an eminent-domain-backed redevelopment plan can itself lead to anticipatory ‘condemnation blight’ where properties lose

<sup>211</sup> *Id.* at 149.

<sup>212</sup> Jeff Benedict, *Apology adds and epilogue to Kelo Case*, HARTFORD COURANT (Sept. 18, 2011), [http://articles.courant.com/2011-09-18/news/hc-op-justice-palmer-apology-20110918\\_1\\_kelo-case-little-pink-house-book-editor](http://articles.courant.com/2011-09-18/news/hc-op-justice-palmer-apology-20110918_1_kelo-case-little-pink-house-book-editor).

<sup>213</sup> Tom Blumer, *Well-kept secret: New London, Conn. Mayor has apologized for Kelo property seizures*, MRC NEWS BUSTERS BLOG (Feb. 15, 2012), <http://www.newsbusters.org/blogs/tom-blumer/2012/02/15/well-kept-secret-new-london-conn-mayor-has-apologized-kelo-property-seiz>.

<sup>214</sup> Nedzel & Block, *supra* note 209.

<sup>215</sup> *Id.* In *Berman v. Parker*, 348 U.S. 26 (1954) the U.S. Supreme Court held that private property could be taken for a public purpose with just compensation. This case laid the foundation for the Court’s later decisions in important public use cases, including *Kelo v. City of New London, Conn.*, 545 U.S.

<sup>216</sup> Nedzel & Block, *supra* note 209.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

value precipitously in advance of actual exercise of eminent domain power. Furthermore, it is quite possible that an area considered for an economic-development taking would improve on its own through normal market behaviour, without the exercise of eminent domain.”<sup>219</sup>

These strong contentions provide reasonable findings that support further limitations on eminent domain and expropriation powers. There are also ethical concerns that shape the understanding of governmental takings:

“The ethical concern is that promiscuous redevelopment takings lead to nefarious overreaching by legislators acting in concert with large business entities, victimizing private parties and small firms. Specifically, business interests who want to purchase property for redevelopment at low cost will be motivated to persuade legislative bodies to grant them eminent domain support and then use this power to bully smaller business and homeowners.”<sup>220</sup>

In all, the conditions alluded to in this article are real and imminent concerns to the general public. It is in the best interest of democracy and the people to force limits on the governmental powers of eminent domain and expropriation. The preceding arguments can be properly summarized in the conclusion of the cited article:

“While ancient governments may have been perceived of as all-powerful, since the Enlightenment, the understanding has been that it is the people who ultimately hold power, and it is the people whose rights must be protected. Some of the most important of these rights include the free market, the right to own property, and freedom of contract. Eminent domain has simply proven to be economically unsound, incompatible with these rights, and pragmatically unnecessary.”<sup>221</sup>

Additionally, Anneke Smit argues for greater protection in the hands of homeowners in Canada, with a specific emphasis on those in lower and middle-income communities in order to challenge the inequitable effects of expropriation processes.<sup>222</sup>

Eminent domain and expropriation are problems experienced by few, as the majority of property owners in both Canada and the United States will never be faced with instances of condemnation. Consequently, there seems to exist little pressure to restructure the systems of eminent domain and expropriation. The purpose of this article is to bring these issues to light and to expand the

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* at 171.

<sup>222</sup> Anneke Smit, *Expropriation and the socio-economic status of neighbourhoods in Canada: Equal sharing of the public interest burden?* 5 Oñati Socio-Legal Series 258, 274 (2015).

discussion on this issue with the hopes of enabling the power of democracy to continue to strive for change.

#### VII. WILL A CONSTITUTIONALIZATION OF THE RIGHT TO PRIVATE PROPERTY SOLVE THE PROBLEM OF EXCESSIVE POWER GIVEN TO SCHOOL BOARDS TO EXPROPRIATE LANDS?

The overly-sweeping authority given to school boards in Ontario regarding their ability to expropriate land should be reviewed and subjected to a stricter legal standard. Perhaps, and as discussed throughout this article, one potential solution to this issue is strengthening the legal protections offered to individuals, through a constitutionalization of a right to private property in Canada. In the United States, the Fifth Amendment protects an individual's right to private property. As such, the government must meet a much stricter standard before it lawfully takes an individual's land. Individuals in the United States who decide to litigate issues of expropriation when their land is targeted have a far greater chance of succeeding.

The advantage of the American position is that it keeps governments honest when they are considering taking private land. In other words, governments may become more hesitant to engage in eminent domain unless they know the taking is absolutely necessary. This serves the dual purpose of (i) protecting individuals from unnecessary expropriation and as such, subjecting them to the financial and emotional toll that follows individuals when they have to leave their homes and (ii) it protects the government itself. The burden this protection places on government certifies that all unexamined alternatives other than expropriation will be analyzed such that if expropriation becomes the final decision, it will truly be absolutely necessary. For example, had a constitutionalized right to private property existed prior to the expropriation at St. Joseph Morrow Park High School in Toronto, the adverse public opinion and the excessive spending of thirty million dollars in public tax dollars may not have occurred. The sad reality is that the St. Joseph's expropriation of private land has yielded unjust results.

