The Expropriation Law Centre

Articles

Regulatory takings in Canada

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Introduction

One of the great advantages of the Internet is the opportunity which it provides to distribute information at extremely low cost. When publishing costs approach zero, anyone who desires to comment on an issue can do so and those thoughts can be sent around the world just as easily as to the neighbours in their back yard.

In the context of legal comment, the Internet makes it possible for an author to start work on an article and distribute it widely before the subject of the article is fully considered. A benefit is that early distribution can generate feedback that would give the author an opportunity to consider other points of view. Another is that the article can be frequently updated to keep the discussion current in the face of frequent changes to the law. Traditional legal publishing methods do not accommodate these objectives very well. The truth is that if this author had to rely upon traditional publication methods to get this article published, this project would not have been possible.

This article examines regulatory takings in the context of Canadian law. The term "regulatory taking" is borrowed from American law where it is widely used. However previous Canadian writings about the topic have focused on the two specific remedies of constructive expropriation and injurious affection without taking rather than the context in which these cases arise. The phrase "regulatory taking" appears to accurately describe this context. Many of the issues discussed here have been described previously, notably in a paper entitled *Exotic Expropriations: Government Action and Compensation*, delivered by Robert J. Bauman (now a justice of the British Columbia Supreme Court) in 1993 at the first annual expropriation seminar of the British Columbia Expropriation Association. Some of these issues were also addressed in the *Report of The Commission of Inquiry into Compensation for the Taking of Resource Interests* authored by Richard Schwindt for the Province of British Columbia in August 1992.

The topic of regulatory takings is expected to generate considerable interest. Readers are invited to check back periodically for updates which will be added from time to time. The law in this area is not static, frequent developments have been taking place and more are anticipated. Many of those developments will be deserving of comment. The author welcomes any comments readers may have. Comments should be e-mailed to jbm@petersonstark.bc.ca

What is a regulatory taking?

Expropriation involves the compulsory transfer of land to an expropriating authority. The power to take land without the consent of the owner is a necessary feature of a civilized society. Without it a single owner would effectively hold a veto over the exercise of the greater public interest. Expropriation powers are generally granted to expropriating authorities in order to serve some public interest. However, the rights of a property owner are usually balanced by a statutory obligation to compensate for the loss.

Sometimes governments have public interest objectives that require controls on land use but do not necessarily require acquisition of title or even possession of the land. Of course, this describes most of the planning legislation typically adopted by local planning authorities across the country. Municipal zoning bylaws are the most obvious example but there are many other types of land use legislation, often adopted by senior governments, which can have a significant impact on the use to which a particular parcel of land can be put. Many of these controls over land use are perceived by Canadians as reasonable limits on the private ownership of land. Few of them contain provisions for compensation and some expressly deny it.

In some cases, particularly in recent years, many regulations have been adopted which severely restrict or eliminate all reasonable uses to which a parcel of land can be put. Often, these regulations have been imposed to achieve environmental or heritage protection objectives. Unfortunately, where the restrictions are so severe as to eliminate all reasonable uses, it usually has dramatic consequences for the land owner. The imposition of land use regulations which go this far can quite accurately be described as a "regulatory taking".

The challenge in this area of the law is to distinguish between regulations which impose reasonable limits on the rights of Canadians to use their property as they see fit and regulations which cross the line and amount to a taking for which compensation is or ought to be available.

Purpose

One obvious reason why a government might choose to rely upon a regulatory taking rather than expropriate is because it does not have any desire to actually occupy the land or to construct works upon it. If by imposing land use restrictions it can achieve all of its objectives the government saves the cost of acquisition and avoids the liability of an occupier.

Regulatory takings have become increasingly common where environmental or heritage protection objectives are sought to be achieved. The advantages of regulatory takings have not been lost on government either. For an example see *Frobeen*, in which the B.C. Expropriation Compensation Board heard evidence of a pamphlet distributed to municipalities by the federal Department of Fisheries and Oceans and the provincial Ministry of the Environment. This pamphlet contained recommendations to municipal government on ways to use municipal land use powers to preserve fish habitat without cost to the public purse.

While regulatory takings can have significant benefits to government, rarely do benefits flow to the property owner affected. By definition, a regulatory taking is

achieved by taking rights away from an owner.

Examples

Many cases listed at the end of this article involved development setbacks that prohibited structures within the setback area. Some cases also involved prohibitions on the alteration of natural vegetation. This type of restriction is often imposed to protect fish habitat or to preserve public views for aesthetic reasons. Examples of this type of situation may be found in *Bignell*, *Frobeen*, *Hampton* and *Mariner*. The regulations involved in all of those cases were found to be proper and no compensation was payable.

