

# Expropriation – What's it all about?

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# Agenda

## Topic

What is Expropriation?

Expropriation Across Canada – Similarities & Differences

Role of CBV, Counsel & Other Experts in Expropriation Matters

CBV Mandates in Expropriation Matters

# What is Expropriation?

# What is Expropriation?

## Who Can Expropriate?

- “**Expropriate**” means the taking of land by an expropriating authority under an enactment without the consent of the owner...
- “**Expropriating authority**” means a person, including the government, empowered under an enactment to expropriate land



# Who Can Make a Claim for Compensation?

- Land owner
- Licensee
- Lessee / Tenant or an Occupant in good faith

Terminology differs in each province



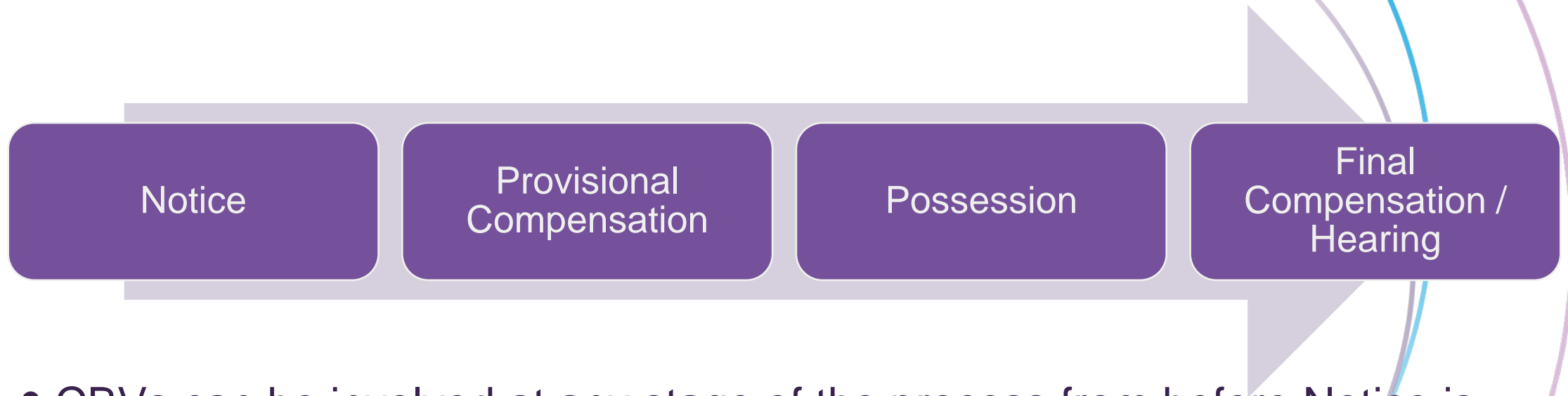
# What Would You be Retained to Do?

- Be an expert – independent
- Evaluate loss to the business as a result of the expropriation (past, current and future)
- Often you are one of a number of experts working for the same party

# The Importance of Knowing the Law

- Expropriation is a unique process
- Each province is governed by their own statute
- Statutes provide the framework for what your role and the scope of your work will entail

# The Process of Expropriation



- CBVs can be involved at any stage of the process from before Notice is given through the various stages of the process to a possible hearing before either a tribunal or the court



# The Scope of an Expropriation

CBVs assess and quantify the financial impact on a business of:

1. Full taking of property
2. Partial taking of property
3. Temporary taking of property
4. Easement
5. No taking of land

# Type of Business Losses at Issue

- Disturbance Damages/Business Interference – costs, expenses, and losses attributable to the disturbance or relocation, impact on customer base, goodwill, etc.
- Injurious Affection – loss in value to that which remains
- Temporary or permanent impact / losses

# Expropriation Across Canada – Similarities & Differences

# Provincial Legislative Framework

- Every province has its own legislation and regime with respect to expropriation. For example:
  - a. British Columbia: *Expropriation Act*, RSBC 1996, c. 125
  - b. Ontario: *Expropriations Act*, RSO 1990, c. E-26
  - c. Quebec : *Act respecting expropriation*, CQLR, c. E-25, entered into force on December 29, 2023 (long-anticipated legislative reform)
- Use of different terminologies (ie. categories of compensation)
- Quebec: French language

