

COMPENSATION FOR INJURIOUS AFFECTION – NO TAKING

“The law on this topic is both stunted and confused.”¹

1. The term “injurious affection” generally describes damages to the lands of an owner or “consequential damage”.² Injurious affection can arise in two situations: (1) where part of an owner’s land has been expropriated and there is damage to the remainder of the land; or (2) where none of an owner’s land has been expropriated, but activities on neighbouring lands (whether they are the subject of expropriation or not) cause damage to the owner’s land. This paper discusses the second of these situations.

2. Although there is no express protection of property rights in Canada, either at common law or in the *Charter of Rights and Freedoms*, courts have generally applied a restrictive interpretation of governmental powers to protect property rights from infringement. The courts have consistently held that the power to expropriate land must be expressly conferred by statute and that there ought to be strict compliance with the statutory procedure for expropriation.³

3. Where expropriation occurs pursuant to statutory authority, there is no right to compensation for damages resulting from the expropriation except as provided by statute. In *Sisters of Charity of Rockingham v. The King*,⁴ the Privy Council stated:

¹ *Law Reform Commission of British Columbia Report on Expropriation* (Project No. 5) LRC 5, 1971, at p. 160.

² Eric C.E. Todd, *The Law of Expropriation in Canada* 2nd ed. (Canada: Carswell, 1992) at 331 [hereinafter “Todd”]

³ Todd at p. 29

⁴ *Sisters of Charity of Rockingham v. The King* (1922), 67 D.L.R. 209 (P.C.)

“Compensation claims are statutory and depend on statutory provisions. No owner of lands expropriated by statute for public purposes is entitled to compensation, either for the value of land taken, or for damage, on the ground that his land is “injuriously affected,” unless he can establish a statutory right. The claim, therefore, of the appellants, if any, must be found in a Canadian statute.”

4. The British Columbia Court of Appeal affirmed the requirement of a statutory basis for a claim for injurious affection in *Jespersion's Brake & Muffler Ltd. v. Chilliwack (District)*,⁵ a leading case on compensation for injurious affection in British Columbia. In *Jespersion's*, the defendant municipality had constructed a highway overpass that eliminated direct access to the claimant's property, but no land of the claimant was taken. The claimant argued that it was entitled to compensation for, among other things, the loss of access to its property. The claimant based its claim on section 544 of the *Municipal Act* (now the *Local Government Act*⁶), which provided as follows:

“544(1) The council shall make to owners, occupiers or other persons interested in real property entered on, taken, expropriated or used by the municipality in the exercise of any of its powers, or **injuriously affected by the exercise of any of its powers**, due compensation for any damages necessarily resulting from the

⁵ *Jespersion's Brake & Muffler Ltd. v. Chilliwack (District)* (1992), 47 L.C.R. 172 (B.C.E.C.B.), varied in part (1994) 88 B.C.L.R. (2d) 230 (C.A.), leave to S.C.C. refused [1994] S.C.C.A. No. 177

⁶ *Local Government Act*, R.S.B.C. 1996, c. 323, s. 312

exercise of those powers beyond any advantage which the claimant may derive from the contemplated work.”

[emphasis added]

5. Clear language of entitlement to compensation for injurious affection is present in other British Columbia statutes conferring the power of expropriation. For example, the *Vancouver Charter*⁷ provides as follows:

“541 **Where real property is injuriously affected** by the exercise on the part of the city of any of its powers, the city shall, unless it is otherwise provided in this or some other Act, make due compensation to the owner for any damage necessarily resulting therefrom beyond any advantage which the owner may derive from any work in connection with which the real property is so affected.”

[emphasis added]

6. In contrast, the *Transportation Act*,⁸ which provides the minister responsible for transportation and highways with expropriation powers, expressly precludes a claim for compensation for injurious affection. Subsection 12(2) provides that: “...no action lies and no proceeding may be brought against the government, the minister or any other person for compensation or damages resulting from injurious affection to land...”.

⁷ *Vancouver Charter*, S.B.C. 1953, c. 55

⁸ *Transportation Act*, S.B.C. 2004, c. 44

7. Some Acts, like the *Greater Vancouver Transportation Authority Act*, S.B.C. 1998, c.30, confer the power to expropriate but are silent with respect to injurious affection.

8. Does it follow that an owner of land, in all expropriation cases, cannot claim compensation for injurious affection unless the right to do so is expressly contained in a statute authorizing the expropriation?