Protection of fish habitat has become a topic of wide public debate in British Columbia with the recent enactment of the *Fish Protection Act*, S.B.C. 1997, c. 21. The most controversial part of this legislation operates by imposing a requirement on municipalities to enact bylaws placing restrictions on new land developments designed to preserve fish habitat. The Act does not contain any provision for compensation.

The *Beaches Act*, R.S.N.S. 1989, c. 32 is a provincial statute intended to preserve the environment on designated lands lying adjacent to beaches in Nova Scotia. The *Mariner* case involved a designation of property under this Act. Even though all economic uses of the land were taken away by the designation, the appeal court found that the owner was not entitled to compensation.

Some regulatory takings have occurred in an attempt to preserve land for future public acquisition most often for highways and parks. Land use restrictions have been adopted to prevent development and keep values down in order to make acquisition cheaper. *Columbia Estates* and *Re North Vancouver (District) Zoning Bylaw No. 4277* are examples of this. In both cases, the bylaws were struck down. Similar allegations were made in other cases where the applicants were not successful. It is difficult to determine why some land owners are successful and others are not, although it is worth noting that in *Columbia Estates* and *Re North Vancouver (District) Zoning Bylaw No. 4277*, there was clear evidence before the court of an intention by the municipality to acquire the land.

Height restrictions are often adopted to protect aircraft flightways from intrusions into the flightways by tall structures. The federal *Aeronautics Act* provides for such regulations and this Act specifically provides for compensation. *Ramey* is an example of this.

Heritage conservation is another public objective which can lead to regulatory takings. Designation of a building as a heritage site can dramatically reduce the value of land, although not in every case. Some heritage regulations do provide for compensation but not always. *Harvard* is a case where the City of Winnipeg desigated a hotel pursuant to heritage legislation that did not expressly provide for compensation. Although the court dismissed the claim for compensation, it did so on the basis that the heritage designation was not the cause of the claimant's heavy financial losses. This left the door open to compensation for similar claims where losses are proven to have been caused by heritage designation.

Some regulatory takings have arisen out of emergency situations where government officials have taken possession of private property for short term use in combatting the emergency. Sometimes legislation exists to justify this extraordinary action, sometimes

not. *Fuoco* involved a flood where officials constructed a temporary dyke on the claimant's property with his permission. There was also legislation authorizing the entry. However the officials failed to remove the dyke after it was no longer required and the legislation did not address this situation. An action for damages is outstanding.

Non-agricultural land uses are prohibited in British Columbia on land designated under the *Agricultural Land Reserve Act*, R.S.B.C. 1996, c. 10. Compensation for designation of land under this Act is specifically prohibited under s. 36.

Remedies

When a regulatory taking occurs, owners should not assume that a legal remedy will be available. Since there is no constitutional protection for property rights in Canada there is no constitutional standard against which the regulation in question can be measured. Canadian law does not absolutely prohibit the taking of private property without compensation. It merely requires that legislation which does so must be clearly worded so as to leave no doubt.

One strategy to consider is whether the regulation in question can be quashed. Many regulations suffer from vagueness, uncertainty and lack of jurisdiction. This is especially so in the context of municipal regulations. Courts frequently strike down regulations that suffer from this problem. This is the remedy that was applied in *Columbia Estates* and in *Re North Vancouver (District) Zoning Bylaw No. 4277*. It was also considered in *MacMillan Bloedel* and *Service Corp.* Sometimes, the regulation can be quashed where there is evidence of bad faith in the enactment or application of the regulations. This was the case in *Rodenbush*.

A variation on this strategy would be considered by an owner where a government agency has refused to issue a building or development permit on grounds that do not appear to be supported by the applicable regulations. This is the strategy that was considered but rejected in *Bignell* and *Western Eagle*.

Another strategy is to make a claim for compensation where available under the applicable legislation. This situation is commonly known as injurious affection without taking. This is the remedy that was available in *Ramey*.

Government action leading to unauthorized possession of private property may not be a regulatory taking. However if an authority takes possession without the owner's consent and there is no legislation to authorize such entry, compensation may be available on the basis of trespass.