# Expropriation Instances

- Specialized administrative bodies or courts have jurisdiction over expropriation matters:

Alberta	British Columbia	Manitoba	New Brunswick	Newfoundland & Labrador	Nova Scotia	Ontario	Prince Edward Island	Quebec	Saskatchewan
Land and Property Rights Tribunal	British Columbia Supreme Court	Land Value Appraisal Commission	Court of King's Bench of New Brunswick	Board of Commissioners of Public Utilities	Nova Scotia Utility and Review Board	Ontario Land Tribunal	PEI Supreme Court	Tribunal administratif du Québec	Court of King's Bench

- Contestation of the right to expropriate: may be a different tribunal or court (ie. QC: Superior Court, BC: Inquiry Officer, ON: OLT)

# Procedure

- The procedural timeline is contingent upon the specific legislative framework in the province
- Trigger: Notice of expropriation or offer
- Expropriating party's offer vs. Expropriated party's claim
- Each province has its own process:
  1. In most provinces there is a specialized tribunal that oversees the process
  2. In British Columbia there is no tribunal, any disputes must go to court
  3. Some provinces have preliminary processes such as discovery to require the exchange of information upon which experts may base their reports, some do not



# Compensation

- Expropriating authorities are required to compensate the expropriated party for the value of the land taken and the damages directly attributable to the taking of the land
- Fairness and equity: expropriated party is no ordinary seller
- Case-by-case analysis
- Rules against “double recovery”
- Expropriating party estimates their value of their taking and often provides expert reports to support the value and makes a preliminary payment
- Discussions and exchange of expert reports relating to compensation can occur before the preliminary payment, but most often occur afterwards before a final compensation award

# Heads of Compensation

Compensation to the expropriated party may include *inter alia*:

1. Market value of property / immovable indemnity (for the owners only/highest and best use)
2. Reparation for injuries / disturbance damages
3. Loss of suitability value (i.e. special value to the individual)
4. Trouble, nuisance and inconvenience
5. Injurious affection
6. Special difficulties in relocation

# Disturbance Damages

- Leading authority: Supreme Court of Canada's 1997 decision in *Dell Holdings*
- Disturbance or economic loss caused by being forced to vacate the property
- To prove causation: damages that are the “*natural and reasonable*” consequence of the expropriation
- Examples: relocation/moving costs, allowance for improvements lost, business loss attributable to relocation, downtime and disruption, increased interest on loans, out-of-pocket expenses, etc.

# Disturbance Damages

- Claims for damages may be subject to restrictions
- For example, in Quebec, the Act provides a list of injuries that are considered not directly caused by the expropriation or not compensable such as:
  1. Damages sustained prior to the date of expropriation
  2. Damages caused by the preparatory work or by the construction work, including noise and dust
  3. Loss of profit or goodwill caused by the construction or presence of the works connected to the project
  4. The payment of the lawyers' professional fees
- Loss of net profit in Quebec: the Act provides specific provisions

# Closure of Business

- Situation where it is not feasible for the business to relocate or redevelop
- Compensation for the expropriated party (tenant) forced to close its business as a result of the expropriation
- Refers to the value of the goodwill of the business

# Injurious Affection

- Compensation for damages to the remainder in partial takings
- Refers to a reduction in market value to the land not taken caused by activities related to the expropriation, and personal or business damages
- Various approaches to determine the compensation for injurious affection such as:
  1. Costs to cure the damages incurred
  2. Loss of the benefits of plottage as a result of the expropriation
  3. Loss of development advantages associated with a larger holding by way of expropriation