9. The *Expropriation Act*,⁹ sets out the *procedure* for all expropriations governed by it. It does not contain the authority to expropriate. This authority is generally found in the particular statute authorizing a particular work or project. Does the *Expropriation Act*, however, contain a *substantive* right to compensation for injurious affection? Section 41 of the *Expropriation Act* states, in part:

“41(1) In this section, “injurious affection” means injurious affection caused by an expropriating authority in respect of a work or project for which the expropriating authority had the power to expropriate land.

(2) The repeal of the *Expropriation Act*, R.S.B.C. 1979, c. 117, and the amendments and repeals in sections 56 to 128 of the *Expropriation Act*, S.B.C. 1987, c. 23, are deemed not to change the law respecting injurious affection if no land of an owner is expropriated, and an owner whose land is not taken or acquired is, despite those amendments or repeals, entitled to compensation to the same extent, if any, that the owner would

⁹ *Expropriation Act*, R.S.B.C. 1996, c. 125

have been entitled to had those enactments not been amended or repealed.”

10. This leads us to a review of the legislative history of section 41. With respect to the early history of that section, the 1971 *Law Reform Commission of British Columbia Report on Expropriation*¹⁰ (“the 1971 Commission Report”) states, in part:

“A general expropriation statute does exist in British Columbia now. This is the Lands Clauses Act,¹¹ which was first enacted in England in 1845¹² for the purpose of providing uniformity in the procedures to be followed and the compensation to be paid consequent upon the exercise of the miscellaneous expropriating powers that existed in that country.¹³ The English statute became law in this Province in 1858 as part of the received English law.¹⁴ It was expressly made applicable, with certain modifications, to Vancouver Island and its Dependencies in 1863.¹⁵ The Imperial Statute itself was replaced by a provincial statute, with some minor alternations, in 1897.”¹⁶

11. Section 69 of the *Lands Clauses Act*, R.S.B.C. 1960, c.209 stated, in part:

“69. If any party is entitled to any compensation in respect of any land or of any interest therein which has been taken for or

¹⁰ At p. 73.

¹¹ R.S.B.C. 1960, c.209.

¹² *Lands Clauses Consolidation Act, 1845, 8 Vict. C. 18, (Imp.)*.

¹³ *IBID.*, see preamble. For historical background of the 1845 legislation and its counterparts in Canada, see Eric C.E. Todd, *The Mystique of Injurious Affection in the Law of Expropriation*, U.B.C. Law Review, Centennial Edition 1967, p.127 at pp.131 *et seq.*

¹⁴ See *English Law Act*, R.S.B.C. 1960, C.129, s.2

¹⁵ *Vancouver Island Land Clauses Consolidation Act, 1877*. See Consol. S.B.C. 1877, c.101; Consol. S.B.C. 19888, c.65.

¹⁶ S.B.C. 1897, c.21; R.S.B.C. 1897, c.112; and S.B.C. 1897, c.41, s.6(2).

injuriously affected by the execution of the works, and for which the promoters of the undertaking have not made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of two hundred and fifty dollars, the party may have the same settled either by arbitration or by the verdict of a jury, as he thinks fit”

12. The *Report of the British Columbia Royal Commission on Expropriation, 1961* – 63 states, in part, at page 69-70:

“(d) Compensation for Injurious Affection where No Land is Taken

Section 69 of the Lands Clauses Act begins:

“If any party is entitled to any compensation in respect of any land or of any interest therein which has been taken for or injuriously affected by the execution of the works ...

and then provides procedures for recovering compensation. **The English courts have interpreted this section as giving a right to compensation for injurious affection in cases where no land is taken.**¹⁷ The Courts took the view that since the expropriation legislation sanctioned acts which under common law were tortious, sounding in nuisance, that this right to compensation was given in substitution for the common law right of an action for damages for nuisance. The Courts were restricted by the

¹⁷ The leading case on this matter in *Metropolitan Board of Works v. McCarthy* (1974) 7 H.L. 243.

words of section 69, which specified "land or any interest therein" and "the execution of the works". . . .

[emphasis added]

13. The 1971 Commission Report stated, in Chapter XIII, at pages 156-157:

"Since this Commission is proposing that the *Lands Clauses Act* be repealed and that there be a new expropriation statute of general application, it is of vital importance that the right to damages for injurious affection be preserved in the new statute.

The Commission firmly believes that, as a minimum, the law of injurious affection as it now exists, should be retained. It also believes that certain improvements could be made, and proposals are set out below for that purpose.