Constitutionalizing a right to private property will not occur overnight. It would require significant cooperation among Canada's political parties and the leaders of the various provinces. Property rights were absent from the 1982 *Constitution Act* because Prime Minister Trudeau and Bill Bennet, the Premier of British Columbia at the time, were the sole advocates for them.<sup>223</sup> Trudeau had long pushed for the protection of property rights even before his time in the highest office, but unfortunately, not enough support from the provinces existed in this cause despite the numerous benefits advocated by Trudeau.<sup>224</sup> However, making the right to private property a constitutionally protected right would have

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<sup>223</sup> Mark Milke, *Lacking constitutional protection, governments routinely trample property rights*, THE FRASER INSTITUTE (May 3, 2014), <https://www.fraserinstitute.org/article/lacking-constitutional-protection-governments-routinely-trample-property-rights>.

<sup>224</sup> *Id.*

far reaching benefits more so than just affording land owners a greater legal ability to defend their land from expropriating authorities. These benefits include placing property owners into an advantageous position in a free market economy by allowing land to be freely exchanged between consenting parties, and also providing them with greater democratic freedom.

As advocated throughout this article, a constitutional right to private property would assist land owners who have been served with a notice of expropriation in their ability to prevent the government taking of their land. Or at the very least, would make the threshold legal test stricter for school boards to justify the taking of land for educational purposes. However, it is important to recognize the limitations of this approach. Practically speaking, this approach would present some difficulties in terms of implementation, particularly given Canada's political history regarding constitutional change. However, there are alternatives to a constitutionalization of the right to private property in Canada that should be considered. These alternatives could have a similar effect in offering land owners greater protection. First, this could come by way of legislative reform and a revamping of the *Expropriations Act*, at least with respect to procedurally raising the threshold test that must be met by government entities (including school boards) when they decide to expropriate land. It has been fifty years since any significant changes were made to expropriation law in Ontario. This could be a factor that legislatures could and should consider.

Second, greater analysis could be engaged in in the use of expropriation as a development tool generally. As discussed above, Ontario has a declining school enrollment problem. Why is expropriation being considered as a development tool when Ontario schools have experienced declining numbers in recent years? Have school boards become too complacent as a result of their overbroad statutory power to expropriate? Regardless, expropriation as a development tool is not always the best approach to solving an issue of space. As discussed above, sharing space among schools may be a more feasible solution to the problem of declining enrollment and the fact that land prices will always be at a premium (i.e. no more land is being made). There are also alternative methods of educational delivery to be used as a means to solve potential problems regarding the declining enrollment issue in Ontario. Most importantly, the time has come for the Ontario Parliament to consider the power it has bestowed upon school boards and their ability to expropriate given some of the issues that have been discussed throughout this article. Above all else, owning real property is far different from any other form of property as each piece of land is different from the other. We believe that a proper functioning modern economy works best when real property rights of land owners remain paramount.

#### VIII. SUGGESTIONS FOR FURTHER RESEARCH

The area of expropriation for educational purposes is an area that has not received much attention from legal scholars for two reasons. First, it is rarely litigated because the costs of retaining counsel and proceeding with litigation has

continually risen in Ontario. Second, most lawyers practicing in the area of real estate and urban development will likely advise clients that chances of successfully challenging a Notice of Expropriation are low and the best that can be hoped for is increased compensation from the expropriating authority. As a result, there is not a wealth of case law on this matter for legal scholars to analyze and interpret.

A suggestion may be to look at long-term effects of expropriation on homeowners who have had their homes taken for public purposes. Probing questions may be: how long did it take for the individuals and/or families to find new homes? Were there any unexpected costs that were not covered by the expropriating authority? Were individuals over the age of sixty-five moved? Did it have any adverse health effects? Financial effects? This list is not meant to be exhaustive but directing funds towards answering these questions may prove fruitful in the long run and may potentially provide the legislature with new public policy details supporting reasons why there is too much statutory power placed in the hands of school boards.

School boards may also consider analyzing financial projections in terms of cost-benefit. Expropriation is an expensive proposition, particularly in the GTA whereby land costs are consistently rising. Currently, housing costs in the GTA are particularly expensive. This will always be a highly desirable area, resulting in high land and home costs. As discussed above, boards could compare upfront costs of expropriation versus alternative means of educational facility management in terms of the ability to handle enrollment levels. One such example is e-learning as an alternative means of educational delivery. It is obvious that researching a problem leads to a better understanding of it. However, before any form of research can continue, the first step for boards is to recognize that expropriation should be an absolute last resort. This is especially true given the current enrollment climate, costs of land, and the negative implications that almost always seem to accompany expropriation. Once the decision-making apparatus recognizes these problems, then a more extensive understanding of how to proceed without expropriation can begin to take place.

A problem exists with the current framework of the system of education in Ontario. The City of Toronto can be used as an example of how resources are poorly distributed and accounted for within the system of educational governance. Four distinct school boards operate independently of each other within Toronto and this only leads to an overconsumption of resources that could be cut down through systems of school sharing and amalgamation. The taxpayers of Ontario are being shortchanged through this operational structure and a severe lack of accountability of public funds exists. Some schools in the city are on the verge of closing down due to a lack of enrolment. At the same time, there are other boards seeking expropriation to expand their reach. This mismatch simply should not be occurring as a myriad of innovative solutions to these problems can be explored and researched to minimize issues of overspending and poor allocations of resources. The problem becomes even more complex when analyzing the fact that the broad power possessed by school boards to