Where the legislation contains no express provisions dealing with compensation, the courts will sometimes ignore this and make an award of compensation anyway. Constructive expropriation, or *de facto* expropriation, is a judge made legal remedy that is sometimes applied to regulatory takings. *Tener* and *Manitoba Fisheries* are examples where this remedy was applied. It was also considered but rejected in *64933 Manitoba Ltd.*, *Mariner*, *Rascal Trucking*, *Reimer* and *Steer Holdings*.

In one case, *Nilsson*, a provincial government imposed environmental regulations that restricted land use. However, the provincial government's real objective was to prevent development and reduce the cost of land acquisition for a planned highway project. An action based on constructive expropriation was not successful. However, an alternate

claim for damages based on the tort of abuse of public office was successful.

Finally, an owner may have to consider whether there are self-help strategies that could trigger a legal remedy. For example, some regulatory takings occur when land is zoned for open space uses, often to preserve land for a future park. *De facto* public use of the private property may even be occurring. If the authority is reluctant to acquire the land, the owner might consider fencing it to prevent or discourage public use. If public interest in acquiring the land for park use is high enough, the local government may be persuaded to initiate expropriation proceedings. This in turn would create the right to obtain compensation. The *Canada Mortgage and Housing Corp.* case suggests a fact pattern where this strategy might work. However, the author is not aware whether it has been considered by the owner.

Determining whether compensation will be available in any particular case is extremely difficult to predict and this author will not attempt to advance any theory to explain why some owners succeeded and others did not. Cases like *Tener* and *Manitoba Fisheries* are illustrations where compensation was available. Cases like *Columbia Estates* and *North Vancouver (District) Zoning Bylaw No. 4277* demonstrate that bylaws which reserve private land for public use can be set aside. On the other hand, compensation was not available in *Frobeen*, *Canada Mortgage and Housing Corp.*, *Rascal Trucking*, *Genevieve Holdings* and others.

Case law

The following cases raise regulatory taking issues. Some claimants were successful in striking out the challenged regulations while a few were found to be entitled to compensation. However, most claimants did not succeed at all. The cases are presented in alphabetical order.

64933 Manitoba Ltd. v. Manitoba
(2000), 71 L.C.R. 171, 193 D.L.R. (4th) 561 (Man. Q.B.)

Claim for compensation based on *de facto* expropriation - provincial park regulations imposed development restrictions leading to the rejection of the claimant's development application - claim dismissed

Alberta (Minister of Public Works, Supply and Services) v. Nilsson
(1999), 67 L.C.R. 1 (Alta. Q.B.)
(1999), 68 L.C.R. 241 (Alta. C.A.)

Claim for compensation based on *de facto* expropriation - provincial regulations created a restricted development area to preserve land for a future perimeter highway around Edmonton - this claim was dismissed; however, an alternate claim based on the tort of abuse of public office succeeded and damages were awarded as if an expropriation had occurred - leave to appeal was granted in 1999

Bignell Enterprises Ltd. v. Campbell River (District)
[1996] BCEA 128 (B.C.S.C.)

Application to compel issue of a development permit - municipality had imposed a 30 metre fish protection setback requirement which rendered the land undevelopable and owner sought to relax the setback to 15 metres - action dismissed

British Columbia v. Tener
(1985), 32 L.C.R. 340 (S.C.C.)

Claim for compensation based on *de facto* expropriation - claimant owned mineral claims that were incorporated into a provincial park - no formal expropriation but surface access to the claims was denied under park regulations - owner was entitled to compensation

Canada Mortgage and Housing Corp. v. North Vancouver (District)
[1998] BCEA 260; 51 B.C.L.R. (3d) 351 (B.C.S.C.)
[2000] BCEA 302; 70 L.C.R. 161 (B.C.C.A.)

Application to quash a zoning bylaw - municipality rezoned land from residential to parks, recreation and open space which severely restricted uses - application to quash dismissed.

Columbia Estate Co. v. Burnaby (District)
[1974] 5 W.W.R. 735 (B.C.S.C.)

Application to quash zoning bylaw - land was re-zoned from industrial to parking district to reserve the land for possible future use as a park and ride facility for a planned rapid transit system - bylaw quashed

Frobeen v. Saanich (District)
[1996] BCEA 170, 58 L.C.R. 267 (B.C.E.C.B.)

Claim for compensation based on injurious affection without taking - zoning bylaw restricting use of claimant's land within 30 metres of a stream - claim dismissed

Fuoco (Estate) v. Kamloops (City)
(2000), 80 B.C.L.R. (3d) 173 (B.C.S.C.)
2001 BCCA 0325 (B.C.C.A.)