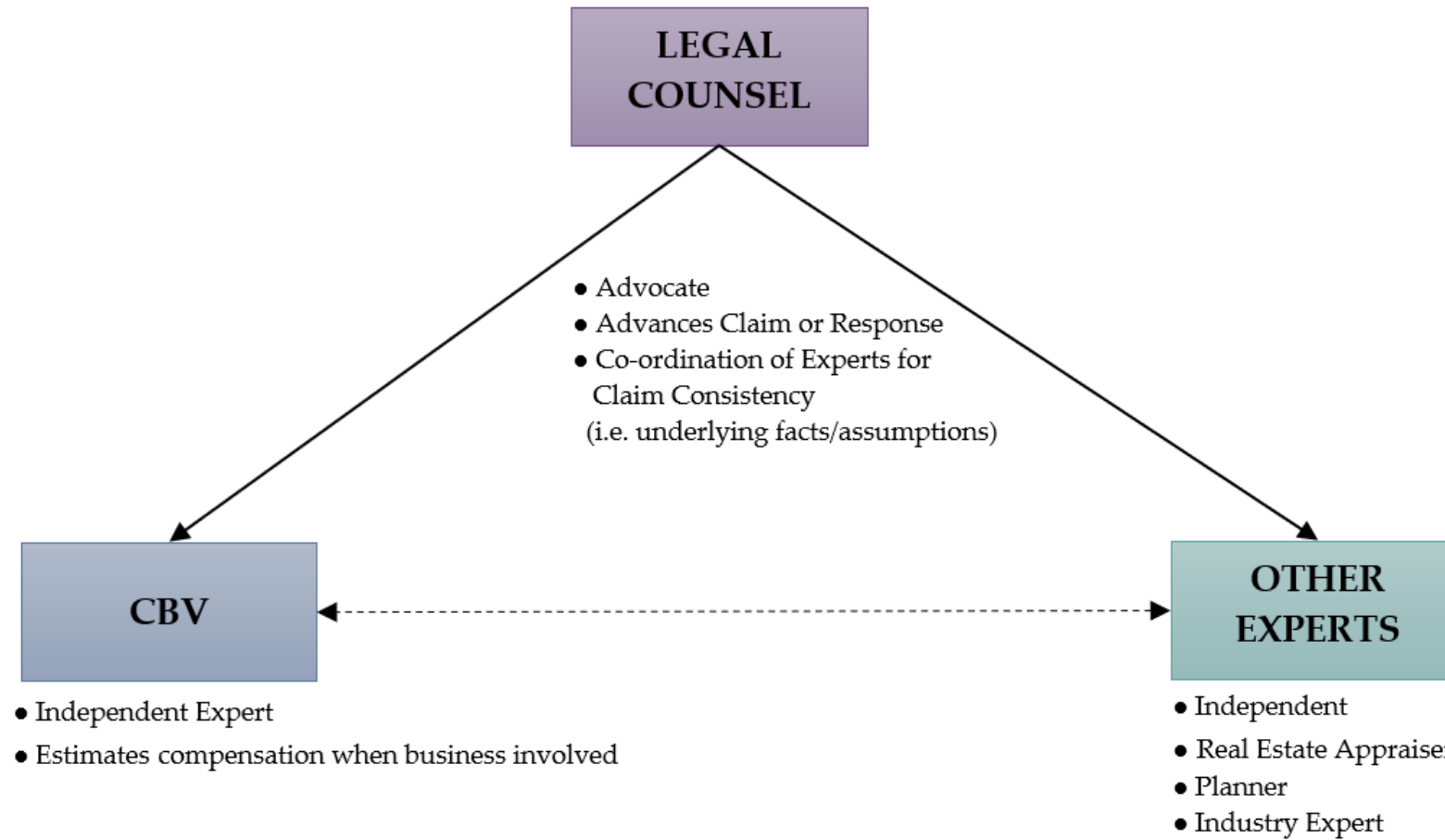


# Interest and Costs

Province	British Columbia	Ontario	Quebec
<b>Interest</b>	<p>Interest must be paid on any amount awarded in excess of the advance payment made by the expropriating authority.</p> <p>If advance payments are under 90% of the award, a 5% interest applies to the shortfall.</p>	<p>Statutory interest for market value/injurious affection outstanding at 6% from date of loss productive use of the land</p>	<p>Interest for market value from date of transfer of expropriated right. Loss of appreciation of market value (market value rate to legal rate for period that begins on first day of the 7th month after date of expropriation until transfer is done)</p>
<b>Expert Costs</b>	Yes – reasonable costs	Yes – reasonable costs	Yes – reasonable costs
<b>Lawyers' Fees</b>	Maybe	Yes – reasonable costs	No