Surely we live in a kind of society today where, if an individual suffers losses because of undertakings carried out in the public interest, the public interest requires that the individual be compensated. Society cannot afford not to compensate him."

14. With respect to injurious affection, the 1971 Commission Report recommended that:

"1. ***General***

Compensation should be payable for personal and business damage in all claims for damages for injurious affection, if in the absence of statutory authority, liability would have existed.

3. *Where No Lands Taken*

- (i) the law of injurious affection, as it now exists in this Province with respect to lands from which there has been no taking, should be retained, except insofar as the Commission recommends modification;
- (ii) in cases where there is no taking, expropriating authorities should be liable for damages caused by the construction and use of the works".¹⁸

15. If section 41 of the *Expropriation Act* creates a substantive right to compensation, a claimant, if not barred by statute, would still have to satisfy the four-part common law test to determine that any damages incurred were compensable. The Supreme Court of Canada in *The Queen v. Loiselle*,¹⁹ set out the four conditions for compensation for damages for injurious affection as follows:

- (i) the damage must result from an act rendered lawful by statutory powers of the person performing such act;
- (ii) the damage must be such as would have been actionable under the common law, but for the statutory powers;

¹⁸ Chapter 15, Part III, at p. 196.

¹⁹ *The Queen v. Loiselle*, [1962] S.C.R. 624

- (iii) the damage must be an injury to the land itself and not a personal injury or an injury to business or trade; and
- (iv) the damage must be occasioned by the construction of the public work, not by its user.

16. In his article, *Injurious Affection in the Absence of a Taking: Historical Analysis in the Canadian (B.C.) Context*, Robert S. Cosburn²⁰ states, in paragraph 31:

“31. The best general conclusion to be drawn from the decisions and the applicable statutes seems to be as follows:

- (a) There is no presumption in favour of compensation for “injurious affection” in the absence of a taking;
- (b) There must be a statutory foundation, such as that found in the *Lands Clauses Consolidation Act* (U.K.) and its Canadian lineal descendants (as are referred to by implication in section 40 of the B.C. *Expropriation Act*) in order to found a claim for compensation for injurious affection in the absence of a taking;
- (c) When there is such a statutory foundation the four-step test must be satisfied by the claimant before compensation will be awarded;

²⁰ A copy of this article may be found on the Expropriation Law Centre webpage, www.expropriationlawcentre.ca

- (d) The courts have shown a consistent pattern of attempting to find an avenue to provide compensation for injurious affection in the absence of a taking when the societal trend promotes private interests over public or when a particular situation appears to demand compensation, either by holding the statutory foundation to exist, or by determining that an expropriation has in fact occurred.”

17. One can only hope that a future amendment of the *Expropriation Act* will find a clearer expression of the legislative intent with respect to entitlement to compensation for injurious affection without a taking.

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Selected British Columbia Cases: Injurious Affection

- *R. v. Tener*, [1985] 1 S.C.R. 533.
- *Tancredi v. British Columbia (Minister of Transportation & Highways)* (1995), 57 L.C.R. 154 (B.C.E.C.B.)
- *Currie v. Chase (Village)* (1986), 35 L.C.R. 293, 32 M.P.L.R. 172 (B.C.S.C.)
- *Reti v. Sicamous (District)* (1999), 68 L.C.R. 296 (B.C.E.C.B.)

- *Warlow v. British Columbia (Minister of Transportation & Highways)* (1997), 60 L.C.R. 218 (B.C.E.C.B.)
- *Spur Valley Improvement District v. Checkman Holdings (Calgary) Ltd.* (2004), 83 L.C.R. 54 (B.C.E.C.B.)
- *Chevron Canada Limited v. British Columbia Transit* (2005), 85 L.C.R. 198 (B.C.E.C.B.)
- *Jespersion's Brake & Muffler Ltd. v. Chilliwack (District)* (1992), 47 L.C.R. 172, 26 R.P.R. (2d) 248, 12 M.P.L.R. (2d) 50 (B.C.E.C.B.)
- *Reimer Mobile Homes Ltd. v. Chilliwack (District)* (1992), 47 L.C.R. 292 (B.C.E.C.B.)
- *Petro Canada Inc. v. Vancouver (City)* (1992), 47 L.C.R. 154 (B.C.E.C.B.)
- *Petro Canada Inc. v. Vancouver (City)* (No. 2) (1994), 54 L.C.R. 224 (B.C.E.C.B.)
- *Rascal Trucking Ltd. v. Nanaimo (City)* (2000), 71 L.C.R. 241 (B.C.E.C.B.)