Claim for damages based alternatively on breach of contract or trespass - municipality constructed temporary dyke to control major flood but failed to remove dyke after it was no longer required - claim struck out due to limitations problem but restored on appeal - final outcome not yet available

Genevieve Holdings Ltd. v. Kamloops (City)
[1988] BCEA 302; 42 M.P.L.R. 171 (B.C.S.C.)

Claim for compensation based alternatively on *de facto* expropriation or injurious affection without taking - municipal council declared a moratorium preventing rezoning and subdivision - action dismissed

Hampton Investments Ltd. v. British Columbia (Minister of Transportation and Highways)
[1997] BCEA 230; 61 L.C.R. 224 (B.C.E.C.B.)

Claim for compensation based alternatively on *de facto* expropriation or injurious affection without taking - municipal development guidelines requiring large setback

area in which development was prohibited - claim dismissed

Harvard Investments Ltd. v. Winnipeg (City)
(1995), 129 D.L.R. (4th) 557 (Man. C.A.)

Claim for compensation based alternatively on *de facto* expropriation or injurious affection without taking - municipal designation of hotel property as a heritage site which prevented demolition and redevelopment - claim was dismissed on the grounds that the claimant's losses were caused by business ineptitude and not by the heritage designation but the court left the door open to other claims based on heritage designation

MacMillan Bloedel Ltd. v. Galiano Island Trust Committee
(1995), 10 B.C.L.R. (3d) 121 (B.C.C.A.)

Application to quash zoning bylaws - zoning bylaw restricted land use and increased minimum parcel size - claim dismissed

Manitoba Fisheries Ltd. v. The Queen
(1978), 88 D.L.R. (3d) 462 (S.C.C.)

Claim for compensation based on *de facto* expropriation - federal legislation put claimant out of business and statute did not expressly provide for compensation - claimant was entitled to compensation

Mariner Real Estate Ltd. v. Nova Scotia (Attorney-General)
(1998), 65 L.C.R. 250 (N.S.S.C.)
(1999), 68 L.C.R. 1, 177 D.L.R. (4th) 696 (N.S.C.A.)

Claim for compensation based on *de facto* expropriation - provincial legislation designated claimant's land as a beach which severely restricted the uses to which it could be put - claim was upheld at trial but on appeal the claim was rejected

North Vancouver (District) Zoning Bylaw 4277, Re
[1973] 2 W.W.R. 260 (B.C.S.C.)

Application to quash zoning bylaw - municipal council downzoned land to park use to prevent development and reduce the cost of acquisition for park - bylaw quashed

Ramey v. Canada
(1986), 36 L.C.R. 97 (Fed. Ct. T.D.)

Airport height restrictions adopted under the *Aeronautics Act* - compensation awarded

Rascal Trucking Ltd. v. Nanaimo (City)
[2000] BCEA 336, 71 L.C.R. 241 (B.C.E.C.B.)

Claim for compensation based alternatively on *de facto* expropriation or injurious affection without taking - municipality removed topsoil from claimant's property pursuant to statutory powers - claim dismissed

Reimer v. Surrey (City)

[1997] BCEA 241, 62 L.C.R. 222 (B.C.E.C.B.)

Claim for compensation based alternatively on *de facto* expropriation or injurious affection without taking - municipality designated portion of claimant's land for future highway but took no steps to acquire it - application dismissed

Rodenbush v. North Cowichan (District)
(1977), 76 D.L.R. (3d) 73 (B.C.S.C.)

Application to quash a bylaw - zoning bylaw applied only to the petitioner's property and it effectively prevented the only use which could be made of the property - bylaw quashed

Service Corporation International (Canada) Inc. v. Burnaby (City)
[1999] BCEA 321 (B.C.S.C.)

Application to quash a bylaw - municipality had adopted a bylaw establishing setbacks and tree cutting restrictions on the petitioner's cemetary properties - application dismissed, however the court found that the petitioner's use was grandfathered because it was established before the bylaws came into effect.

Steer Holdings Ltd. v. Manitoba
(1992), 48 L.C.R. 241 (Man. C.A.)

Claim for compensation based on *de facto* expropriation - legislation adopted to prevent a proposed land development spanning a creek which divided the claimant's property - claim dismissed

Western Eagle Properties Ltd. v. Burnaby (City)
[1999] BCEA 320 (B.C.S.C.)

Application to compel the issue of a building permit - municipality had refused to issue the permit because the land was required for a road - Application dismissed

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