# Role of CBV, Counsel & Other Experts

# Overview of Roles



# CBVs Involvement In Process

- Often engaged prior to formal pleadings
- Assist in obtaining necessary documents
- Prepare Without prejudice report for settlement discussions
- Attend mediation / meeting of experts
- Provide input for pleadings (e.g. estimate of losses)
- Draft suggested discovery questions
- Prepare report / reply report for Tribunal hearing
- Attend mediation / meeting of experts
- If necessary, provide evidence at Tribunal hearing

# Role of Other Experts

- Real Estate Appraiser
  - Determines “highest & best use” for property
  - Estimates “market value” of property
  - Estimates “market rent” where property is owned by the business, necessary for business valuation
- Planner
  - Determines what was possible with respect to the development of the property at the valuation date, absent the “scheme”

# Role of Other Experts Cont'd

- Industry expert
  - May assist in quantifying losses (e.g. lost sales volumes), identifying industry competitors, providing industry outlook, etc.
- Transportation expert
  - May comment on traffic flows/access before, during, and after the expropriation and related construction, medians, etc. to support losses



# Relying on Other Experts

- CBV Practice Standard No. 320 – Expert Reports (5.E)

“The Expert shall consider the necessity of relying upon the work of a specialist (e.g. real estate appraiser, engineer, actuary, etc.)”

“(Recommendations: If it is deemed appropriate to request the assistance of a specialist, the Expert should obtain reasonable assurance concerning the specialist’s reputation for competence and degree of independence.)”

# Relying on Other Experts Con'td

“(Explanatory comment. The appropriateness and reasonableness of the assumptions and methods used by the specialist are the responsibility of the specialist. Ordinarily, the Expert may accept the specialist’s judgement and work in this regard unless the report of the specialist, the Expert’s communication with the specialist or the Expert’s knowledge of the nature of the dispute and the events giving rise to the claim lead the Expert to believe that the specialist’s assumptions or methods are unreasonable in the circumstances.)”

