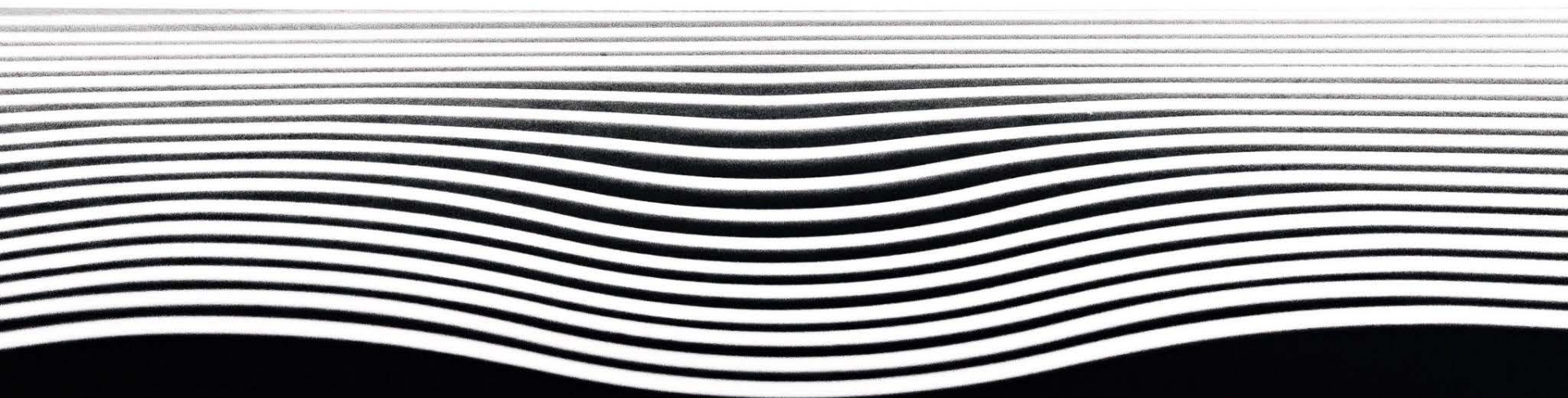


DEFICIENT RIGHTS

Presented by:
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When does this come up?

Frequently!

- A contractor uses land outside the license area for project laydown.
- A surveying error results in the work as built being outside the Statutory Right of Way.
- A culvert ends up flooding private land
- A powerline to a residence was forgotten, or a pipeline has an unregistered junction.

What does this result in?

Trespass

An unjustifiable interference with possession of land.

Volovsek v. Boisvenu
Alter-Ego Trust #1, 2021
BCCA 179 (CanLII)

Including entry upon, remaining upon, or projecting any object upon land in the possession of the plaintiff without lawful justification.

Ward v Cariboo Regional District, 2021 BCSC 1495

Nuisance

Interference with the claimant's use or enjoyment of land that is both **substantial** and **unreasonable**.

May include not only actual physical damage to land but also interference with the health, comfort or convenience of the owner or occupier

Antrim Truck Centre Ltd. v. Ontario (Transportation),
2013 SCC 13

De Facto Expropriation

Where an authority has (without expropriation) acquired a beneficial interest in the property, or flowing from it, that removes all reasonable uses from the owner (not just highest and best use) and gives the authority the use of it.

But this does not extend to zoning or legislative acts that merely makes particular uses "uneconomic".

Canadian Pacific Railway Co. v. Vancouver (City), 2006 SCC 5



Example 1

1. How do you fix it?

(“Just say Please”)

Easy Steps

1. Get an agreement
2. Correct any damage caused
3. Compensate for the rights taken
4. But don't over-reach (as built SRW solves many problems).

The Agreement



As Built SRW

Charging the entire parcel of land is not required.



Ancillary Rights

Removal of trees, structures and broad rights to access the property typical.



Beware Future Uses

Rights often extend to allowing a change of method (e.g. from domestic supply to distribution tower or underground lines).



Land Agents

Negotiating these instruments may have a greater impact on the owner's rights than meets the eye.



Lawyers

Consider restricting the "Purpose" clause and ensuring compensation proposed is adequate.



Appraiser

Rights taken may impact on value more than meets the eye.
May be a bundle of rights analysis or a functional utility assessment of injurious affection.

The Damage – When the Owner Knows it's There

Penno v. British Columbia (British Columbia Hydro and Power Authority), [1987] B.C.J. No. 2617

1. A trespasser may acquire by acquiescence a revocable license that can only be revoked by reasonable notice;
2. A license is not an estate or interest in the land ...;
3. A mere license does not create an estate or interest in the property to which it relates; it only makes an act lawful which otherwise would be unlawful ... A purely personal license is not assignable. A gratuitous license is revocable by notice at any time ...; and
4. If the licensee under a revocable license has brought property in to the land, he is entitled to notice of revocation and to a reasonable time for removing his property and in which to make arrangements to carry on his business elsewhere.

If the owner knows it's there, they could be restricted to two years of occupational rent, plus compensation for the rights acquired.

Imperial Oil Resources Limited v. Nelson et al., 2006 BCSC 438.