# CBV Mandates in Expropriation Matters

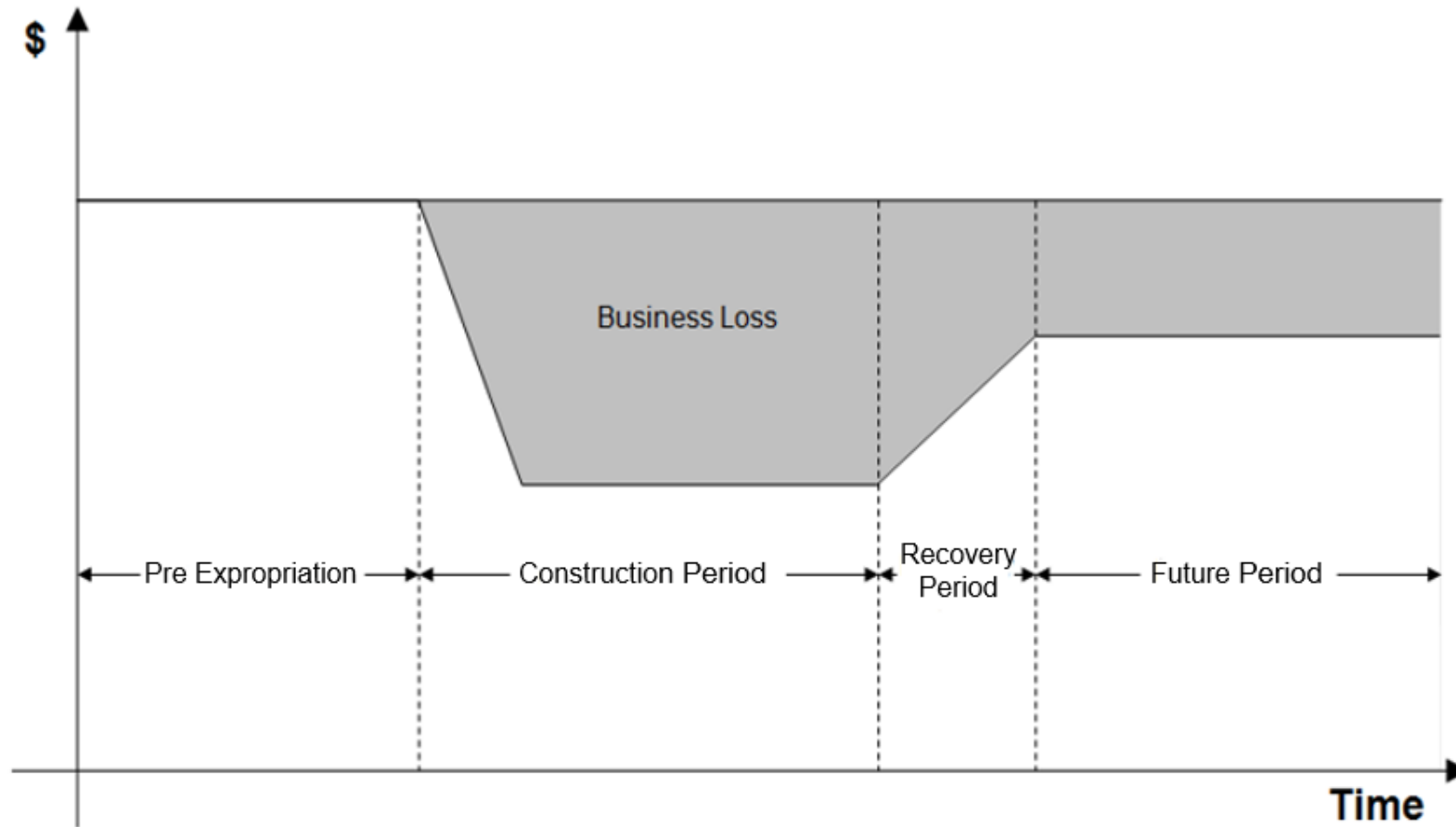
# Estimate Compensation Due to Claimant When Business Involved

- Claimant can be an owner or tenant of the expropriated property
- Type of compensation depends on:
  - The nature of the expropriation (e.g. portion or entire property expropriated)
  - Whether the business can relocate (when the entire property is expropriated)

# Portion of Property is Expropriated ("Partial Taking")

- Compensation may include:
  - Business losses and out-of-pocket expenses due to the expropriation/related construction
  - "Injurious affection" – impact of the expropriation on the remainder of the business (can impact property and/or business)
  - Can include future losses / permanent losses

# Business Loss When Portion of Property Taken

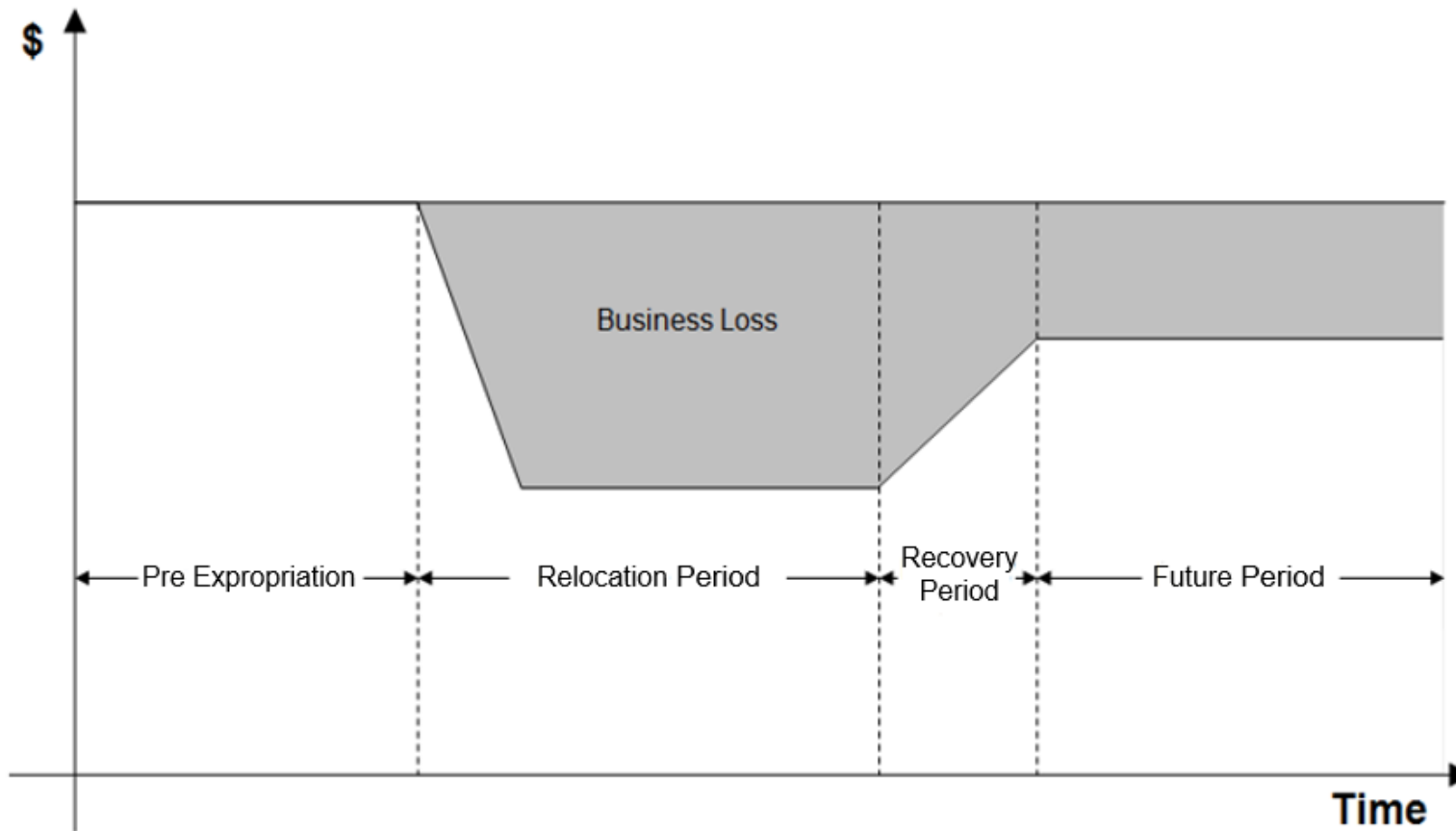




# Entire Property is Expropriated ("Full Taking")

- Can the business relocate?
- If yes, then compensation may include:
  - Business losses during relocation period, at new location, and possibly future permanent losses
  - Relocation costs (e.g. moving costs, utility disconnection/reconnection costs, incremental advertising costs, leasehold improvement costs, etc.)
- Consideration of betterment