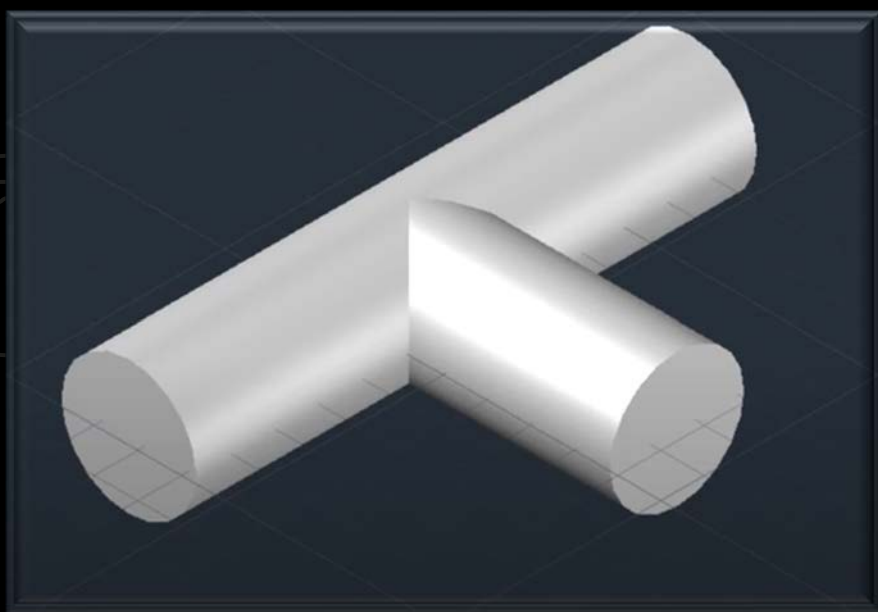
The same Project or a new taking?

33 In determining the market value of land, account must not be taken of (d) an increase or decrease in the value of the land resulting from the development or prospect of the development in respect of which the expropriation is made...

Lulu Island Holdings Ltd. v. GVSDD, 2007 BCSC 938

- [45]...section 33 should not be construed more broadly than is necessary to reach a fair result...The claimants purchased [the Lands] some years after the 1985 acquisition with the knowledge that adjacent or nearby lands were designated for future highway. No part of the properties they purchased lay within the gazetted highway corridor. To ignore the 1985 acquisition, in our view, could lead to an unwarranted award of compensation.
- The result was the new taking was valued with the highway in place.

Absent the Effect of the Scheme... could carry a significant upside or downside depending on the circumstances.



Example 2

When the Trespass isn't Apparent?



New Taking

Unless the owner was aware of the extra pipe, there is no licence. But what if the vendor was aware and failed to inform the purchaser. The problem comes back.



Land Agents

Beware of increased impacts (safety zones and severance).



Occupational Rent?

How far back?



Lawyers

Does discoverability change the limitation analysis?



Point In Time

Does the Authority get the benefit of its own error?



Appraiser

Consider if there is an increase or decrease related to the original project, and if so consider a special instruction.



Example 3

When the Damage is Apparent but not admitted it.



Flooding Damage

Could be a claim trespass or nuisance.



Compensation?

Sometimes an obvious tort is defended, (maybe insurance driven) and settlement without compensation.



SRW in trade

If the Authority acquired the rights made necessary by its project there would be compensation for all the consequences.



Land Agents

Independent legal advice is critical for owners in these situations.



Lawyers

Financial aid to citizens is not allowed, which implies the trespass/nuisance claim is implicitly acknowledged. What about knowing trespass?



Appraiser

[not invited to this scenario]

Halsbury's, 4th ed., vol. 45, para. 1403 - Damages for Trespass:

Damages. ...Where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such a sum as should reasonably be paid for that use.

Where there is an oppressive, arbitrary or unconstitutional **trespass by a government official or where the defendant cynically disregards the rights of the plaintiff in the land with the object of making a gain by his unlawful conduct**, exemplary damages may be awarded. If the trespass is accompanied by aggravating circumstances which do not allow an award of exemplary damages, the general damages may be increased.



Hypothetical 1 No Taking

May Depend on the Type of Infrastructure

A pillar or track

May have a licence until the owner in possession of the lands demands their removal.

Underground

Soil anchors or subsurface tension supports may not.

Elizabeth v. Cressey Development Corp., 1990 CanLII 2091 (BC SC)
\$70,000 awarded for trespassing soil anchors and highhanded conduct.

Physical Infrastructure in Trespass

Trespass

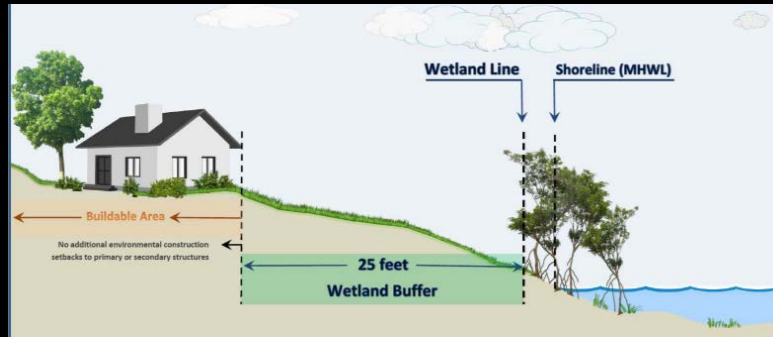
Occupational rent, damages (actual) and nominal, BUT if the Authority is reckless or indifferent the exposure trespass damages increases.

Nuisance

Similar analysis to trespass.

De Facto Expropriation

Potentially available, but likely redundant in this case.



Hypothetical 2
No Taking, No “Work” on Site

Water Troubles

Not a Taking, trespass or nuisance to impose a Riparian Zone in respect of streams and water bodies as a matter of regulation.

Creating a water body that in turn imposes a significant set back/eliminates the economic utility of an entire property could go either way depending on the analysis.

Directing Water to Land without rights is a nuisance and/or trespass. That is, unless it is constructed with an authorized plan (that requires compensation). Do the damages include the effects of the Riparian Area?

Thank you for your attention

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