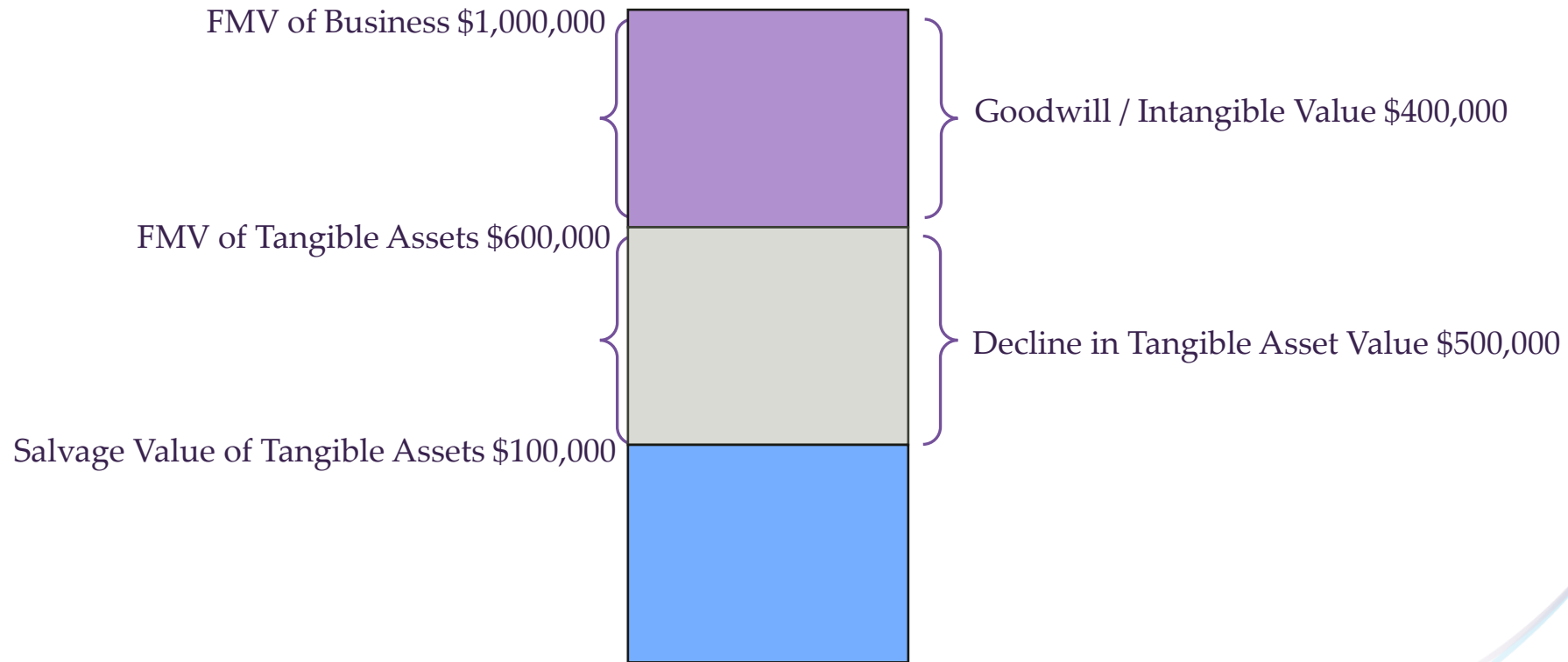
# Business Loss When Business Relocates



# Entire Property is Expropriated (“Full Taking”) Cont’d

- If business can’t be relocated, then compensation may include:
  - A “termination payment” equal to:
    - Goodwill of the business (value of intangible assets)
    - Decline in value of tangible assets (i.e. going concern value vs. liquidation value)
  - Valuation of the business is required

# Termination Payment Example



# Some Issues to Consider

- Estimating losses for tenant
  - How long left in the lease? Renewal terms?  
Demolition clause in lease?
- Causal relationship must exist between the expropriation and losses
  - Must rule out other causes and adjust estimate of loss according (e.g. COVID, competition, recession)
  - Use of comparables – how did other similar businesses perform during loss period? (e.g. franchises, gas stations, etc.)

# Some Issues to Consider Cont'd

- Basis upon which market value of property was determined by appraiser
  - For example, highest and best use of property was determined to be redevelopment of the property as opposed to the existing use for the business
  - As a result, absent the expropriation the business would have to have terminated so the property could be redeveloped
  - So, can't quantify business losses if the business would have terminated anyways, absent the expropriation

# Summary

- CBV's mandate in expropriation matters involves the same loss quantification and business valuation principals as other matters
- It's important to understand the expropriation law in the relevant jurisdiction and what is claimable
- Often other experts involved and must ensure underlying assumptions are consistent and if relying on them, their competence and independence
- Need to understand the terminology (e.g. injurious affection, disturbance damages, partial/full taking, expropriation date, possession date, the "scheme", betterment, etc.)

# Questions?